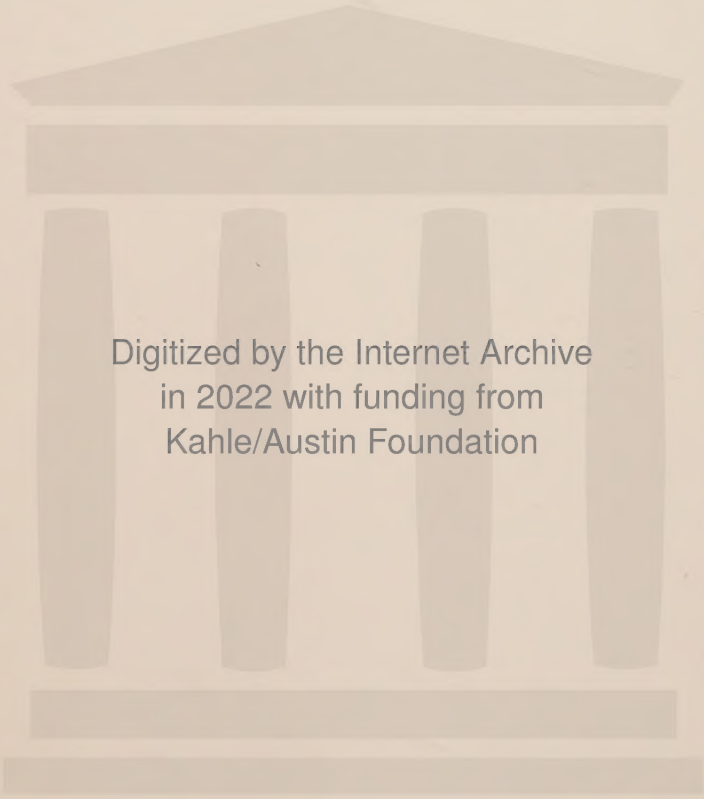
G. E. MAYCOCK



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62D CONGRESS
3d Session

SENATE

DOCUMENT
No. 1036

COMPILATION OF

SENATE ELECTION CASES

FROM 1789 TO 1913

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913

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GEORGE E. MAYCOCK

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913

IN THE SENATE OF THE UNITED STATES,

January 18, 1913.

Resolved, That the Committee on Privileges and Elections be, and is hereby, authorized and directed to have compiled and printed as a document a revised edition of the document entitled "Compilation of Senate Election Cases," bringing the same down to the close of the Sixty-second Congress.

Attest:

CHARLES G. BENNETT, *Secretary.*

PREFACE.

The first compilation of strictly Senate election cases, as distinguished from previous compilations containing cases arising in both branches of Congress, was made by George S. Taft in 1885 and covered the Senate cases from 1789 to December, 1885. This work was continued with such changes as were adopted from time to time with the purpose of increasing the value of the work as a book of reference by George P. Furber, to March 3, 1893; by George M. Buck, to March 3, 1903; and by Charles A. Webb and Herbert R. Pierce to March 3, 1913.

The work contains not only contested cases, strictly speaking, but all cases in which the right to a seat of any person who has presented credentials has been questioned in such a manner that the Senate has deemed proper to investigate or to discuss the question. It does not, however, contain cases in which the mere form of a credential has been casually criticized with no idea of questioning the validity of the election or appointment.

The cases are presented in chronological order under three headings: "Cases concerning the power of executives of States to fill vacancies," "Miscellaneous cases," and "Expulsion of Senators." A list of the Senators appointed by executives of States follows the cases dealt with under the first-mentioned heading.

The general plan adopted in presenting these cases has been to give the reports of committees, with views of the minority, in all cases in which there were reports; brief statements of the action taken by the Senate from day to day with references indicating the volume of the Congressional Globe or Congressional Record, and the pages which contain the full record of the proceedings; extracts from debates in those cases in which there were no reports; the full debate in some cases in which the discussions have been brief; and a headnote accompanying each case stating the points in question and the action of the Senate.

The introduction contains extracts from the debates in the Federal Convention of 1787, from the Madison Papers, relating to the election and qualification of Senators; extracts from the Constitution of the United States relating to the same; extracts from Federal laws relating to the election of Senators; and a list of all cases referred by the Senate to the Committee on Privileges and Elections on which reports have been made to the Senate. References to facilitate the location of precedents will be found in the index.

WASHINGTON, D. C., *March 3, 1913.*

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INTRODUCTION.

EXTRACTS FROM THE DEBATES IN THE FEDERAL CONVENTION.

PORTIONS OF THE REPORT OF THE COMMITTEE OF DETAIL, MADE AUGUST 6, 1787, RELATING TO THE ELECTION AND QUALIFICATIONS OF SENATORS.

ART. V.—SECT. 1. The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

SECT. 2. The Senators shall be chosen for six years; but immediately after the first election they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; so that a third part of the members may be chosen every second year.

SECT. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the State for which he shall be chosen.

SECT. 4. The Senate shall choose its own President and other officers.

ART. VI.—SECT. 1. The times, and places, and manner of holding the elections of the members of each House shall be prescribed by the legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

SECT. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House with regard to property as to the said legislature shall seem expedient.

SECT. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

SECT. 4. Each House shall be the judge of the elections, returns, and qualifications of its own members.

SECT. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress and in going to and returning from it.

SECT. 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member.

SECT. 7. The House of Representatives, and the Senate when it shall be acting in a legislative capacity, shall keep a journal of their proceed-

ings; and shall, from time to time, publish them; and the yeas and nays of the members of each House on any question shall, at the desire of one-fifth part of the members present, be entered on the Journal.

SECT. 8. Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the ——— article.

SECT. 9. The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.

SECT. 10. The members of each House shall receive a compensation for their services, to be ascertained and paid by the State in which they shall be chosen.

DEBATES.

THURSDAY, *August 9, 1787.*

Article V, section 1, was then taken up.

Mr. Wilson objected to vacancies in the Senate being supplied by the executives of the States. It was unnecessary, as the legislatures will meet so frequently. It removes the appointment too far from the people, the executives in most of the States being elected by the legislatures. As he had always thought the appointment of the executive by the legislative department wrong, so it was still more so that the executive should elect into the legislative department.

Mr. Randolph thought it necessary, in order to prevent inconvenient chasms in the Senate. In some States the legislatures meet but once a year. As the Senate will have more power, and consist of a smaller number than the other House, vacancies there will be of more consequence. The executives might be safely trusted, he thought, with the appointment for so short a time.

Mr. ELLSWORTH. It is only said that the executive *may* supply vacancies. When the legislative meeting happens to be near the power will not be exerted. As there will be but two members from a State vacancies may be of great moment.

Mr. WILLIAMSON. Senators may resign or not accept. This provision is therefore absolutely necessary.

On the question for striking out "vacancies shall be supplied by the executives"—

Pennsylvania, ay, 1; New Hampshire, Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, South Carolina, Georgia, no, 8; Maryland, divided.

Mr. Williamson moved to insert after "vacancies shall be supplied by the executives," the words, "unless other provisions shall be made by the legislature" (of the State).

Mr. ELLSWORTH. He was willing to trust the legislature or the executive of a State, but not to give the former a discretion to refer appointments for the Senate to whom they pleased.

On the question on Mr. Williamson's motion—

Maryland, North Carolina, South Carolina, Georgia, ay, 4; New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, no, 6.

Mr. Madison, in order to prevent doubts whether resignations could be made by Senators, or whether they could refuse to accept, moved to strike out the words after "vacancies," and insert the words, "happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature."

Mr. GOUVERNEUR MORRIS. This is absolutely necessary; otherwise, as members chosen, into the Senate are disqualified from being appointed to any office by section 9 of this article, it will be in the power of a legislature, by appointing a man a Senator against his consent, to deprive the United States of his services.

The motion of Mr. Madison was agreed to *nem. con.*

Mr. Randolph called for a division of the section, so as to leave a distinct question on the last words, "each member shall have one vote."

* * * * * * *

On the question on the first section, down to the last sentence—

New Hampshire, Connecticut, New Jersey, Delaware, Maryland, Virginia, Georgia, ay, 7; Massachusetts, Pennsylvania, North Carolina, no, 3; South Carolina, divided. (In the printed Journal, Pennsylvania, ay.)

* * * * * * *

Article V, section 2, was then taken up.

Mr. Gouverneur Morris moved to insert, after the words, "immediately after," the following: "they shall be assembled in consequence of," which was agreed to *nem. con.*, as was then the whole section.

Article V, section 3, was then taken up.

Mr. Gouverneur Morris moved to insert fourteen, instead of four years' citizenship as a qualification for Senators; urging the danger of admitting strangers into our public councils.

Mr. Pinckney seconded him.

Mr. Ellsworth was opposed to the section, as discouraging meritorious aliens from emigrating to this country.

Mr. PINCKNEY. As the Senate is to have the power of making treaties and managing our foreign affairs, there is peculiar danger and impropriety in opening its doors to those who have foreign attachments. He quoted the jealousy of the Athenians on this subject, who made it death for any stranger to intrude his voice into their legislative proceedings.

Colonel Mason highly approved of the policy of the motion. Were it not that many not natives of this country had acquired great credit during the Revolution, he should be for restraining the eligibility into the Senate to natives.

Mr. Madison was not averse to some restrictions on this subject, but could never agree to the proposed amendment. He thought any restriction, however, in the *Constitution*, unnecessary and improper—unnecessary, because the national Legislature is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of citizenship; improper, because it will give a tincture of illiberality to the Constitution; because it will put it out of the power of the national Legislature, even by special acts of naturalization, to confer the full rank of citizens on meritorious strangers, and because it will discourage the most desirable class of people from emigrating to the United States. Should the proposed Constitution have the intended effect of giving stability and reputation to our Government, great numbers of respectable Europeans, men

who love liberty and wish to partake its blessings, will be ready to transfer their fortunes hither. All such would feel the mortification of being marked with suspicious incapacitations, though they should not covet the public honors. He was not apprehensive that any dangerous number of strangers would be appointed by the State legislatures if they were left at liberty to do so, nor that foreign powers would make use of strangers as instruments for their purposes. Their bribes would be expended on men whose circumstances would rather stifle than excite jealousy and watchfulness in the public.

Mr. Butler was decidedly opposed to the admission of foreigners without a long residence in the country. They bring with them not only attachments to other countries, but ideas of government so distinct from ours that in every point of view they are dangerous. He acknowledged that if he himself had been called into public life within a short time after his coming to America, his foreign habits, opinions, and attachments would have rendered him an improper agent in public affairs. He mentioned the great strictness observed in Great Britain on this subject.

Dr. Franklin was not against a reasonable time, but should be very sorry to see anything like illiberality inserted in the Constitution. The people in Europe are friendly to this country. Even in the country with which we have been lately at war we have now and had during the war a great many friends, not only among the people at large, but in both houses of Parliament. In every other country in Europe all the people are our friends. We found in the course of the Revolution that many strangers served us faithfully, and that many natives took part against their country. When foreigners, after looking about for some other country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence and affection.

Mr. Randolph did not know but it might be problematical whether emigrations to this country were, on the whole, useful, or not, but he could never agree to the motion for disabling them, for fourteen years, to participate in the public honors. He reminded the convention of the language held by our patriots during the Revolution, and the principles laid down in all our American constitutions. Many foreigners may have fixed their fortunes among us under the faith of these invitations. All persons under this description, with all others who would be affected by such a regulation, would enlist themselves under the banners of hostility to the proposed system. He would go as far as seven years, but no farther.

Mr. Wilson said he rose with feelings which were perhaps peculiar; mentioning the circumstance of his not being a native, and the possibility, if the ideas of some gentlemen should be pursued, of his being incapacitated from holding a place under the very Constitution which he had shared in the trust of making. He remarked the illiberal complexion which the motion would give to the system, and the effect which a good system would have in inviting meritorious foreigners among us, and the discouragement and mortification they must feel from the degrading discrimination now proposed. He had himself experienced this mortification. On his removal into Maryland he found himself, from defect of residence, under certain legal incapacities which never ceased to produce chagrin, though he as suredly did not desire, and would not have accepted, the offices to which they related. To be appointed to a place may be a matter of indifference. To be incapable of being appointed is a circumstance grating and mortifying.

Mr. GOUVERNEUR MORRIS. The lesson we are taught is that we should be governed as much by our reason and as little by our feelings as possible. What is the language of reason on this subject? That we should not be polite at the expense of prudence. There was a moderation in all things. It is said that some tribes of Indians carried their hospitality so far as to offer to strangers their wives and daughters. Was this a proper model for us? He would admit them to his house, he would invite them to his table, would provide for them comfortable lodgings, but would not carry the complaisance so far as to bed them with his wife. He would let them worship at the same altar, but did not choose to make priests of them. He ran over the privileges which emigrants would enjoy among us, though they should be deprived of that of being eligible to the great offices of Government; observing that they exceeded the privileges allowed to foreigners in any part of the world; and that as every society, from a great nation down to a club, had the right of declaring the conditions on which new members should be admitted, there could be no room for complaint. As to those philosophical gentlemen, those citizens of the world, as they called themselves, he owned he did not wish to see any of them in our public councils. He would not trust them. The men who can shake off their attachments to their own country can never love any other. These attachments are the wholesome prejudices which uphold all governments. Admit a Frenchman into your Senate, and he would study to increase the commerce of France; an Englishman, and he will feel an equal bias in favor of that of England. It has been said that the legislatures will not choose foreigners, at least improper ones. There was no knowing what legislatures would do. Some appointments made by them proved that everything ought to be apprehended from the cabals practiced on such occasions. He mentioned the case of a foreigner who left this State in disgrace, and worked himself into an appointment from another to Congress.

On the question on the motion of Mr. Gouverneur Morris to insert fourteen in place of four years—

New Hampshire, New Jersey, South Carolina, Georgia, ay, 4; Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, no, 7.

On the question for thirteen years, moved by Mr. Gouverneur Morris, it was negatived, as above.

On ten years, moved by General Pinckney, the votes were the same.

Dr. Franklin reminded the convention that it did not follow, from an omission to insert the restriction in the Constitution, that the persons in question would be actually chosen into the legislature.

Mr. RUTLEDGE. Seven years of citizenship have been required for the House of Representatives. Surely a longer time is requisite for the Senate, which will have more power.

Mr. WILLIAMSON. It is more necessary to guard the Senate in this case than the other House. Bribery and cabal can be more easily practiced in the choice of the Senate, which is to be made by the legislatures, composed of a few men, than of the House of Representatives, who will be chosen by the people.

Mr. Randall will agree to nine years, with the expectation that it will be reduced to seven, if Mr. Wilson's motion to reconsider the vote fixing seven years for the House of Representatives should produce a reduction of that period.

On the question for nine years—

New Hampshire, New Jersey, Delaware, Virginia, South Carolina,

Georgia, ay, 6; Massachusetts, Connecticut, Pennsylvania, Maryland, no, 4; North Carolina, divided.

The term "resident" was struck out, and "inhabitant" inserted *nem. con.*

Article V, section 3, as amended, was then agreed to *nem. con.* (198).

Article V, section 4, was agreed to *nem. con.*

Article VI, section 1, was then taken up.

Mr. Madison and Mr. Gouverneur Morris moved to strike out "each House," and to insert "the House of Representatives"; the right of the legislatures to regulate the times and places, &c., in the election of Senators being involved in the right of appointing them; which was disagreed to.

A division of the question being called for, it was taken on the first part down to "but their provisions concerning," &c.

The first part was agreed to *nem. con.*

Mr. Pinckney and Mr. Rutledge moved to strike out the remaining part, viz, "but their provisions concerning them may at any time be altered by the Legislature of the United States." The States, they contended, could and must be relied on in such cases.

Mr. GORHAM. It would be as improper to take this power from the the national Legislature as to restrain the British Parliament from regulating the circumstances of elections, leaving this business to the counties themselves.

Mr. MADISON. The necessity of a general government supposes that the State legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. The policy of referring the appointment of the House of Representatives to the people, and not to the legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the legislatures of the States ought not to have the uncontrolled right of regulating the times, places, and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts or all meet at one place, should all vote for all the Representatives or all in a district vote for a number allotted to the district—these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the State legislatures had a favorite measure to carry they would take care so to mold their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the representation in the legislatures of particular States would produce a like inequality in their representation in the national Legislature, as it was presumable that the counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controlling power to the national Legislature? Of whom was it to consist? First, of a Senate to be chosen by the State legislatures. If the latter, therefore, could be trusted, their representatives could not be dangerous. Secondly, of Representatives elected by the same people who elect the State legislatures. Surely, then, if confidence is due to the latter, it must be due to the former. It seems as improper in principle, though it might be less inconvenient in practice, to give to the State legislatures this great authority over the election of the Representatives of the people in the general legislature as it would be to give to the latter a like power over the election of their representatives in the State legislatures.

Mr. KING. If this power be not given to the national Legislature, their right of judging of the returns of their members may be frustrated. No probability has been suggested of its being abused by them. Although this scheme of erecting the General Government on the authority of the State legislatures has been fatal to the Federal establishment, it would seem as if many gentlemen still foster the dangerous ideas.

Mr. Gouverneur Morris observed that the States might make false returns, and then make no provisions for new elections.

Mr. Sherman did not know but it might be best to retain the clause, though he had himself sufficient confidence in the State legislatures.

The motion of Mr. Pinckney and Mr. Rutledge did not prevail.

The word "respectively" was inserted after the word "State."

On the motion of Mr. Read, the word "their" was struck out, and "regulations in such cases" inserted, in place of "provisions concerning them"—the clause then reading, "but regulations, in each of the foregoing cases, may, at any time, be made or altered by the Legislature of the United States." This was meant to give the national Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether. Article VI, section 1, as thus amended, was agreed to *nem. con.* (199).

FRIDAY, *August 10, 1787.*

[On the question of agreeing to section 2, Article VI, the ayes were 3, the noes 7. The debate is here omitted.]

[Section 3 of Article VI was amended and agreed to. The debate is here omitted.]

Sections 4 and 5 of Article VI were then agreed to *nem. con.*

Mr. Madison observed that the right of expulsion (Article VI, section 6) was too important to be exercised by a bare majority of a quorum, and in emergencies of faction might be dangerously abused. He moved that "with the concurrence of two-thirds" might be inserted between "may" and "expel."

Mr. Randolph and Mr. Mason approved the idea.

Mr. GOUVERNEUR MORRIS. This power may be safely trusted to a majority. To require more may produce abuses on the side of the minority. A few men, from factious motives, may keep in a member who ought to be expelled.

Mr. Carroll thought that the concurrence of two-thirds, at least, ought to be required.

On the question requiring two-thirds in cases of expelling a member, 10 States were in the affirmative; Pennsylvania, divided.

Article VI, section 6, as thus amended, was then agreed to *nem. con.* (202).

[Section 7 of Article VI was amended and agreed to. The debate is here omitted.]

SATURDAY, *August 11, 1787.*

[Section 8 of Article VI was amended and agreed to. The debate is here omitted.]

TUESDAY, *August 14, 1787.*

In convention.—Article VI, section 9, was taken up.

Mr. Pinckney argued that the making the members ineligible to offices was degrading to them, and the more improper as their election into the legislature implied that they had the confidence of the people; that it was inconvenient, because the Senate might be supposed to

contain the fittest men. He hoped to see that body become a school of public ministers, a nursery of statesmen. That it was impolitic, because the legislature would cease to be a magnet to the first talents and abilities. He moved to postpone the section, in order to take up the following proposition, viz:

"The members of each House shall be incapable of holding any office under the United States for which they, or any others for their benefit, receive any salary, fees, or emoluments of any kind; and the acceptance of such office shall vacate their seats respectively."

General Mifflin seconded the motion.

Colonel Mason ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American soil; for completing that aristocracy which was probably in the contemplation of some among us; and for inviting into the legislative service those generous and benevolent characters who will do justice to each other's merit by carving out offices and rewards for it. In the present state of American morals and manners, few friends, it may be thought, will be lost to the plan by the opportunity of giving premiums to a mercenary and depraved ambition.

Mr. MERCER. It is a first principle in political science that whenever the rights of property are secured an aristocracy will grow out of it. Elective governments also necessarily become aristocratic, because the rulers, being few, can and will draw emoluments for themselves from the many. The governments of America will become aristocracies. They are so already. The public measures are calculated for the benefit of the governors, not of the people. The people are dissatisfied, and complain. They change their rulers, and the public measures are changed, but it is only a change of one scheme of emolument to the rulers of another. The people gain nothing by it but an addition of instability and uncertainty to their other evils. Governments can only be maintained by force or influence. The executive has not force; deprive him of influence by rendering the members of the legislature ineligible to executive offices, and he becomes a mere phantom of authority. The aristocratic part will not even let him in for a share of the plunder. The legislature must and will be composed of wealth and abilities, and the people will be governed by a junto. The executive ought to have a council, being members of both Houses. Without such an influence, the war will be between the aristocracy and the people. He wished it to be between the aristocracy and the executive. Nothing else can protect the people aginst those speculating legislatures which are now plundering them throughout the United States.

Mr. Gerry read a resolution of the legislature of Massachusetts, passed before the act of Congress recommending the convention, in which her deputies were instructed not to depart from the rotation established in the fifth article of the Confederation, nor to agree, in any case, to give to the members of Congress a capacity to hold offices under the Government. This, he said, was repealed, in consequence of the act of Congress, with which the State thought it proper to comply in an unqualified manner. The sense of the State, however, was still the same. He could not think, with Mr. Pinckney, that the disqualification was degrading. Confidence is the road to tyranny. As to ministers and ambassadors, few of them were necessary. It is the opinion of a great many that they ought to be discontinued on our part, that none may be sent among us, and that source of influence shut up. If the Senate were to appoint ambassadors, as seemed to be intended,

they will multiply embassies for their own sakes. He was not so fond of those productions as to wish to establish nurseries for them. If they are once appointed, the House of Representatives will be obliged to provide salaries for them, whether they approve of the measures or not. If men will not serve in the legislature without a prospect of such offices, our situation is deplorable indeed. If our best citizens are actuated by such mercenary views, we had better choose a single despot at once. It will be more easy to satisfy the rapacity of one than of many. According to the idea of one gentleman (Mr. Mercer), our Government, it seems, is to be a government of plunder. In that case, it certainly would be prudent to have but one, rather than many, to be employed in it. We cannot be too circumspect in the formation of this system. It will be examined on all sides, and with a very suspicious eye. The people who have been so lately in arms against Great Britain for their liberties will not easily give them up. He lamented the evils existing, at present, under our governments, but imputed them to the faults of those in office, not to the people. The misdeeds of the former will produce a critical attention to the opportunities afforded by the new system to like or greater abuses. As it now stands, it is as complete an aristocracy as ever was framed. If great powers should be given to the Senate, we shall be governed in reality by a junto, as has been apprehended. He remarked that it would be very differently constituted from Congress. In the first place, there would be but two deputies from each State; in Congress there may be seven, and are generally five. In the second place, they are chosen for six years; those of Congress annually. In the third place, they are not subject to recall; those of Congress are. And, finally, in Congress nine States are necessary for all great purposes; here eight persons will suffice. Is it to be presumed that the people will ever agree to such a system? He moved to render the members of the House of Representatives, as well as of the Senate, ineligible, not only during, but for one year after the expiration of, their terms. If it should be thought that this will injure the legislature, by keeping out of it men of abilities, who are willing to serve in other offices, it may be required, as a qualification for other offices, that the candidate shall have served a certain time in the legislature.

Mr. GOUVERNEUR MORRIS. Exclude the officers of the Army and Navy, and you form a band having a different interest from, and opposed to, the civil power. You stimulate them to despise and reproach those "talking lords who dare not face the foe." Let this spirit be roused at the end of a war, before your troops shall have laid down their arms, and, though the civil authority be "intrenched in parchment to the teeth," they will cut their way to it. He was against rendering the members of the legislature ineligible to offices. He was for rendering them eligible again, after having vacated their seats by accepting office. Why should we not avail ourselves of their services if the people choose to give them their confidence? There can be little danger of corruption, either among the people or the legislatures, who are to be the electors. If they say, We see their merits, we honor the men, we choose to renew our confidence in them, have they not a right to give them a preference, and can they be properly abridged of it?

Mr. Williamson introduced his opposition to the motion by referring to the question concerning "money bills." That clause, he said, was dead. Its ghost, he was afraid, would, notwithstanding, haunt us. It had been a matter of conscience with him to insist on it as long as there was hope of retaining it. He had swallowed the vote of rejection with

reluctance. He could not digest it. All that was said on the other side was that the restriction was not convenient. We have now got a house of lords which is to originate money bills. To avoid another inconvenience, we are to have a whole legislature at liberty to cut out offices for one another. He thought a self-denying ordinance for ourselves would be more proper. Bad as the Constitution has been made by expunging the restriction on the Senate concerning money bills, he did not wish to make it worse by expunging the present section. He had scarcely seen a single corrupt measure in the legislature of North Carolina which could not be traced up to office-hunting.

Mr. SHERMAN. The Constitution should lay as few temptations as possible in the way of those in power. Men of abilities will increase as the country grows more populous, and as the means of education are more diffused.

Mr. PINCKNEY. No State has rendered the members of the legislature ineligible to offices. In South Carolina the judges are eligible into the legislature. It cannot be supposed, then, that the motion will be offensive to the people. If the State constitutions should be revised, he believed, restrictions of this sort would be rather diminished than multiplied.

Mr. Wilson could not approve of the section as it stood, and could not give up his judgment to any supposed objections that might arise among the people. He considered himself as acting and responsible for the welfare of millions not immediately represented in this House. He had also asked himself the serious question, what he should say to his constituents in case they should call upon him to tell them why he sacrificed his own judgment in a case where they authorized him to exercise it. Were he to own to them that he sacrificed it in order to flatter their prejudices, he should dread the retort, "Did you suppose the people of Pennsylvania had not good sense enough to receive a good government?" Under this impression, he should certainly follow his own judgment, which disapproved of the section. He would remark, in addition to the objections urged against it, that, as one branch of the Legislature was to be appointed by the legislatures of the States, the other by the people of the States—as both are to be paid by the States, and to be appointable to State offices—nothing seemed to be wanting to prostrate the national Legislature but to render its members ineligible to national offices, and by that means take away its power of attracting those talents which were necessary to give weight to the Government, and to render it useful to the people. He was far from thinking the ambition which aspired to offices of dignity and trust an ignoble or culpable one. He was sure it was not politic to regard it in that light, or to withhold from it the prospect of those rewards which might engage it in the career of public service. He observed that the State of Pennsylvania, which had gone as far as any State into the policy of fettering power, had not rendered the members of the legislature ineligible to offices of Government.

Mr. Ellsworth did not think the mere postponement of the reward would be any material discouragement of merit. Ambitious minds will serve two years, or seven years, in the legislature, for the sake of qualifying themselves for other offices. This he thought a sufficient security for obtaining the services of the ablest men in the legislature; although, whilst members, they should be ineligible to public offices. Besides, merit will be most encouraged when most impartially rewarded. If rewards are to circulate only within the legislature, merit out of it will be discouraged.

Mr. Mercer was extremely anxious on this point. What led to the appointment of this convention? The corruption and mutability of the legislative councils of the States. If the plan does not remedy these, it will not recommend itself; and we shall not be able, in our private capacities, to support and enforce it; nor will the best part of our citizens exert themselves for the purpose. It is a great mistake to suppose that the paper we are to propose will govern the United States. It is the men whom it will bring into the government, and interest in maintaining it, that are to govern them. The paper will only mark out the mode and the form. Men are the substance, and must do the business. All government must be by force or influence. It is not the King of France, but 200,000 janizaries of power, that govern that kingdom. There will be no such force here; influence, then, must be substituted; and he would ask whether this could be done if the members of the legislature should be ineligible to offices of state; whether such a disqualification would not determine all the most influential men to stay at home, and prefer appointments within their respective States.

Mr. Wilson was by no means satisfied with the answer given by Mr. Ellsworth to the argument as to the discouragement of merit. The members must either go a second time into the legislature, and disqualify themselves, or say to their constituents, "We served you before only from the mercenary view of qualifying ourselves for offices, and, having answered this purpose, we do not choose to be again elected."

Mr. Gouverneur Morris put the case of a war, and the citizen most capable of conducting it happening to be a member of the legislature. What might have been the consequence of such a regulation at the commencement, or even in the course, of the late contest for our liberties?

On the question for postponing, in order to take up Mr. Pinckney's motion, it was lost.

New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, ay, 5; Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, no, 5; Georgia, divided.

Mr. Gouverneur Morris moved to insert, after "office," "except offices in the Army or Navy; but, in that case, their offices shall be vacated."

Mr. Broome seconds him.

Mr. Randolph had been, and should continue, uniformly opposed to the striking out of the clause, as opening a door for influence and corruption. No arguments had made any impression on him but those which related to the case of war, and a coexisting incapacity of the fittest commanders to be employed. He admitted great weight in these, and would agree to the exception proposed by Mr. Gouverneur Morris.

Mr. Butler and Mr. Pinckney urged a general postponement of Article VI, section 9, till it should be seen what powers would be vested in the Senate, when it would be more easy to judge of the expediency of allowing the officers of state to be chosen out of that body.

A general postponement was agreed to *nem con.* (207).

[Section 10 of Article VI was amended and agreed to. The debate is here omitted.]

SATURDAY, *September 1, 1787.*

In convention.—Mr. Brearly, from the committee of eleven, to which were referred yesterday the postponed part of the Constitution, and parts of reports not acted upon, made the following partial report:

"That in lieu of Article VI, section 9, the words following be in-

serted, viz: 'The members of each House shall be ineligible to any civil office under the authority of the United States, during the time for which they shall respectively be elected; and no person holding an office under the United States shall be a member of either House during his continuance in office.'"

MONDAY, *September 3, 1787.*

Mr. Pinckney moved to postpone the report of the committee of eleven (see the 1st of September), in order to take up the following:

"The members of each House shall be incapable of holding any office under the United States for which they, or any other for their benefit, receive any salary, fees, or emoluments of any kind, and the acceptance of such office shall vacate their seats respectively."

He was strenuously opposed to an ineligibility of members to office, and, therefore, wished to restrain the proposition to a mere incompatibility. He considered the eligibility of members of the legislature to the honorable offices of government as resembling the policy of the Romans, in making the temple of Virtue the road to the temple of Fame.

On this question—

Pennsylvania, North Carolina, ay, 2; New Hampshire, Massachusetts, Connecticut, New Jersey, Maryland, Virginia, South Carolina, Georgia, no, 8.

Mr. King moved to insert the word "created" before the word "during," in the report of the committee. This, he said, would exclude the members of the first legislature under the Constitution, as most of the offices would then be created.

Mr. Williamson seconded the motion. He did not see why members of the legislature should be ineligible to vacancies happening during the term of their election.

Mr. Sherman was for entirely incapacitating members of the legislature. He thought their eligibility to offices would give too much influence to the executive. He said the incapacity ought at least to be extended to cases where salaries should be increased, as well as created, during the term of the member. He mentioned, also, the expedient by which the restriction could be evaded; to wit, an existing officer might be translated to an office created, and a member of the legislature, be then put into the office vacated.

Mr. Gouverneur Morris contended that the eligibility of members to office would lessen the influence of the executive. If they can not be appointed themselves, the executive will appoint their relations and friends, retaining the service and votes of the members for his purpose, in the legislature; whereas the appointment of the members deprives him of such an advantage.

Mr. Gerry thought the eligibility of members would have the effect of opening batteries against good officers, in order to drive them out and make way for members of the legislature.

Mr. Gorham was in favor of the amendment. Without it, we go farther than has been done in any of the States, or, indeed, any other country. The experience of the State governments, where there was no such ineligibility, proved that it was not necessary; on the contrary, that the eligibility was among the inducements for fit men to enter into the legislative service.

Mr. Randolph was inflexibly fixed against inviting men into the legislature by the prospect of being appointed to offices.

Mr. Baldwin remarked, that the example of the States was not applicable. The legislatures there are so numerous that an exclusion of

their members would not leave proper men for offices. The case would be otherwise in the General Government.

Colonel MASON. Instead of excluding merit, the ineligibility will keep out corruption, by excluding office-hunters.

Mr. Wilson considered the exclusion of members of the legislature as increasing the influence of the executive, as observed by Mr. Gouverneur Morris; at the same time that it would diminish the general energy of the Government. He said that the legal disqualification for office would be odious to those who did not wish for office, but did not wish either to be marked by so degrading a distinction.

Mr. PINCKNEY. The first legislature will be composed of the ablest men to be found. The States will select such to put the Government into operation. Should the report of the committee, or even the amendment, be agreed to, the great offices, even those of the judiciary department, which are to continue for life, must be filled, while those most capable of filling them will be under a disqualification.

On the question on Mr. King's motion—

New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, ay, 5; Connecticut, New Jersey, Maryland, South Carolina, Georgia, no, 5.

The amendment being thus lost, by the equal division of the States, Mr. Williamson moved to insert the words "created, or the emoluments whereof shall have been increased," before the word "during," in the report of the committee.

Mr. King seconded the motion, and on the question—

New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, ay, 5; Connecticut, New Jersey, Maryland, South Carolina, no, 4; Georgia, divided.

The last clause, rendering a seat in the legislature and an office incompatible, was agreed to *nem. con.*

The report, as amended and agreed to, is as follows:

"The members of each House shall be ineligible to any civil office under the authority of the United States, created, or the emoluments whereof shall have been increased, during the time for which they shall respectively be elected. And no person, holding any office under the United States, shall be a member of either house during his continuance in office. (251)

Adjourned.

[September 12, 1787, the Committee to Revise the Style, &c., reported the Constitution, in which the following changes were made in regard to the election and qualifications of Senators.]

FRIDAY, *September 14, 1787.*

Article I, section 3, the words "by lot"* were struck out *nem. con.*, on motion of Mr. Madison, that some rule might prevail in the rotation that would prevent both the members from the same State from going out at the same time.

"*Ex officio*" struck out of the same section, as superfluous, *nem. con.*; and "or affirmation," after "oath," inserted also unanimously.

Mr. Rutledge and Mr. Gouverneur Morris moved—"That persons impeached be suspended from their offices until they be tried and acquitted."

* "By lot" had been reinstated from the report of the committee of five, made on the 6th of August, as a correction of the printed report by the committee of style, &c.

Mr. MADISON. The President is made too dependent already on the Legislature by the power of one branch to try him in consequence of an impeachment by the other. This intermediate suspension will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate.

Mr. King concurred in the opposition to the amendment.

On the question to agree to it—

Connecticut, South Carolina, Georgia, ay, 3; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, no, 8.

Article I, section 4, "except as to the places of choosing Senators," was added, *nem. con.*, to the end of the first clause, in order to exempt the seats of government in the States from the power of Congress.

Article I, section 5—

"Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy."

Colonel Mason and Mr. Gerry moved to insert, after the word "parts," the words "of the proceedings of the Senate," so as to require publication of all the proceedings of the House of Representatives.

It was intimated, on the other side, that cases might arise where secrecy might be necessary in both Houses. Measures preparatory to a declaration of war, in which the House of Representatives was to concur, were instanced.

On the question, it passed in the negative.

Pennsylvania, Maryland, North Carolina, ay, 3; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Virginia, Georgia, no, 7; South Carolina, divided.

Mr. Baldwin observed that the clause, Article I, section 6, declaring that no member of Congress, "during the time for which he was elected, shall be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time," would not extend to offices created by the Constitution, and the salaries of which would be created, not increased, by Congress at their first session. The members of the first Congress, consequently, might evade the disqualification in this instance. He was neither seconded nor opposed, nor did anything further pass on the subject.

EXTRACTS FROM THE CONSTITUTION.

ARTICLE. I.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of

the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he

was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

ARTICLE XIV, OF THE AMENDMENTS.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

ACT OF JULY 25, 1866.

REVISED STATUTES, TITLE II, CHAPTER 1.

SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a viva voce vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a viva voce vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected.

SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to elect a person to fill such vacancy, in the manner pre-

scribed in the preceding section for the election of a Senator for a full term.

SEC. 17. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

SEC. 18. It shall be the duty of the executive of the State from which any Senator has been chosen, to certify his election, under the seal of the State, to the President of the Senate of the United States.

SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.

EXTRACTS FROM REVISED LAW RELATING TO PUBLICITY OF CAMPAIGN EXPENDITURES BY CANDIDATES FOR SENATOR OF THE UNITED STATES, LIMITATION OF AMOUNT OF EXPENDITURES BY, ETC.

[Act of Aug. 19, 1911, as amended by act of Aug. 23, 1912.]

SEC. 8. The word "candidate" as used in this section shall include all persons whose names are presented for nomination for Representative or Senator in the Congress of the United States at any primary election or nominating convention, or for indorsement or election at any general or special election held in connection with the nomination or election of a person to fill such office, whether or not such persons are actually nominated, indorsed, or elected.

* * * * * * *

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for indorsement at any general or special election, or election by the legislature of any State, as Senator in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which he is seeking indorsement, and not less than five nor more than ten days before the day upon which the first vote is to be taken in the two houses of the legislature before which he is a candidate for election as Senator, file with the Secretary of the Senate at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination or election.

Every such candidate for nomination at any primary election or nominating convention, or for indorsement or election at any general or special election, or for election by the legislature of any State, shall,

within fifteen days after such primary election or nominating convention, and within thirty days after any such general or special election, and within thirty days after the day upon which the legislature shall have elected a Senator, file with the Clerk of the House of Repre entatives or with the Secretary of the Senate, as the case may be, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, up to, on, and after the day of such primary election, nominating convention, general or special election, or election by the legislature, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination, indorsement, or election.

Every such candidate shall include therein a statement of every promise or pledge made by him, or by anyone for him with his knowledge and consent or to whom he has given authority to make any such promise or pledge, before the completion of any such primary election or nominating convention or general or special election or election by the legislature, relative to the appointment or recommendation for appointment of any person to any position of trust, honor, or profit, either in the county, State, or Nation, or in any political subdivision thereof, or in any private or corporate employment, for the purpose of procuring the support of such person or of any person in his candidacy, and if any such promise or pledge shall have been made the name or names, the address or addresses, and the occupation or occupations, of the person or persons to whom such promise or pledge shall have been made, shall be stated, together with a description of the position relating to which such promise or pledge has been made. In the event that no such promise or pledge has been made by such candidate, that fact shall be distinctly stated.

No candidate for Representative in Congress or for Senator of the United States shall promise any office or position to any person, or to use his influence or to give his support to any person for any office or position for the purpose of procuring the support of such person, or of any person, in his candidacy; nor shall any candidate for Senator of the United States give, contribute, expend, use, or promise any money or thing of value to assist in procuring the nomination or election of any particular candidate for the legislature of the State in which he resides, but such candidate may, within the limititions and restrictions and subject to the requirements of this act, contribute to political committees having charge of the disbursement of campaign funds.

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided*, That no candidate for Representative in Congress shall give, con-

tribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election: *Provided further*, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

The statements herein required to be made and filed before the general election, or the election by the legislature at which such candidate seeks election, need not contain items of which publicity is given in a previous statement, but the statement required to be made and filed after said general election or election by the legislature, shall, in addition to an itemized statement of all expenses not theretofore given publicity, contain a summary of all preceding statements.

Any person, not then a candidate for Senator of the United States, who shall have given, contributed, expended, used, or promised any money or thing of value to aid or assist in the nomination or election of any particular member of the legislature of the State in which he resides, shall, if he thereafter becomes a candidate for such office, or if he shall thereafter be elected to such office without becoming a candidate therefor, comply with all of the provisions of this section relating to candidates for such office, so far as the same may be applicable; and the statement herein required to be made, verified, and filed after such election shall contain a full, true, and itemized account of each and every gift, contribution, expenditure, and promise whenever made, in any wise relating to the nomination or election of members of the legislature of said State, or in any wise connected with or pertaining to his nomination and election of which publicity is not given in a previous statement.

Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives, or to the Secretary of the Senate, as the case may be, duly stamped and registered, within the time required herein, shall be deemed a sufficient filing of any such statement under any of the provisions of this act.

This act shall not be construed to annul or vitiate the laws of any State, not directly in conflict herewith, relating to the nomination or election of candidates for the offices herein named, or to exempt any such candidate from complying with such State laws.

* * * * * * *

SEC. 10. That nothing contained in this act shall limit or affect the right of any person to spend money for proper legal expenses in maintaining or contesting the results of any election.

SEC. 11. That every person willfully violating any of the foregoing provisions of this act, shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both.

CONTRIBUTIONS BY CORPORATIONS.

An Act To prohibit corporations from making money contributions in connection with political elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be subject to a fine not exceeding five thousand dollars, and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall upon conviction be punished by a fine of not exceeding one thousand and not less than two hundred and fifty dollars, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court.

Approved, January 26, 1907.

COMMITTEE ON PRIVILEGES AND ELECTIONS.

The Committee on Privileges and Elections was appointed on March 10, 1871, Forty-second Congress, first session.

CASES REFERRED TO THE COMMITTEE ON PRIVILEGES AND ELECTIONS SINCE ITS ORGANIZATION AND REPORTED BACK TO THE SENATE.

1871. Reynolds *v.* Hamilton.
1871. Goldthwaite, of Alabama. Report by Stewart.
1871. Norwood *v.* Blodgett, of Georgia. Mr. Stewart reported.
1871. Ransome *v.* Abbott, of North Carolina. Reports by Logan and Carpenter.
1872. Pomeroy and Caldwell, of Kansas. Reports by Logan, Morton, and Thurman.
1872 Sykes *v.* Spencer, of Alabama. Reports by Carpenter and others.
1872. George *v.* Spencer, of Alabama. Reports by Carpenter and others.
1873 to 1880. Louisiana cases. Committee directed to inquire whether an existing legal State government in Louisiana and to look over credentials of McMillan and Ray. Reports by Carpenter and others.
1873. Bogy, of Missouri. Report by Morton.
1877. Corbin *v* Butler, of South Carolina. Report by Cameron.
1877. Grover, of Oregon. Report by Wad eigh.
1879. Ingalls, of Kansas. Report by Salisbury.
1881. Lapham *v.* Miller, of New York. Report by Hill, of Georgia.
1886 Payne, of Ohio. Reports by Pugh and others.
1887. Lucas *v.* Faulkner, of West Virginia. Report by Hoar.
1890. Clark and Maginnis *v.* Sanders and Power, of Montana. Report by Hoar.
1890. Shoup and McConnell, of Idaho. Report by Hoar.
1890. Dubois, of Idaho. Report by Hoar.
1891. Claggett *v.* Dubois of Idaho. Report by Mitchell.
1891. Call, of Florida.
1892. Davidson *v.* Call, of Florida. Report by Turpie.
1893. Roach, of North Dakota.
1893. Ady *v.* Martin, of Kansas.
1895. du Pont, of Delaware. Report by Mitchell.
1897 Addicks *v.* Kenney, of Delaware.
1898. Hanna, of Ohio. Report by Chandler.
1899. Scott, of West Virginia. Report by McComas.
1899. Clark, of Montana. Report by Chandler.
1906. Smoot, of Utah. Report by Burrows.
1911. Lorimer, of Illinois. Report by Burrows.
*1912. Lorimer, of Illinois. Report by Dillingham.
1912. Stephenson, of Wisconsin. Report by Heyburn.
1913. Watson and Chilton, of West Virginia. Report by Dillingham.

* Special committee made up of members of the Committee on Privileges and Elections.

SENATE ELECTION CASES.

I.

CASES CONCERNING THE POWER OF EXECUTIVES OF STATES TO FILL VACANCIES.

[Third Congress—First session.]

KENSEY JOHNS,

of Delaware.

George Read, a Senator from Delaware, resigned his seat in December, 1793, during the recess of the legislature of said State. The legislature met in January and adjourned in February, 1794. On the 19th of March, Kensey Johns was appointed by the governor of said State to fill the vacancy. It was determined that Mr. Johns was not entitled to his seat, a session of the legislature having intervened between the resignation of Mr. Read and the appointment of Mr. Johns.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 3d Cong., 1793-'95, within pages 73-78.

MONDAY, *March* 24, 1794.

Kensey Johns appeared and produced his credentials of an appointment by the governor of the State of Delaware as a Senator of the United States; which were read.

Whereupon it was moved that they be referred to the consideration of the Committee of Elections before the said Kensey Johns should be permitted to qualify, who are directed to report thereon; and it passed in the affirmative—yeas 13, nays 12; as follows:

YEAS—Messrs. Bradley, Brown, Burr, Edwards, Gunn, Hawkins, Jackson, Langdon, Livermore, Martin, Monroe, Robinson, and Taylor.

NAYS—Messrs. Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Izard, Mitchell, Morris, Potts, Rutherfurd, Strong, and Vining.

WEDNESDAY, *March* 26, 1794.

Mr. Bradley reported from the Committee on Elections, to whom were referred the credentials of Kensey Johns, appointed by the executive of the State of Delaware a Senator of the United States in the place of George Read, resigned.

Ordered, That the report lie for consideration.

THURSDAY, *March* 27, 1794.

The Senate proceeded to the consideration of the report of the Committee of Elections, to whom were referred the credentials of Kensey Johns, appointed by the executive of the State of Delaware to be a Senator of the United States.

On motion that the report be recommitted, it passed in the negative; and,

After progress, it was

Ordered, That the further consideration of this report be postponed until to-morrow

FRIDAY, *March* 28, 1794.

The Senate resumed the consideration of the report of the Committee of Elections, to whom were referred the credentials of Kensey Johns, appointed by the executive of the State of Delaware to be a Senator of the United States; which report is as follows:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Bradley, Ellsworth, Mitchell, Rutherford, Brown, Livermore, and Taylor.]

The Committee of Elections, to whom were referred the credentials of an appointment by the governor of the State of Delaware of Kensey Johns as a Senator of the United States, having had the same under consideration, report—

That George Read, a Senator for the State of Delaware, resigned his seat upon the 18th day of December, 1793, and during the recess of the legislature of said State.

That the legislature of the said State met in January and adjourned in February, 1794.

That upon the 19th day of March, and subsequent to the adjournment of the said legislature, Kensey Johns was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid.

Whereupon the committee submit the following resolution:

Resolved, That Kensey Johns, appointed by the governor of the State of Delaware as a Senator of the United States for said State, is not entitled to a seat in the Senate of the United States, a session of the legislature of the said State having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.

On the question to agree to this report, it passed in the affirmative—yeas 20, nays 7; as follows:

YEAS—Messrs. Bradford, Bradley, Brown, Burr, Butler, Cabot, Edwards, Ellsworth, Frelinghuysen, Gunn, Hawkins, Jackson, King, Langdon, Livermore, Martin, Mitchell, Monroe, Robinson, and Taylor.

NAYS—Messrs. Foster, Izard, Morris, Potts, Rutherfurd, Strong, and Vining.

Resolved, That an attested copy of the resolution of the Senate on the appointment of Kensey Johns to be a Senator of the United States be transmitted by the President of the Senate to the executive of the State of Delaware.

[Special session of Senate, March, 1801.]

URIAH TRACY,

Senator from Connecticut from December 6, 1796, *till his death, July* 19, 1807.

Mr. Tracy's first term expired March 3, 1801. On March 4, at a special session of the Senate, he produced credentials of appointment by the governor of Connecticut to fill the vacancy. It appears from the credentials, which are dated February 20, 1801, that the legislature of the State was not then in session, and that he was appointed "from the 3d of March next until the next meeting of the legislature of said State." Exception being taken to his credentials he was admitted by a vote of 13 yeas to 10 nays. Under these credentials he occupied his seat during the special session of the Senate, March 4 and 5. In May following he was elected by the legislature, and on December 6, the second day of the next session of Congress, he produced his credentials of election and the oath was administered.

The brief history of the case here given, taken from the Annals of Congress, 6th Cong., 1799–1801, page 763, contains all that there is relating to it, neither the debate referred to nor the grounds of the decision being given.

WEDNESDAY, *March* 4, 1801.

Exception being taken to the credentials of the Hon. Mr. Tracy, a Senator from the State of Connecticut, a debate ensued; and,

On motion that he be admitted to take the oath required by the Constitution, it passed in the affirmative—yeas 13, nays 10; as follows:

YEAS—Messrs. Chipman, Dayton, Dwight Foster, Hillhouse, Howard, Livermore, J. Mason, Morris, Ogden, Ross, Sheafe, Wells, and White.

NAYS—Messrs. Anderson, Armstrong, Baldwin, Brown, Cocke, S. T. Mason, Muhlenberg, Nicholas, Pinckney, and Stone.

[Eleventh Congress—First session.]

SAMUEL SMITH,

Senator from Maryland from March 4, 1803, to March 3, 1815, and from December 17, 1822, to March 3, 1833.

On the expiration of Mr. Smith's first term, viz, March 3, 1809, the legislature of Maryland not having elected his successor, and not then being in session, he was appointed by the governor on March 4 to fill the vacancy until the next meeting of the legislature, which would take place on the 5th of June next. Thereupon Mr. Smith addressed a letter to the Senate, setting forth these facts, and submitting to its determination the question whether the appointment would or would not cease on the first day of the meeting of the legislature. It was determined that he was entitled to hold his seat in the Senate during the session of the legislature, unless the legislature should fill such vacancy by the appointment of a Senator, and the Senate be officially informed thereof. Under these credentials Mr. Smith held his seat during the special session of the Senate March 4–7, 1809, and during the first session of the Eleventh Congress (May 22 to June 28, 1809). On the 16th of November following he was elected by the legislature, and on December 4, in the next session of Congress, he produced his credentials of election and the oath was administered.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 11th Cong., 1st and 2d sess., vol. 1, 1809–'10, within pages 15–25.

MONDAY, *May* 29, 1809.

The President laid before the Senate a letter from Mr. Smith, of Maryland, stating that being appointed by the executive of that State a Senator, in conformity with the Constitution, until the next meeting of the legislature, which will take place on the 5th day of June next, he submits to the determination of the Senate the question whether an appointment under the executive of Maryland to represent that State in the Senate of the United States will or will not cease on the first day of the meeting of the legislature thereof? And the letter was read; and,

After debate, it was agreed that the further consideration thereof be postponed until to-morrow.

TUESDAY, *May* 30, 1809.

The Senate resumed the consideration of the letter from Mr. Smith, of Maryland, communicated yesterday; and,

On motion of Mr. Giles, the further consideration thereof was postponed to the 5th of June next.

TUESDAY, *June* 6, 1809.

The Senate resumed the consideration of the letter of Mr. Smith, a Senator from the State of Maryland; and

Mr. Giles submitted a resolution, which was amended, and is as follows:

"*Resolved*, That the Hon. Samuel Smith, a Senator appointed by the executive of the State of Maryland to fill the vacancy which happened in the office of Senator for that State, is entitled to hold his seat in the Senate of the United States during the session of the Legislature of Maryland, which, by the proclamation of the governor of said State, was to commence on the 5th day of the present month of June; unless said legislature shall fill such vacancy by the appointment of a Senator, and this Senate be officially informed thereof."

On motion by Mr. Anderson to amend the motion by striking out all after the word "resolved," and inserting:

"That any Senator of this body who holds a seat under an executive appointment cannot, according to the provisions of the Constitution of the United States, be entitled to continue to hold his seat as a member of this body after the meeting of the legislature of the State from which such Senator may be a member,"

And a division of the motion for amendment was called for, and the question having been taken on striking out, it passed in the negative; and,

The motion for amendment having been lost, the original motion was agreed to—yeas 19, nays 6; as follows:

YEAS—Messrs. Anderson, Brent, Franklin, Gaillard, German, Giles, Gilman, Goodrich, Griswold, Hillhouse, Lambert, Mathewson, Meigs, Pope, Robinson, Smith of New York, Thruston, White, and Whiteside.

NAYS—Messrs. Bradley, Leib, Lloyd, Parker, Pickering, and Turner.

[Special session of Senate, March, 1825.]

JAMES LANMAN,

Senator from Connecticut from March 4, 1819, to March 3, 1825.

Mr. Lanman's term expired March 3, 1825. March 4, 1825, he produced credentials of appointment by the governor to fill the vacancy. The credentials of appointment were dated February 8, 1825, and set forth that the President of the United States had desired the Senate to convene on the 4th day of March, and had caused official notice of that fact to be communicated to the governor. They were "to take effect immediately after the 3d day of March, 1825, and to continue until the next meeting of the legislature." Exception being taken to the credentials, they were referred to a committee, who reported the facts as above. On motion that he be admitted, it was determined in the negative, the grounds on which the Senate proceeded not being given.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 2d sess. 18th Cong., 1824–'25, within pages 272–283. A slightly fuller sketch of the debate than that here given may be found in Niles's Weekly Register, vol. 28, pages 31, 32.

FRIDAY, *March* 4, 1825.

The President laid before the Senate a letter from the Hon. James Lanman, inclosing the credentials of his appointment by the governor of Connecticut as a Senator of the United States, "to take effect immediately after the 3d day of March, 1825, and to continue until the next meeting of the legislature," and expressing his readiness to receive the usual qualifications.

The letter and credentials were read.

On motion by Mr. Holmes, of Maine, that Mr. Lanman be admitted to take the oath required by the Constitution, a debate ensued, and,

On motion,

Ordered, That the further consideration thereof be postponed until to-morrow.

SATURDAY, *March* 5, 1825.

The Senate resumed the consideration of the motion of yesterday, "that Mr. Lanman be admitted to take the oath required by the Constitution," and,

On motion by Mr. Eaton,

Ordered, That said motion, together with the credentials of Mr. Lanman, be referred to a select committee, to consist of three members, to consider and report thereon.

Mr. Eaton, Mr. Edwards, and Mr. Tazewell were appointed the committee.

Mr. Van Buren submitted the following motion for consideration:

"*Resolved*, That the Hon. James Lanman have leave to be heard at the bar of the Senate on the question as to his right to a seat therein under an appointment by the executive of Connecticut."

MONDAY, *March* 7, 1825.

Mr. Eaton, from the select committee to whom was referred, on the 5th instant, the motion "that Mr. Lanman be admitted to take the oath required by the Constitution," together with the credentials of Mr. Lanman, submitted the following report, which was read:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Eaton, Edwards, and Tazewell.]

That Mr. Lanman's term of service in the Senate expired on the 3d March. On the 4th, he presented to the Senate a certificate, regularly and properly authenticated, from Oliver Wolcott, governor of the State of Connecticut, setting forth that the President of the United States had desired the Senate to convene on the 4th day of March, and had caused official notice of that fact to be communicated to him.

The certificate of appointment is dated the 8th of February, 1825, subsequent to the time of notification to him by the President. The certificate further recites that, at the time of its execution, the legislature of the State was not in session, and would not be until the month of May.

The committee have looked into the Journals of the Senate to discover if they could find any authority or decision by them on this question; and the following have been found recorded:

"On the 27th of April, 1797, William Cocke was appointed a Senator from that State

by the governor of Tennessee; his term of service having expired on the 3d of the preceding March, and on the 15th of May took his seat, and was qualified.

"On the 3d of March, 1801, the seat of Uriah Tracy became vacant, the time for which he had been elected having expired. On the 20th of February preceding the governor of Connecticut reappointed him a Senator, and, in pursuance thereof, he was qualified and took his seat.

"Joseph Anderson, a Senator from Tennessee, was appointed by the governor a member of the Senate on the 6th of February, 1809, and on the 4th of March after took his seat; the period for which he had been elected having on the preceding day expired.

"John Williams, of Tennessee, on the 20th of January, 1817, was appointed a Senator in Congress, to take his seat on the 4th of March, when the term for which he had been elected would expire. Mr. Williams appeared, was qualified, and took his seat."

In none of these cases does it appear that there was any objection made, or question raised, except in 1801, in the case of Mr Tracy, when the vote was 13 for and 10 against the right of the member to take his seat. Those are the only analogous cases the committee have been able to find.

By reference to the statute laws of Connecticut the committee find that in that State there is a law upon this subject which is in the following words: "Whenever any vacancy shall happen in the representation of this State in the Senate of the United States, by the expiration of the term of service of a Senator, or by resignation or otherwise, the general assembly, if then in session, shall, by a concurrent vote of the senate and house of representatives, proceed to fill said vacancy by a new election; and in case such vacancy shall happen in the recess of the general assembly, the governor shall appoint some person to fill the same until the next meeting of the general assembly."

The Senate proceeded to consider the motion of the 5th instant, that the Hon. James Lanman have leave to be heard at the bar of the Senate on the question as to his right to a seat therein; and agreed thereto.

Mr. Edwards submitted the following motion; which was read:

"*Resolved*, That the Hon. James Lanman, appointed a Senator by the governor of the State of Connecticut, be now admitted to the oath required by the Constitution."

And on the question to agree thereto, it was determined in the negative—yeas 18, nays 23.

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bell, Bouligny, Chase, Clayton, D'Wolf, Edwards, Harrison, Hendricks, Johnston of Louisiana, Kane, Knight, Lloyd of Massachusetts, M'Ilvaine, Mills, Noble, Rowan, Seymour, and Thomas.

Those who voted in the negative are Messrs. Barton, Benton, Berrien, Branch, Chandler, Dickerson, Eaton, Findlay, Gaillard, Hayne, Holmes of Maine, Holmes of Mississippi, Jackson, King of Alabama, Lloyd of Maryland, Macon, Marks, Ruggles, Smith, Tazewell, Van Buren, Van Dyke, and Williams.

[Special session of Senate, March, 1837.]

AMBROSE H. SEVIER,

Senator from Arkansas from December 5, 1836, to March 4, 1837, and from March 8, 1837, till he resigned, March 15, 1848.

The State of Arkansas was admitted into the Union in June, 1836. In October, 1836, the legislature of that State elected Ambrose H. Sevier and William S. Fulton Senators. On the allotment of the Arkansas Senators to their respective classes, as required by the third section of the first article of the Constitution, Mr. Sevier was placed in the class of Senators whose term of service expired on the 3d of March, 1837. The legislature of Arkansas had no opportunity to fill the vacancy, not having been in session after the result of the allotment was known in that State. January 17, 1837, the governor of Arkansas appointed Mr. Sevier to fill the vacancy which would take place on the 3d of March. At the special session of the Senate in March the credentials were referred to the Committee on the Judiciary. The committee reported that as the time when Mr. Sevier was to go out of office was decided by lot, and as the legislature, not being in session after this decision, could not supply the vacancy, it came "fairly within the provision of the Constitution contained in the third section of the first article, which declares, 'and if vacancies happen by resignation or otherwise,' &c."; and reported a resolution that the oath required by the Constitution be administered to him. March 8 this resolution passed and Mr. Sevier took his seat. No debates on the adoption of the resolution are found. Under these credentials Mr. Sevier held the seat during the remainder of the special session March 8–10, during the first session of the Twenty-fifth Congress, September 4 to October 16, and from December 4–13 of the second session, when he presented credentials of election (which had taken place November 7) for term ending March 3, 1843, and the oath was administered.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Congressional Globe, 2d sess. 24th Cong., pages 1 and 209, and during the special session from the Senate Journal, 2d sess. 24th Cong., 1836–'37, within pages 358–367. No fuller account of the proceedings during the special session than that taken from the Senate Journal is found.

MONDAY, *December* 5, 1836.

Mr. Benton presented the credentials of the Hon. A. H. Sevier and W. S. Fulton, Senators-elect from the State of Arkansas. The Vice-President administered the oath prescribed by the Constitution of the United States, and they took their seats.

On motion by Mr. Benton,

Resolved, That the Secretary put into the ballot-box three papers of equal size, numbered 1, 2, 3. Each of the Senators from the State of Arkansas draw out one paper. No. 1, if drawn, shall entitle the member to be placed in the class of Senators whose terms of service will expire the 3d day of March, 1837; No. 2 in the class whose terms will expire the 3d day of March, 1839; and No. 3 in the class whose terms will expire on the 3d day of March, 1841.

In pursuance of the above order, Mr. Sevier drew from the ballot-box No. 1, and Mr. Fulton No. 3. Therefore Mr. Sevier's term expires on the 3d of March, 1837, and Mr. Fulton's on the 3d of March, 1841.

MONDAY, *February* 27, 1837.

Mr. Fulton presented the credentials of the Hon. Ambrose H. Sevier, appointed a Senator by the governor of Arkansas to fill the vacancy that will occur on the 4th of March next, for the term of six years.

Mr. Webster expressed his doubts as to the constitutionality of making an appointment, no vacancy having occurred.

Mr. Fulton remarked that he and his colleague were aware of this difficulty; but he (Mr. F.), supposing that it would be a matter for the next Senate to act upon, presented the credentials under that impression.

The Chair said that it was not for the Senate to consider the qualifications of Senators elected to the next Congress. That Congress must act on this subject.

Mr. Sevier said that he had very great doubt of the legality of the appointment, and did not at all doubt the patriotic motives which influenced the Senator from Massachusetts in expressing himself as he had done. Mr. S. cared not how the matter should be decided, one way or the other.

Mr. Webster was sure that the honorable Senator was very indifferent as to how the question might be decided, and would give him credit as to his motives in intimating that there might be some irregularity in the proceeding.

Mr. Sevier expressed himself quite satisfied with the course pursued by the honorable Senator from Massachusetts.

SATURDAY, *March* 4, 1837.

The Hon. Ambrose H. Sevier, whose credentials were read the 27th February, 1837, appearing for the purpose of being qualified,

On motion by Mr. King, of Alabama,

Ordered, That the further consideration of the same be postponed to Monday next.

MONDAY, *March* 6, 1837.

The Senate resumed the consideration of the credentials of the Hon. Ambrose H. Sevier, and,

On motion by Mr. Fulton,

Ordered, That they be referred to the Committee on the Judiciary.

TUESDAY, *March* 7, 1837.

Mr. Grundy, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. Ambrose H. Sevier, submitted the following report:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Grundy (chairman), Crittenden, Morris, King of Georgia, and Wall.]

The Committee on the Judiciary, to whom was referred the credentials of the Hon. Ambrose H. Sevier, have had the same under consideration, and submit the following report:

At the last session of Congress the State of Arkansas was admitted into the Union, and the legislature of that State, in the month of October, 1836, elected Ambrose H. Sevier and William S. Fulton Senators to represent the State in the Senate of the United States. It also appears that upon the allotment of the said Arkansas Senators to their respective classes, as required by the third section of the first article of the Constitution, the said Ambrose H. Sevier was placed in the class of Senators whose term of service expired on the 3d day of March, 1837, and that the legislature of Arkansas have had no opportunity of filling the vacancy, not having been in session since the fact that the vacancy would occur could have been known in that State. The governor of the State of Arkansas on the 17th day of January last commissioned the said Sevier as Senator to fill the vacancy which would take place on the 3d of March. Upon this state of the case the question is presented whether the said Ambrose H. Sevier is entitled to his seat under the appointment made by the executive of the State of Arkansas? In looking into the practice of the Senate upon the subject of executive appointments, no case like the present has been found. Several cases have occurred in which the executives of different States in anticipation of the expiration of the regular term of service have appointed Senators (the legislatures not being in session), and in all of these cases the Senators thus appointed were admitted to their seats, until the called session of the Senate in March, 1825, when Mr. Lanman, of Connecticut, whose term of service expired on the 3d of March, 1825, produced his credentials from the governor of Connecticut and the Senate decided he was not entitled to his seat by a vote of 23 to 18.

This decision seems to have been generally acquiesced in since that time; nor is it intended by the committee to call its correctness in question. The principle asserted in that case is that the legislature of a State by making elections themselves shall provide for all vacancies which must occur at stated and known periods; and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution.

The case now under consideration is wholly different in principle. The time when Mr. Sevier was to go out of office under his election made by the legislature of Arkansas was decided by lot, agreeably to the provisions of the Constitution on that subject. After the decision thus made, the legislature of Arkansas, not being in session, could not supply the vacancy; and the case, in the opinion of the committee, comes fairly within the provision of the Constitution contained in the third section of the first article, which declares, "and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The committee are of opinion that Mr. Sevier is entitled to his seat under the executive appointment of the 17th of January, 1837, and therefore submit the following resolution:

Resolved, That the Hon. Ambrose H. Sevier, appointed a Senator by the governor of the State of Arkansas, have the oath required by the Constitution administered to him.

The Senate proceeded to consider the resolution; and,

On motion by Mr. King, of Georgia,

Ordered, That it lie on the table, and that the report be printed.

WEDNESDAY, *March* 8, 1837.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary in relation to the appointment of the Hon. Ambrose H. Sevier; and,

On the question, "Will the Senate agree to the resolution?" it was determined in the affirmative—yeas 26, nays 19.

On motion by Mr. Grundy, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Benton, Brown, Buchanan, Clayton, Cuthbert, Fulton, Grundy, Hubbard, Linn, Lyon, Nicholas, Niles, Norvell, Pierce, Preston, Rives, Robinson, Ruggles, Smith of Connecticut, Tipton, Walker, Wall, White, Wright, and Young.

Those who voted in the negative are Messrs. Bayard, Black, Clay, Crittenden, Davis, Kent, King of Alabama, King of Georgia, Knight, McKean, Morris, Mouton, Prentiss, Robbins, Smith of Indiana, Southard, Swift, Webster, and Williams.

Whereupon the oath prescribed by law was administered to the Hon. Mr. Sevier, and he took his seat in the Senate.

[Thirty-second Congress—Second session.]

ROBERT C. WINTHROP,

Senator from Massachusetts from July 30, 1850, to February 7, 1851.

Mr. Winthrop was appointed July 27, 1850, to fill a vacancy happening in the Senate by the resignation of Daniel Webster. February 1, 1851, Robert Rantoul was elected by the legislature to fill the unexpired term. February 4, Mr. Rantoul not having appeared to take the seat, Mr. Winthrop offered a resolution, which was agreed to, "that the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires." The committee reported that a person so appointed had a right to the seat until the legislature, at its next meeting, should elect a person to fill the unexpired term, and the person elected should accept, and his acceptance appear to the Senate; that presentation of credentials implied acceptance; that these views were sustained by precedents. The report was debated, but no action taken, the whole subject being laid on the table. Mr. Winthrop vacated the seat February 7, 1851, when Mr. Rantoul's credentials were presented.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 2d sess. 31st Cong., 1850–'51, with the report of the committee from Senate Reports, 2d sess. 31st Cong., 1850–'51, No. 269.

The debates on the case are found in the Congressional Globe, 2d sess. 31st Cong., vol. 23, within pages 425–478, special references to which are inserted below.

TUESDAY, *February* 4, 1851.

Mr. Winthrop submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires."

[Mr. Winthrop accompanied the introduction of the resolution by some remarks on the practice of the Senate in regard to the subject, expressing a desire in his own case to hold his seat just so long as he was constitutionally entitled thereto and no longer. These remarks are found on pages 425, 426 of the Congressional Globe referred to.]

WEDNESDAY, *February* 5, 1851.

Mr. Butler, from the Committee on the Judiciary, consisting of Messrs, Butler (chairman), Berrien, Bradbury, Dayton, and Downs, who were instructed by a resolution of the Senate to inquire and report at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires, submitted a report, which was ordered to be printed.

REPORT OF COMMITTEE.

IN SENATE OF THE UNITED STATES.

FEBRUARY 5, 1851.—Submitted, and ordered to be printed.

Mr. Butler made the following report:

The Committee on the Judiciary, to whom was referred a resolution directing said committee to inquire and report at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires, have had the same under consideration, and report:

The question presented by the resolution turns mainly upon the construction of the clause of Article I, section 2, of the Constitution of the United States, which provides that "if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall fill such vacancies."

Your committee are of the opinion that the sitting member under executive appointment has a right to occupy his seat until the vacancy shall be filled by the legislature of the State of which he is a Senator during the next meeting thereof. To fill such vacancy it is not only necessary to make an election, but that the person elected shall accept the appointment. And your committee are further of the opinion that such acceptance should appear by the presentation to the Senate of the credentials of the member-elect, or other official information of the fact—at which time the office of the sitting

member terminates. When the member-elect is present and ready to qualify his express acceptance is at once made known; and when his credentials are presented in his absence his acceptance may be fairly implied.

These general views are sustained by precedents. An early one may be found in the Senate Journal of 1809, page 381, where the question was settled, after debate, by the adoption on the 6th of June of the following resolution:

"*Resolved*, That the Hon. Samuel Smith, a Senator appointed by the executive of Maryland to fill the vacancy which happened in the office of Senator for that State, is entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to commence on the 5th day of the present month of June, unless said legislature shall fill such vacancy by the appointment of a Senator, and this Senate be officially informed thereof."

The precedent in this case has been uniformly followed from that time to the present in the many cases that have arisen involving the same question.

[A list of precedents accompanying the report is found annexed to the report in the volume of Senate Reports referred to in the head-note. It is not printed here, as all the cases are included in the list of appointments on page 146 of this book.]

FRIDAY, *February* 7, 1851.

Mr. Winthrop presented the credentials of the Hon. Robert Rantoul, jr., elected a Senator by the legislature of the Commonwealth of Massachusetts to fill the vacancy occasioned by the resignation of the Hon. Daniel Webster; which were read.

[Mr. Winthrop stated that he presented the credentials "with the understanding that, agreeably to the recent report of the Judiciary Committee, the presentation of the credentials would imply an acceptance on the part of the Senator-elect, so far forth at least as to terminate the office of the sitting member." These remarks are found on pages 459, 460 of the Congressional Globe referred to.]

Mr. Clay moved to take up the report of the committee with the view of deciding whether the retiring member is entitled to his seat.*

[Some remarks on the report are found on page 460 of the Congressional Globe referred to.]

Mr. Davis, of Massachusetts, submitted the following resolution; which was considered by unanimous consent:

"*Resolved*, That a Senator appointed by the executive of a State to fill a vacancy is entitled to hold his seat until the Senate is satisfied that a successor is elected and has accepted the office: *Provided*, Such election and acceptance take place during the session of the legislature held next after the vacancy occurs, and that such acceptance ought not to be inferred from the mere presentation to the Senate of the credentials of the newly-elected Senator."

[A debate on the question whether the right to a seat under executive appointment expires on the day of the meeting of the legislature or not until an election has taken place is found on pages 460–463.]

Mr. Rhett moved to amend the resolution of the gentleman from Massachusetts by striking out all after the word "resolved" and inserting the following:

"That a Senator holding a seat by appointment of the executive of a State can only fill the same 'until the next meeting of the legislature' thereof, at which time it devolves upon the legislature of the State to fill the vacancy then existing."†

[The debate on the same question is continued on pages 463–465 of the Congressional Globe referred to.]

An amendment having been proposed by Mr. Rhett, on motion by Mr. Hale that the resolution lie on the table, it was determined in the negative—yeas 22, nays 25.

On motion by Mr. Rhett, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Benton, Bradbury, Butler, Chase, Davis of Mississippi, Dickinson, Douglas, Downs, Felch, Gwin, Hale, Hamlin, Hunter, Jones, King, Miller, Pearce, Phelps, Pratt, Sturgeon, Upham, and Wales.

Those who voted in the negative are Messrs. Badger, Baldwin, Bell, Berrien, Borland, Clarke, Davis of Massachusetts, Dodge of Wisconsin, Dodge of Iowa, Foote, Greene, Mangum, Mason, Morton, Norris, Rhett, Rusk, Smith, Soulé, Spruance, Turney, Underwood, Walker, Whitcomb, and Yulee.

[The debate on the same subject is continued on pages 465–467 of the Congressional Globe referred to.]

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* This motion is taken from the Congressional Globe. It does not appear in the Senate Journal.
† This amendment is taken from the Congressional Globe. It does not appear in the Senate Journal.

SATURDAY, *February* 8, 1851.

The Senate resumed the consideration of the resolution submitted yesterday by Mr. Davis, of Massachusetts, in relation to the duration of an appointment made by the executive of a State to fill vacancies in the Senate, and after debate (which is found on pages 477, 478 of the Congressional Globe referred to),

Mr. Baldwin proposed the following resolution as an amendment to the resolution submitted by the Senator from Massachusetts:

"*Resolved*, That a Senator appointed by the executive of a State in consequence of the happening of a vacancy during the recess of the legislature is entitled to hold his seat under the temporary appointment of the executive until such vacancy is filled by the legislature at the next session thereof, and the person appointed to fill the same shall appear and be qualified therefor, pursuant to the requirement of the Constitution."*

[Remarks to the effect that nothing practical was before the Senate, Mr. Winthrop having vacated his seat and Mr. Rantoul not having appeared, are found on page 478 of the Congressional Globe referred to.]

On motion by Mr. Hale,

Ordered, That it lie on the table.

*This resolution is taken from the Congressional Globe. It does not appear in the Senate Journal.

[Thirty-second Congress—Second session.]

ARCHIBALD DIXON,

Senator from Kentucky from December 20, 1852, till March 3, 1855.

December 15, 1851, Henry Clay addressed a letter to the general assembly of Kentucky resigning his seat in the Senate, "to take effect on the first Monday of September, 1852." December 30, 1851, Archibald Dixon was elected by the legislature to fill that unexpired term. June 29, 1852, during the recess of the legislature, Henry Clay died. July 6, the governor appointed David Meriwether Senator "until the time the resignation of Henry Clay takes effect." Mr. Meriwether's credentials were presented and he took his seat July 15, and held it until Congress adjourned August 31. December 6, the Senate reassembled, Mr. Meriwether did not appear, and Mr. Dixon appeared and presented his credentials. Objection was made to his taking the oath of office, on the ground that the seat belonged to Mr. Meriwether; that Mr. Meriwether had been appointed to fill a vacancy happening by the death of a Senator, and that he had a right to the seat until the next meeting of the legislature, and that it was not in the power of the governor to limit his term of office to the first Monday in September, 1852. The seat was vacant until December 20, when the Senate by a vote of 27 yeas to 16 nays resolved that Mr. Dixon had been duly elected "to fill the vacancy in the Senate occasioned by the resignation of the Hon. Henry Clay, and was entitled to a seat therein."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journals, 1st and 2d sess. 32d Cong., 1851–'52 and 1852–'53. There being no report of a committee in the case, an extract from the remarks of Mr. Rusk (page 93 of the Congressional Globe, vol. 26, 2d sess. 32d Cong., December 20, 1852) is given, which states briefly the main points under discussion by the Senate.

Special references to each day's debates on the subject, most of which are found within pages 1-96 of the Congressional Globe above referred to, are inserted below.

[Extract from remarks of Thomas J. Rusk, of Texas, in Senate, December 20, 1852.]

"The following facts make up the case: On the 17th of December, 1851, Henry Clay was a Senator from Kentucky, chosen by the legislature for six years, which would have expired on the 3d of March, 1855. Being so a Senator, he resigned by a communication to the legislature of Kentucky, declaring that it was to take effect on the first Monday in September, 1852. The legislature, then in session, received the resignation, and chose Mr. Dixon to fill the vacancy thus to occur from the first Monday in September, 1852, to the 3d day of March, 1855. The legislature then adjourned. On the 29th day of June, 1852, during the recess of the legislature of Kentucky, Mr. Clay died, and the governor of that State made a 'temporary appointment' of Mr. Meriwether as a Senator from Kentucky, to hold the seat *until the first Monday of September*, 1852. Mr. Meriwether immediately took the vacant seat, and held it until Congress adjourned on the last day of August, 1852. On the 6th of December, 1852, the Senate reassembles, Mr Meriwether does not appear, and Mr. Dixon appears and presents his credentials, and claims the vacant seat.

"Manifestly, Mr. Dixon is one of *two* Senators 'chosen by the legislature' of Kentucky 'for six years,' and he was chosen to fill a vacancy which has happened in the term of Mr. Clay.

"The whole question turns on the point, how did this vacancy happen? Mr. Clay resigned, fixing the first Monday of September as the day when he should *vacate* his seat, and died, nevertheless, a Senator before that day arrived. Mr. Dixon was appointed by the legislature when in session, before not only the day which Mr. Clay's resignation fixed for his retirement, but also before Mr. Clay's death.

"We who maintain Mr. Dixon's title insist that the vancancy happened by Mr. Clay's resignation. On the contrary, those who deny Mr. Dixon's title insist that the vacancy happened by Mr. Clay's death.

"Four questions arise:

"First. Can a Senator resign?

"Second. Can a Senator resigning *appoint a future day for his retirement from the Senate?*

"Third. Can the proper appointing power receive such a resignation, and prospectively fill the vacancy?

"Fourth. If the legislature so prospectively fill the vacancy, can the appointment be *defeated by the death* of the resigning Senator before the arrival of the day fixed for his retirement from the Senate?

"If a Senator can resign, and can so resign prospectively, and if the legislature can so fill the vacancy prospectively, and if their action cannot be defeated by the death of the resigning Senator, then Mr. Dixon's title is good, valid, and complete.

"The first question is expressly decided by the Constitution, which declares that vacancies may 'happen by resignation.'

"The second question is decided by an unbroken succession of precedents from the

foundation of the Government. Mr. Bledsoe so resigned, fixing a future day; so did Mr. Clay in 1842; so did Mr. Berrien in 1852; and so did Mr. Foote in 1852.

"The third question is answered with equal distinctness by precedents. The legislature of Kentucky prospectively filled the vacancy made by Mr. Clay's resignation in 1842; the governor of Georgia prospectively filled the vacancy of Mr. Berrien in 1852; and the governor or legislature of Mississippi prospectively filled the vacancy of Mr. Foote in 1852.

"The only question remaining is the fourth: Can the death of the resigning Senator after the legislature has prospectively filled the vacancy, and before the day fixed for his retirement, defeat the appointment of his successor already made?"

[Transcript of proceedings from the Journals.]

THURSDAY, *July* 15, 1852.

Mr. Bright presented the credentials of the Hon. David Meriwether, appointed a Senator by the executive of the State of Kentucky until the first Monday in September next, to fill the vacancy occasioned by the death of the Hon. Henry Clay; which were read, and the oath prescribed by law having been administered to Mr. Meriwether, he took his seat in the Senate.

[A debate on the question whether Mr. Meriwether's credentials should be referred to a committee on account of the irregularity they contained of limiting the term of service to the first Monday in September is found on pages 1783, 1784 of the Congressional Globe, vol. 24, part 3, 1st sess. 32d Cong., 1851–'52.]

MONDAY, *December* 6, 1852.

Mr. Jones, of Tennessee, presented the credentials of the Hon. Archibald Dixon, chosen a Senator by the legislature of the Commonwealth of Kentucky, to serve for the unexpired term rendered vacant by the resignation of the Hon. Henry Clay, to take effect from the first Monday of September, 1852, until the end of the term for which said Henry Clay was elected; which were read.

An objection being made by Mr. Gwin to administering the oath prescribed by law to the Hon. Mr. Dixon, a debate ensued, and the following resolution was submitted by Mr. Gwin:

"*Resolved*, That the credentials of Archibald Dixon, esq., be referred to a select committee of five, to consider and report thereon."

And Mr. Mangum having proposed the following amendment: Insert at the end of the resolution, "and that the said Archibald Dixon be now qualified and permitted to take his seat in the Senate, and occupy the same pending the action of the said committee,"

By unanimous consent the proceeding thereon was suspended.

* * * * * * *

The Senate resumed the consideration of the credentials of the Hon. Archibald Dixon, and, after further debate, on motion, and by unanimous consent, the proceeding thereon was suspended for the purpose of receiving a report of a committee.

* * * * * * *

The Senate resumed the consideration of the credentials of the Hon. Archibald Dixon, with the resolution submitted by Mr. Gwin.

[The debates of this day on the subject are found on pages 1–5 of the volume of the Congressional Globe referred to in the head-note. They include a discussion of the *prima facie* right of Mr. Dixon to the seat pending the action of the Senate.]

TUESDAY, *December* 7, 1852.

The Senate resumed the consideration of the credentials, &c.

[The debate is found on pages 12–19 of the Globe.]

WEDNESDAY, *December* 8, 1852.

The Senate resumed the consideration of the credentials of the Hon. Archibald Dixon, with the resolution submitted by Mr. Gwin, and,

On motion by Mr. Badger,

Ordered, That the further consideration thereof be postponed to Monday next.

MONDAY, *December* 13, 1852.

The Senate resumed the consideration of the credentials of the Hon. Archibald Dixon, with the resolution submitted by Mr. Gwin.

On motion by Mr. Hunter, and by unanimous consent,

Ordered, That, until the question thereon be decided, the name of Mr. Meriwether be omitted in any call of the yeas and nays.

Mr. Mangum withdrew the amendment which he offered, and Mr. Jones, of Tennessee, offered the following as an amendment to the proposition of Mr. Gwin, to strike out all after the word "resolved," and insert: "That the Hon. Archibald Dixon was duly elected by the legislature of the State of Kentucky to fill the vacancy in the Senate occasioned by the resignation of the Hon. Henry Clay, and is entitled to a seat therein." *

[The debate is found on pages 43–47 of the Globe.]

WEDNESDAY, *December* 15, 1852.

The Senate resumed the consideration of the credentials, &c.

[The debate is found on pages 58–62 of the Globe.]

THURSDAY, *December* 16, 1852.

The Senate resumed the consideration of the credentials. &c.

[The debate is found on pages 69–76 of the Globe.]

MONDAY, *December* 20, 1852.

The Senate resumed consideration of the credentials of the Hon. Archibald Dixon, with the resolution submitted by Mr. Gwin.

On motion by Mr. Jones, of Tennessee, to amend the resolution by striking out, after the word "resolved," "that the credentials of Archibald Dixon, esq., be referred to the Committee on the Judiciary, who shall consider and report thereon;" and, in lieu thereof, inserting, "that the Hon. Archibald Dixon was duly elected by the legislature of the State of Kentucky to fill the vacancy in the Senate occasioned by the resignation of the Hon. Henry Clay, and is entitled to a seat therein," it was determined in the affirmative—yeas 27, nays 16.

On motion by Mr. Hale, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Atchison, Badger, Bell, Brooke, Butler, Chase, Clarke, Cooper, Davis, Dawson, Dodge of Iowa, Fish, Geyer, Hale, Jones of Tennessee, Miller, Morton, Pearce, Rusk, Seward, Smith, Spruance, Sumner, Underwood, Upham, and Wade.

Those who voted in the negative are Messrs. Bayard, Borland, Bradbury, Bright, Cass, Cathcart, De Saussure, Dodge of Wisconsin, Douglas, Downs, Felch, Gwin, Mason, Norris, Toucey, and Weller.

So the proposed amendment was agreed to.

On the question to agree to the resolution as amended, it passed in the affirmative; and the oath prescribed by law was administered to Mr. Dixon, and he took his seat in the Senate.

[The debate is found on pages 90–96 of the Globe.]

COMPENSATION OF MR. MERIWETHER.

TUESDAY, *December* 21, 1852.

Mr. Rusk submitted the following resolution; which was read:

"*Resolved*, That the Hon. David Meriwether, late a member of the Senate from the State of Kentucky, be paid his mileage and per diem up to the 20th day of December inclusive."

[Some remarks in favor of the adoption of the resolution are found on page 105 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *January* 5, 1853.

The resolution submitted by Mr. Rusk the 21st of December last, to pay the Hon. Mr. Meriwether his per diem and mileage, was read the second time, and considered as in Committee of the Whole; and, no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read a third time, by unanimous consent.

Resolved, That it pass.

[Remarks on the adoption of the resolution are found on pages 220–221 of the Congressional Globe referred to in the head-note.]

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* This amendment is taken from the Globe. It does not appear in the Senate Journal.

Thirty-third Congress—First session.

SAMUEL S. PHELPS,

Senator from Vermont from March 4, 1839, *to March* 3, 1851, *and from January* 19, 1853, *to March* 17, 1854.

Mr. Phelps was appointed by the governor of Vermont January 17, 1853, during the recess of the legislature, to fill a vacancy in the Senate happening by the death of William Upham. His credentials were presented and he took his seat January 19. The legislature met in October and adjourned in December without electing a Senator to fill the unexpired term. Mr. Phelps had held the seat during the remainder of the second session of the Thirty-second Congress, ending March 3, and during the special session of the Senate March 4 to April 11. December 20 he again attended. January 4, 1854, the Senate resolved that the Committee on the Judiciary inquire whether he was entitled to retain his seat. January 16 the committee reported the resolution, "that the Hon. Samuel S. Phelps is entitled to his seat in the Senate of the United States." It was accompanied by a minority report adverse to the right of Mr. Phelps to a seat. March 16 the resolution reported by the committee was rejected by a vote of 12 yeas to 26 nays, and it was "*Resolved*, That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 1st sess. 33d Cong., 1853–'54, together with the report of the committee (majority and minority), from Senate Reports, 1st sess. 33d Cong., vol. 1, 1853–'54, Report No. 34.

The debates in the case, which are extended, are found in the Congressional Globe, vol. 28, part 1 1st sess. 33d Cong., and in the Appendix to the Congressional Globe, vol. 29, 1st sess., 32d Cong.

Special references to the debates of each day are inserted below.

WEDNESDAY, *January* 19, 1853.

Mr. Foot presented the credentials of the Hon. Samuel S. Phelps, appointed a Senator by the governor of the State of Vermont to fill the vacancy occasioned by the death of the Hon. William Upham; which were read.

The oath prescribed by law was administered to Mr. Phelps, and he took his seat in the Senate.

TUESDAY, *January* 3, 1854.

Mr. Seward submitted the following resolution for consideration:

"Whereas the Hon. Samuel S. Phelps was appointed by his excellency the governor of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had happened by the death of the Hon. William Upham, a Senator whose term of six years would have continued until the 4th of March, 1855; and

"Whereas it is understood that since that temporary appointment was made the legislature of Vermont has been convened at their annual session and has adjourned without filling such vacancy: Therefore,

"*Resolved*, That the Committee on the Judiciary inquire whether the Hon. Samuel S. Phelps is entitled to retain a seat in the Senate of the United States."

[Mr. Seward accompanied the introduction of the resolution by a statement of the facts in the case, which statement is found on page 103 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *January* 4, 1854.

The Senate proceeded to consider the resolution submitted by Mr. Seward respecting the right of the Hon. Samuel S. Phelps to a seat in the Senate, and the resolution was agreed to.

[A short debate is found on pages 115–117 of the Globe.]

MONDAY, *January* 16, 1854.

Mr. Pettit, from the Committee on the Judiciary, who were instructed by a resolution of the Senate "to inquire whether the Hon. Samuel S. Phelps is entitled to retain a seat in the Senate of the United States," submitted a report (No. 34), also the views of the minority of the committee, in relation to the subject; which were ordered to be printed.

The Senate proceeded to consider the said report, and,

On motion by Mr. Pettit,

Ordered, That the further consideration thereof be postponed to, and made the order of the day for, Wednesday next.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Butler (chairman), Toucey, Bayard, Geyer, Pettit, and Toombs.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 16, 1854.—Ordered to be printed.

Mr. Pettit made the following report; which was considered, postponed to, and made the special order for the day for, Wednesday next, January 18, 1854:

The Committee on the Judiciary, to whom was referred a resolution of the Senate of the 4th of January, 1854, have had the same under consideration, and have directed me to make the following report:

The following is the resolution referred to the committee, to wit:

"Whereas the Hon. Samuel S. Phelps was appointed by his excellency the governor of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had happened by the death of the Hon. William Upham, a Senator, whose term of six years would have continued until the 4th of March, 1855; and

"Whereas it is understood that since that temporary appointment was made the legislature of Vermont has been convened at their regular session, and has adjourned without filling such vacancy: Therefore,

"*Resolved*, That the Committee on the Judiciary inquire whether the Hon. Samuel S. Phelps is entitled to retain a seat in the Senate of the United States."

The clauses of the Constitution which bear upon this question may be found in the third section of the first article of that instrument, and read as follows:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

"Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The committee do not think that the last clause of Article V. of the Constitution, which provides "that no State, without its consent, shall be deprived of its equal suffrage in the Senate," has any bearing on this question. If a State refuses to appoint two Senators by some means known to the Constitution, it does consent to be deprived of its equal suffrage in the Senate. And in such case the Senate cannot supply the deficiency by creating a Senator; but it can determine upon the validity of his appointment, whether it comes from the legislature or the executive of the State.

There are two modes by which Senators may be appointed, and whether appointed by the one or the other mode, they possess the same power and exercise the same rights and privileges and receive the same emoluments. These modes may be called *primary* and *contingent*. The first rests with the legislature and the second with the executive of the State, when a vacancy happens in the recess of the legislature.

The committee are of opinion that the framers of the Constitution, in providing these two modes by which Senators may be appointed, had in view the obvious propriety, if not necessity, of having two Senators from each State at all times in commission and ready for public service. The committee do not think that the language above quoted, "the executive thereof may make temporary appointments until the next meeting of the legislature," is very perspicuous, definite, or concise in its phraseology or meaning, but, on the contrary, it is subject to two constructions. By one of these constructions both the power to appoint and the term of office of the appointee would terminate upon the *meeting* of the legislature, and thus leave the State for some days, until the legislature could appoint and the new Senator reach the seat of government, without an "equal suffrage in the Senate," a condition which the committee think it was the intention of the constitutional convention to avoid. "The executive thereof may make temporary appointments until the next meeting of the legislature." What may be done *until* the next meeting of the legislature? May appointments be made until that time? Or may the appointee hold his office until that period and no longer? Or do both determine on the next meeting of the legislature?

The committee think it is a limitation upon the power of the executive to make appointments in the recess of the legislature, and which cannot be exercised after its next meeting; but that the force or effect of such appointment, viz., the commission and office, continue until superseded by the action of the primary appointing power, or the expira-

tion of the Senatorial term. In giving this exposition to this provision of the Constitution, the committee believes it has consulted and gives effect to the spirit of that instrument, and has found the true intention and design of its framers, that the Senate should be composed of two Senators from each State.

On the 6th of June, 1809, the Senate adopted the following resolution:

"*Resolved*, That the Hon. Samuel Smith, a Senator appointed by the executive of Maryland to fill the vacancy which happened in the office of Senator for that State, is entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to commence on the 5th day of the present month of June, unless said legislature shall fill such vacancy by the appointment of a Senator, and this Senate be officially informed thereof."

The Senate, in this instance, after able and full debate, has solemnly determined that the office of a Senator appointed by the executive does not end on the next meeting of the legislature, but that it may continue during its session.

The construction that the office does not terminate on the meeting of the legislature has received the uniform approval of the Senate from that time till this; for in all instances (and they are numerous) the Senator appointed by the executive has not only held his office until the next meeting of the legislature, but *until* his successor was appointed and made his appearance here to qualify.

In the late cases of Mr. Winthrop and Mr. Rantoul, of Massachusetts, and of Mr. Meriwether and Mr. Dixon, of Kentucky, many able Senators, to whose opinions great deference is due, expressed their convictions that it was a limitation of time within which the appointment must be made, but that the office continued until superseded by the legislature. If, then, the office does not terminate on the *meeting* of the legislature, when will it terminate? Can *meeting* be construed into end, dissolution, or adjournment? Your committee think not.

With these adjudications of the Senate, and the exposition in debate by able Senators, and in view of the propriety if not the necessity of having a full representation from each State in the Senate before us, and believing the language of the Constitution warrants the interpretation we have given it, your committee have come to the conclusion that the Hon. Samuel S. Phelps is entitled to retain his seat, and offer for adoption the following resolution:

Resolved, That the Hon. Samuel S. Phelps is entitled to retain his seat in the Senate of the United States.

MINORITY REPORT.

The Committee on the Judiciary, to whom was referred the resolution of the Senate of the 4th instant, which reads as follows—

"*Resolved*, That the Committee on the Judiciary inquire whether the Hon. Samuel S. Phelps is entitled to a seat in the Senate of the United States"—

Has reported thereon.

As the undersigned dissent from the conclusions of a majority of their colleagues, they ask leave to submit the following report of the minority. The facts upon which the resolution was founded are as follows:

That the Hon. Samuel S. Phelps was appointed by his excellency the governor of the State of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had occurred by the death of the Hon. William Upham, a Senator, whose term of six years would have continued until the 4th March, 1855; and that since the temporary appointment by the governor of said State, the legislature of Vermont has been convened at their annual session, and adjourned without filling the vacancy, as prescribed by the Constitution, which reads as follows:

"And if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The question presented to the committee by the foregoing resolution may be thus stated: What shall be the operation of an appointment of a Senator made by the governor of a State in the recess of its legislature where the legislature has met and failed to fill the vacancy by an election?

The decision of this question depends upon the construction of the above words of the Constitution. If the power to fill the vacancy is devolved *exclusively* upon the legislature at its next meeting, then it would follow that the appointing power of the executive would be exhausted; and the Senator appointed by him could, according to precedent, hold his seat only during the session of the legislature; or, in other words, his commission would expire at the adjournment of the legislature.

The question may be presented in another point of view, which might *possibly* lead to a different conclusion. If the legislature has merely the potential capacity to fill the vacancy according to its discretion, then a failure to perform this function might leave the executive appointment good to fill a continuing vacancy.

This reduces the question to this proposition, viz: Do the words of the Constitution impose a limitation upon the office or the appointing power?

Before stating the conclusion of the undersigned, it may be proper to cite the precedents which are applicable to the question under consideration.

The first case upon record is as follows: George Read, a Senator from the State of Delaware, resigned his seat upon the 18th day of September, 1793, and during the recess of the legislature of said State. The legislature of the said State met in January, and adjourned in February, 1794. Upon the 19th day of March, and subsequent to the adjournment of the said legislature, Kensey Johns was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid. The Senate decided—

That Kensey Johns was not entitled to a seat in the Senate of the United States, as a session of the legislature of the said State had intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.

Mr. Eaton, from the select committee to whom was referred, on the 5th instant, the motion "that Mr. Lanman be admitted to take the oath required by the Constitution," together with the credentials of Mr. Lanman, submitted the following report:

"That Mr. Lanman's term of service in the Senate expired on the 3d March. On the 4th he presented to the Senate a certificate, regularly and properly authenticated, from Oliver Wolcott, governor of the State of Connecticut, setting forth that the President of the United States had desired the Senate to convene on the 4th day of March, and had caused official notice of that fact to be communicated to him."

The certificate of appointment is dated the 8th of February, 1825, subsequent to the time of the notification to him by the President. The certificate further recites that at the time of its execution the legislature of the State was not in session, and would not be until the month of May. The Senate decided that Mr. Lanman was not entitled to a seat in the Senate of the United States.

In May, 1809, the President of the Senate laid before that body a letter from the Hon. Samuel Smith, of Maryland, stating that, being appointed by the executive of that State a Senator, in conformity with the Constitution, until the next meeting of the legislature, which will take place on the 5th day of June next, he submits to the determination of the Senate the question whether an appointment under the executive of Maryland to represent that State in the Senate of the United States will, or will not, cease on the first day of the meeting of the legislature thereof.

The Senate decided that the Hon. Samuel Smith, a Senator appointed to fill a vacancy, was entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to convene on the 5th day of the present month of June, unless said legislature shall fill such vacancy by the appointment of a Senator, and the Senate be officially informed thereof.

The chairman of the Committee on the Judiciary, at the second session of the Thirty-first Congress, to whom was referred the resolution of the Senate directing said committee to inquire and report at what period the term of service of a Senator appointed by the executive of a State, during the recess of the legislature thereof, rightfully expires, submitted the following report:

"The question presented by the resolution turns mainly upon the construction of the clause of Article XVIII., section 2, of the Constitution of the United States, which provides that 'if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall fill such vacancies.'"

Your committee are of the opinion that the sitting member, under executive appointment, has a right to occupy his seat until the vacancy shall be filled by the legislature of the State of which he is a Senator, during the next meeting thereof. To fill such vacancy it is not only necessary to make an election, but that the person elected shall accept the appointment. And your committee are further of the opinion that such acceptance should appear by the presentation to the Senate of the credentials of the member-elect, or other official information of the fact, at which time the office of the sitting member terminates. When the member-elect is present and ready to qualify, his express acceptance is at once made known; and when his credentials are presented in his absence his acceptance may be fairly implied.

Perhaps it would have been as well if the strict and literal meaning of the words, "*until* the next meeting of the legislature," had been observed on the first occasion in which their construction was brought in question; that would have had the merit of

certainty, but a certainty that might have been too severe for the true and liberal intendment of the framers of the Constitution. They certainly did mean to say that an executive appointment should terminate when legislative jurisdiction shall commence or be exercised. To give this severe construction to the words quoted would in all cases leave a State unrepresented for a time, that depending on legislative action; rather than lead to that result the Senate, under the precedents quoted, seem to have regarded the "*next meeting of the legislature*" as synonymous with the next session of the legislature, during which time the member under executive appointment might hold his seat, unless it should be filled by an election before the termination of a session; and this was probably in analogy to that provision of the Federal Constitution by which power is vested in the President "to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

As there was no reference to a committee, and no reported debate in the case of Mr. Smith, of Maryland, which made the precedent, the essential reasons which governed the judgment of the Senate are not given; the case, however, seems to have been well considered. There are two considerations which seem to have entered into that judgment: First, that the State legislature, after their meeting, should have an *opportunity* of consultation in making a choice of Senator, and the State, during such term of consultation, should not be deprived of a representative in the Senate. The utmost limit contemplated for the exercise of this legislative jurisdiction was the term of the sitting of the legislature. The second consideration was a confident assumption that the office would be filled during such term. The idea that a session would pass over without an election was not in the mind of the Senate. The Senate went very far when it gave an interpretation to the words referred to beyond their literal meaning, limiting the tenure of office of the sitting member to the day of the meeting of the legislature. This met with a decided opposition from a respectable minority, and in subsequent cases distinguished Senators maintained the same view of the Constitution. By the report of the committee we are required to recognize as authority and to enlarge this liberality of construction—to say that the words "until the next meeting of the legislature" may be construed to mean not only until and during the session of the next legislature, but beyond the next meeting of the legislature; in other terms, that until the next meeting, &c., may operate under the authority of precedent to give the sitting member a right to hold his seat *beyond* the meeting of the legislature. We cannot agree that by the authority of any precedent these words "until and beyond" shall have such a meaning as will control the import of the Constitution, both in its spirit and letter.

The Senate of the United States is composed of organized constituencies, the State legislatures; to them belong the power primarily of electing their Senators, when they are in session, at the happening of the vacancy, and at their first meeting when it happens in their recess, and on them devolves the exclusive jurisdiction of filling such vacancies. Their right and authority to fill or supply vacancies which have been temporarily filled by executive appointment are as absolute and exclusive as was their power in an original election. When their power is brought into existence it must supersede all others, with this qualification, and that according to precedent, that they have a session to make the choice. In our view it does not depend on the actual exertion of the power to elect, but on its existence. A Senator, under an executive appointment, may or may not represent the political views of his State; he may be the mere personal favorite of the governor. The Senate, as far as practicable, should be made to represent its constitutional constituency, and in this respect should preserve the republican feature of our Union.

In nothing that is said here would we have it inferred that we regard the sitting member whose case is before us as one who may not claim his seat on high grounds and respectable authority. The sanction of a majority of the committee, the opinions of eminent jurists out of this body, go far to sustain his claim. But from the views of the undersigned above presented we do not think the Hon. Samuel S. Phelps is entitled to hold his seat in this body.

A. P. BUTLER.
J. A. BAYARD.

WEDNESDAY *January* 18, 1854.

The Senate resumed the consideration of the report of the Committee on the Judiciary on the right of the Hon. S. S. Phelps to a seat in the Senate; and,

On motion of Mr. Pettit,

Ordered, That the further consideration thereof be postponed until Wednesday next.

[Some remarks on the postponement of the resolution on account of sickness of Mr Phelps are found on pages 196, 197 of the Congressional Globe referred to in the head note.]

THURSDAY, *January* 26, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary respecting the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion by Mr. Butler,

Ordered, That it lie on the table.

[The debate on the subject on this day is found on pages 250–252 of the Globe referred to. It includes remarks by Mr. Pettit, stating the position of the committee.]

WEDNESDAY, *February* 1, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary in relation to the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion by Mr. Butler, the Senate adjourned.

[The debate is found on pages 303, 304 of the Globe referred to. Mr. Bayard's speech on this day against the resolution reported by the majority of the committee is reported in the Appendix to the Congressional Globe referred to in the head-note.]

THURSDAY, *February* 2, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary in relation to the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion by Mr. Pratt,

Ordered, That the further consideration thereof be postponed until Thursday next, the 9th instant.

[The debate is found on pages 314–318 of the Congressional Globe referred to. It includes remarks by Mr. Butler, stating the position of the minority of the committee. A speech made by Mr. Phelps on this day in vindication of his title to the seat is found on pages 356–359 of the Appendix to the Congressional Globe referred to.]

WEDNESDAY, *March* 8, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion by Mr. Foot,

Ordered, That the further consideration thereof be postponed until to-morrow.

[The debate, consisting largely of remarks by Mr. Phelps, is found on pages 359–365 of the Appendix to the Congressional Globe referred to.]

MONDAY, *March* 13, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion,

Ordered, That the further consideration thereof be postponed until to-morrow.

[The debate is found on page 610 of the Congressional Globe. Mr. Phelps's remarks are on pages 365–369 of the Appendix, and Mr. Badger's reply to a portion of Mr. Phelps's argument is on pages 369–371 of the Appendix.]

WEDNESDAY, *March* 15, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate,

On motion by Mr. Mason,

Ordered, That the further consideration thereof be postponed until to-morrow.

[A speech by Mr. Foot, in vindication of the right of his colleague to the seat, which was the only speech made on the subject this day, is found on pages 630–632 of the Congressional Globe.]

THURSDAY, *March* 16, 1854.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the right of the Hon. Samuel S. Phelps to a seat in the Senate; and,

After debate, on the question of agreeing thereto, it was determined in the negative—yeas 12, nays 26.

On motion by Mr. Foot, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Clayton, Dodge of Iowa, Everett, Fessenden, Foot, Geyer, Morton, Norris, Sebastian, Wade, Walker, and Williams.

Those who voted in the negative are Messrs. Adams, Allen, Atchison, Badger, Bayard, Brodhead, Brown, Butler, Clay, Dodge of Wisconsin, Douglas, Evans, Fish, Fitzpatrick, Hamlin, Hunter, Mason, Pearce, Pratt, Rusk, Seward, Shields, Slidell, Stuart, Sumner, and Toucey.

So the resolution was not agreed to; and it was

Resolved, That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States.

COMPENSATION OF MR. PHELPS.

Mr. Badger submitted the following resolution; which was read the first and second times, by unanimous consent, and considered as in Committee of the Whole:

"*Resolved*, That there be paid out of the contingent fund of the Senate, to the Hon. Samuel S. Phelps, a sum equal to the amount of mileage and per diem compensation of a Senator from the day of his attendance at the present session to this day, inclusive."

And no amendment being made, it was reported to the Senate.

The resolution was read the third time by unanimous consent.

Resolved, That it pass.

[The debate is found on pages 639–646 of the Congressional Globe.]

FRIDAY, *March* 17, 1854.

On motion by Mr. Foot, the vote on passing the resolution, submitted yesterday by Mr. Badger, to pay to the Hon. Samuel S. Phelps his mileage and per diem, was reconsidered.

The Senate resumed the consideration of the said resolution; and, having been amended on the motion of Mr. Foot, it was agreed to, as follows:

"*Resolved*, That there be paid to the Hon. Samuel S. Phelps the amount of mileage and per diem compensation of a Senator from the day of his attendance at the present session to this day, inclusive."

[Brief remarks are found on page 678 of the Congressional Globe.]

[Thirty-third Congress—First session.]

JARED W. WILLIAMS,

Senator from New Hampshire from December 12, 1853, *to August* 4, 1854.

Mr. Williams was appointed to fill a vacancy happening by the death of Charles G. Atherton. After his appointment the legislature met and adjourned without electing a Senator to fill the unexpired term. The circumstances of the meeting and adjournment of the legislature were as follows: The constitution of New Hampshire provided that "the senate and house shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve and be dissolved seven days next preceding the said first Wednesday of June." It further provided (article 50, part 2) that "the governor, with advice of council, shall have full power and authority during the sessions of the general court to adjourn or prorogue it to any time the two houses may desire, and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the State should require the same." July 15, 1854, the governor, in a communication to the legislature, said: "Having been informed by a joint committee of both branches of the legislature that you have finished the business before you, and are ready to adjourn, by the authority vested in me, I do hereby adjourn the legislature to the last Wednesday of May next." The Judiciary Committee of the United States Senate reported that this was an adjournment "*sine die*, in the legal import of the term," and that "the right of representation under appointment" had expired. Mr. Williams claimed that even if this were so, he was entitled to his seat, notwithstanding precedents to the contrary; but claimed further that this was an adjournment to a day certain, and not an adjournment *sine die*. The Senate concurred in the report of the committee, and "*Resolved*, That the 'right of representation under appointment' had expired."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 1st sess. 33d Cong., 1853–'54, together with the report of the committee from Senate Reports, 1st sess. 33d Cong., vol. 2, 1853–'54, No. 385.

The debate in the case, which is brief, is found on pages 2208–2211 of the Congressional Globe, vol. 28, part 3, 1st sess. 33d Cong.

MONDAY, *December* 12, 1853.

Mr. Weller presented the credentials of the Hon. Jared W. Williams, appointed a Senator by the executive of the State of New Hampshire to fill the vacancy occasioned by the death of the Hon. Charles G. Atherton, which were read; and the oath prescribed by law having been administered to Mr. Williams, he took his seat in the Senate.

TUESDAY, *July* 25, 1854.

Mr. Mallory submitted the following resolution; which was considered by unanimous consent, and agreed to:

"Whereas the Hon. Jared W. Williams was appointed by his excellency the governor of New Hampshire, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had happened by the death of the Hon. Charles G. Atherton, a Senator, whose term of service would have continued until the 4th of March, 1859; and

"Whereas it is understood that since that temporary appointment was made the legislature of New Hampshire has been convened at their regular session and has adjourned to the last Wednesday of May next without filling such vacancy, and that said State still claims a right of representation under said appointment, which the appointee is not at liberty to surrender by his act without the action of the Senate: At his request, therefore,

"*Resolved*, That the subject be referred to the Committee on the Judiciary to inquire into the facts connected with it and to make such report as they deem proper to enable the Senate to determine whether the right of representation under said appointment has expired."

WEDNESDAY, *August* 2, 1854.

Mr. Butler, from the Committee on the Judiciary, who were directed by a resolution of the Senate to inquire into and report on the right of the Hon. Jared W. Williams, appointed a Senator by the governor of New Hampshire, to continue to hold his seat under that appointment, submitted a report (No. 385) thereon; which was ordered to be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Butler (chairman), Toucey, Bayard, Geyer, Pettit, and Toombs.]

IN THE SENATE OF THE UNITED STATES.

AUGUST 2, 1854.—Ordered to be printed.

Mr. Butler made the following report:

The Committee on the Judiciary, to whom was referred the following preamble and resolution of the Senate, have had the same under consideration, and report:

"Whereas the Hon. Jared W. Williams was appointed by his excellency the governor

of New Hampshire, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had happened by the death of the Hon. Charles G. Atherton, a Senator, whose term of service would have continued till the 4th of March, 1859; and

"Whereas it is understood that since that temporary appointment was made the legislature of New Hampshire has been convened at their regular session, and has adjourned to the last Wednesday of May next, without filling such vacancy, and that said State still claims a right of representation under said appointment, which the appointee is not at liberty to surrender by his act without the action of the Senate: At his request, therefore,

"*Resolved*, That the subject be referred to the Committee on the Judiciary, to inquire into the facts connected with it, and to make such report as they deem proper to enable the Senate to determine whether the right of representation under said appointment has expired."

Under this resolution the committee are required to inquire into the facts connected with the case, and to make such report as they deem proper, to enable the Senate to determine whether the right of representation under said appointment had expired.

As the question to be determined must depend in a great measure on the proceedings of the legislature and constitution of New Hampshire, the committee submit the following as a part of their report, having a bearing on the case:

COMMUNICATION FROM THE GOVERNOR TO THE LEGISLATURE.

To the senate and house of representatives:

I have signed all the bills and resolutions which you have passed the present session and presented for my approval (except the bills and resolutions which I have returned to the house of representatives with my objection thereto), and having been informed by a joint committee of both branches of the legislature that you have finished the business before you and are ready to adjourn, by the authority vested in me I do hereby adjourn the legislature to the last Wednesday of May next.

N. B. BAKER.

COUNCIL CHAMBER, *July* 15, 1854.

"The senate and house shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve and be dissolved seven days next preceding the said first Wednesday of June, and shall be styled the general court of New Hampshire."—*Constitution of New Hampshire*, page 23.

From the language of the governor's communication to the legislature it seems to have been his judgment that the session had closed; and from the language of the constitution it would appear that it will have terminated on the day mentioned, as by another provision of the constitution the governor on the same day is required to dissolve the legislature. In this view of the subject in *proprio vigore*, the legislature had no power of assembling from the time of its adjournment, as announced by the governor, until the last Wednesday of May next, when its existence terminated.

There was a power in the governor, should the general welfare require it, to call the legislature together as an existing body. But when so called together what would have been the character of such a meeting? Would it not have been a distinct session, carrying with its acts and doings all the incidents of a *separate* session? Such would seem to be a fair inference. This being conceded, then it would follow that the late legislature did adjourn *sine die* in the legal import of the term. If this is a legitimate conclusion this case cannot in any particular be distinguished from that decided by the Senate in the case of the Hon. Samuel S. Phelps, a Senator from Vermont, and the committee refer to that case as the authority for their conclusion in the case under consideration.

In response to the resolution the committee are of opinion that "the right of representation under the appointment" has expired.

THURSDAY, *August* 3, 1854.

The Senate proceeded to consider the report of the Committee on the Judiciary on the right of the Hon. Jared W. Williams, appointed a Senator by the governor of the State of New Hampshire, to continue to hold his seat in the Senate under that appointment; and,

After debate, in concurrence therewith,

Resolved, That "the right of representation under appointment" had expired.

[No debate of any importance is recorded in the Congressional Globe.]

FRIDAY, *August* 4, 1854.

On motion by Mr. Dodge, of Iowa, to reconsider the vote agreeing to the report of the Committee on the Judiciary on the right of the Hon. Jared W. Williams to hold his seat in the Senate, under his present appointment, as a Senator from New Hampshire, it was determined in the affirmative—yeas 19, nays 16.

On motion by Mr. Dodge, of Iowa, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Atchison, Bayard, Bell, Brodhead, Butler, Chase, Dawson, Dodge of Wisconsin, Dodge of Iowa, Douglas, Evans, Fitzpatrick, Houston, Johnson, Jones of Iowa, Mallory, Mason, Norris, and Weller.

Those who voted in the negative are Messrs. Allen, Benjamin, Bright, Cooper, Fish, Gillette, Hunter, James, Jones of Tennessee, Pratt, Rockwell, Seward, Stuart, Thompson of Kentucky, Toombs, and Wade.

So the Senate proceeded to consider the said report.

On motion by Mr. Cass that the further consideration of the report be postponed until the first Monday in December next, it was determined in the negative—yeas 11, nays 37.

On motion by Mr. Atchison, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Atchison, Dodge of Wisconsin, Dodge of Iowa, Douglas, Houston, Johnson, Jones of Iowa, Mallory, Pettit, Sebastian, and Toombs.

Those who voted in the negative are Messrs. Allen, Bayard, Benjamin, Bright, Brodhead, Brown, Butler, Cass, Chase, Clay, Cooper, Dawson, Evans, Fessenden, Fish, Foot, Geyer, Gillette, Hunter, James, Jones of Tennessee, Mason, Morton, Pearce, Pratt, Rockwell, Rusk, Seward, Slidell, Stuart, Sumner, Thompson of Kentucky, Thomson of New Jersey, Toucey, Wade, Walker, and Weller.

After debate, in concurrence with the report, it was

Resolved, That "the right of representation under the appointment" had expired.

[It appears from the debate referred to in the head-note that the vote was reconsidered in order to allow Mr. Williams, who had been absent when the subject was first considered, to address the Senate.]

[Forty-sixth Congress—First session.]

CHARLES H. BELL,

Senator from New Hampshire from April 10, 1879, *till June* 20, 1879.

March 18, 1879, the credentials of Mr. Bell, appointed by the governor to fill a vacancy happening during the recess of the legislature, by the expiration of the term of Bainbridge Wadleigh, March 3, were presented. March 19, the credentials were referred to the Committee on Privileges and Elections. April 2, 1879, the committee reported that by reason of a change in the State constitution in 1878, two legislatures were chosen in that year, one, under the old constitution, in March, whose term of office began in June, 1878, and would terminate in May, 1879, and the other, under the new constitution, chosen in November to serve for two years, whose term would begin in June, 1879; that in the Forty-fifth Congress this committee had reported to the Senate that the last-named legislature was the one entitled to elect under the act of July 25, 1866; that the vacancy arising under these circumstances was not a vacancy "happening by resignation or otherwise during the recess of the legislature of any State" (Article I, section 3, of the Constitution); that until the year 1817 persons appointed to fill vacancies arising from the expiration of terms of service had been admitted to seats; but that in 1825, in the Lanman case (see page 5), "it was held, and, in the opinion of this committee, correctly, that the Constitution conferred upon the legislature, and upon it alone, the power to appoint a Senator for the beginning of a new term"; that this decision had been regarded by the Senate as final; that the case of Mr. Sevier (see page 7), in which it was claimed that the Senate had departed from the rule in Lanman's case, was in all material points different from the one under consideration, in that "the time when Mr. Sevier was to go out of office under his election was decided by lot." The committee recommended the adoption of a resolution that Mr. Bell was not entitled to the seat. A minority report held that there was no historical evidence to show whether the Lanman case decided that a governor could not fill a vacancy happening at the beginning of a term, or only that a governor could not lawfully make an appointment in anticipation before the vacancy had occurred; that the report in the Sevier case stated that the Lanman case proceeded upon the former ground; but that, with the exception of that statement, there is no indication that the Senate ever doubted the correctness of the construction of the Constitution that in a case where a Senator has been appointed by the executive after the happening of a vacancy by the expiration of the term without an election of a successor by the legislature, the person so appointed is entitled to the seat. April 10, the resolution reported by the committee was amended by striking out the word "not," and the Senate resolved that Mr. Bell was entitled to the seat.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 46th Cong., 1st sess., and the report of the committee from Senate Reports, 46th Cong., 1st sess., No. 1.

Special references to the debates of each day, which are found in the Congressional Record, vol. ix, part 1, are inserted below.

TUESDAY, *March* 18, 1879.

The Vice-President laid before the Senate the credentials of Charles H. Bell, appointed a Senator by the governor of the State of New Hampshire to fill the vacancy happening in the Senate of the United States by the expiration of the term of Bainbridge Wadleigh on March 3, 1879, during the recess of the legislature of said State; which were read.

On motion by Mr. Wallace,

Ordered, That the credentials lie on the table.

[The debate is found on pages 2, 3 of the Congressional Record referred to in the head-note. In the remarks of Mr. Bell will be found a list of precedents.]

WEDNESDAY, *March* 19, 1879.

On motion by Mr. Wallace,

Ordered, That the credentials of Charles H. Bell be referred to the Committee on Privileges and Elections with instructions to report at as early a day as practicable.

WEDNESDAY, *April* 2, 1879.

Mr. Saulsbury, from the Committee on Privileges and Elections, to whom were referred the credentials of Charles H. Bell, appointed a Senator by the governor of the State of New Hampshire, submitted a report (No. 1) thereon accompanied by the following resolution:

"*Resolved*, That Hon. Charles H. Bell is not entitled to a seat as a Senator by virtue of the appointment by the executive of New Hampshire."

Mr. Hoar obtained leave to submit the views of a minority of the Committee on Privileges and Elections upon the credentials of Charles H. Bell; which were ordered to be printed to accompany the foregoing report.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Saulsbury (chairman), Hill of Georgia, Kernan, Bailey, Houston, Vance, Cameron of Wisconsin, Hoar, and Ingalls.]

IN THE SENATE OF THE UNITED STATES.

APRIL 2, 1879.—Ordered to lie on the table and be printed.

Mr. Saulsbury, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of the Hon. Charles H. Bell, claiming a seat in the Senate as a Senator from the State of New Hampshire, have had the same under consideration, and ask leave to make the following report:

The term of Bainbridge Wadleigh, a Senator from the State of New Hampshire, expired by constitutional limitation on the 3d day of March, 1879, in a recess of the legislature, and on the 13th day of March, 1879, Mr. Bell was appointed in his place by the executive.

By reason of a change in the constitution of that State, which took effect in October, 1878, two legislatures were chosen in that year, one, under the old constitution, in March, whose term of office commenced in June, 1878, and will terminate in May, 1879; the other, under the new constitution, was chosen in November to serve for two years, the term commencing in June, 1879.

The Committee on Privileges and Elections of the Senate in the Forty-fifth Congress, to whom was referred the question which of these two bodies had the right to choose a successor to Mr. Wadleigh, was of opinion, and so reported to the Senate, that under the act of 1866 (Revised Statues, section 14) the last-named legislature was entitled to elect, because it was the legislature chosen next preceding the expiration of Mr. Wadleigh's term of service. In the opinion of the committee this report, and the action of the Senate in adopting it, are not important in the settlement of the question now presented.

The Constitution of the United States, Article I, section 3, provides as follows:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years, and each Senator shall have one vote.

"Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

It has been noticed that this claimant bases his right to a seat in the Senate, not upon the fact that a term filled by the legislature of New Hampshire had become vacant during a recess of the legislature, but upon the fact that the executive claims the right to make a temporary appointment at the beginning of a term which the legislature has not undertaken to fill.

The committee cannot find in the Constitution any sufficient warrant for this claim. If we look at the provision authorizing the governor to make temporary appointments independently of its connection with the rest of the section, we think it is manifest that the authority is limited to filling vacancies which happen in a term which had been previously filled by the legislature. If it was intended to vest in the executive the power to make temporary appointments to terms for which no person had been chosen by the legislature, why should the words "happen by resignation or otherwise" have been added to the word "vacancies"? They certainly did not render it more comprehensive, and must have been designed to limit and restrict its meaning to vacancies occurring from accident or some unforeseen event. If any doubt, however, existed as to the meaning of the language referred to, when considered unconnected with the rest of the section, such doubts would be removed by construing the provisions of the section together. Applying to them the rules recognized for the construction of statutes and constitutional provisions, the committee are forced to the conclusion that the legislature alone is empowered to choose a Senator upon the expiration of a Senatorial term, and that the executive can only make temporary appointments to fill vacancies occurring in a term which has been previously filled. It is well known that in the convention which framed the Constitution this subject received careful consideration. After it had been determined that the States should have equal representation in the Senate, the manner of choosing Senators was considered; various propositions were submitted, and, among others, appointments by the executives of the States. Finally it was determined to vest in the

legislature the power of choosing Senators, and in the executive the power to make temporary appointments, if vacancies should happen in the office after it had been filled, until such time as the legislature could again act. This, it seems to the committee, was the obvious intent of the Constitution, gathered not only from the language of the entire section under consideration, but also from the debates in the convention in reference to its provisions.

Nothing in the history of the Senate for the last fifty years is at variance with the views here presented.

The records of the Senate show that down to the year 1817 a number of appointments were made by State executives of persons to succeed Senators whose terms of service had expired, and that the persons so appointed were admitted to seats in the Senate.

The first case was that of William Cocke, of the State of Tennessee.

This State was admitted into the Union in 1796. In the month of August of that year, William Cocke and William Blount were chosen Senators in Congress by the legislature. By lot they were assigned to the first and second classes of the three classes directed to be formed by the article of the Constitution above quoted, and Mr. Cocke having drawn the term which expired on the 3d day of March, 1797, during a recess of the legislature, was appointed by the governor to be his own successor on the 22d of April, 1797, and he was admitted to a seat without objection.

The second case was that of Uriah Tracy, a Senator from the State of Connecticut, whose term expired on the 3d of March, 1801. Under an appointment by the governor he was admitted to a seat on the 4th day of March, 1801, after a heated discussion, and by a party vote of 13 to 10.

This precedent was followed on the next day by the admission of Mr. Hindman, of Maryland; by the admission of Mr. Condit, of New Jersey, in 1803; Mr. Anderson, of Tennessee, and Mr. Smith, of Maryland, in 1809; Mr. Cutts, of New Hampshire, in 1813; and Mr. Williams, of Tennessee, in 1817; all executive appointments to fill places made vacant by the expiration of full terms of service during recesses of legislatures, and all were admitted without discussion and without objection.

But in 1825 the term of James Lanman, of Connecticut, expired during a recess of the legislature. In anticipation of the vacancy he had been appointed by the governor as his own successor. His credentials were presented on the 4th day of March, 1825, and after a protracted debate the Senate refused to admit him to a seat. No record of this debate has been preserved, and the committee have not the advantage of the reasoning by which the Senate was guided in its action. Enough, however, remains to show that the Senate decided that a vacancy authorizing an appointment by the executive had not "happened" within the meaning of the Constitution. It was held, and, in the opinion of this committee, correctly, that the Constitution conferred upon the legislature, and upon it alone, the power to appoint a Senator for the beginning of a new term; and it seems to the committee that this decision is clearly in accord with the spirit and meaning of the article of the Constitution already quoted.

This section confers upon the legislature the right, and imposes upon it the duty, of choosing Senators who are to serve for six years.

In every one of the States a legislature must be in session at some time preceding the expiration of a Senatorial term. We know as a fact that at the time of the adoption of the Constitution these sessions were mostly annual, and, as now, those not annual were biennial. After the first assignment of Senators to classes, the term of office was fixed, and, under the Constitution, would expire at a time certain. When, therefore, the first clause of the third section, first article of the Constitution directed that Senators should be chosen by the legislatures, it appears most manifestly to have been the purpose of its framers to give exclusive power to the legislature to make the choice, unless, as provided by the last clause, vacancies should "happen" by resignation, or otherwise, during a recess of the legislature, when the executive should make temporary appointments until the next session of the legislature.

The power to make temporary appointments was conferred upon the executive because the accidents of death, resignation, expulsion, or acceptance of another office could not be foreseen or provided for by the legislature. In the one class of cases the time when a term would expire was fixed by law and was well known. There could be no doubt or uncertainty in regard to it, and in such case a vacancy could occur only by the willful disregard by the State in framing its organic law, or by the legislature, of constitutional obligations. In such case a vacancy could not "happen," or occur by chance, casualty, or other event that could not be guarded against.

The decision in Lanman's case has been for more than fifty years regarded as a correct exposition of the Constitution. During this long lapse of years its authority has not been questioned, and it has guided the action of legislatures and of executives of States.

Many cases have occurred when, under like circumstances, for months, and in some instances for one or two years, and even a longer time, States have been represented upon

the floor of the Senate by a single Senator, and for the reason that the decision in Lanman's case was regarded as final and conclusive of the question. The following are cases of this character:

Cases of unfilled seats or vacancies at beginning of Senatorial terms by reason of non-election.

Maine.—Vacancy from March 4, 1853, till February 23, 1854, when William Pitt Fessenden took the seat under an election.

Connecticut.—Vacancy from March 4, 1851, to May 12, 1852, when Isaac Toucey presented credentials of election by legislature.

Pennsylvania.—Vacancy from March 4, 1855, to January 18, 1856, when William Bigler was seated on an election by the legislature.

Maryland.—Vacancy from March 4, 1843, to January 2, 1844, when James Alfred Pearce, elected by the legislature, took the seat.

North Carolina.—Vacancy from March 4, 1853, to December 6, 1854, when David S. Reid's certificate of election was presented.

Indiana.—Vacancy from March 4, 1855, to February 4, 1857, when Graham N. Fitch was admitted on credentials of legislative election, which was contested, and the contest not decided till late in the spring of 1858.

Missouri.—Vacancy from March 4, 1855, to January 12, 1857, when James S. Green was admitted on a legislative election.

California.—Vacancy from March 4, 1855, to February 15, 1857, when William M. Gwin presented himself under an election by the legislature.

Oregon.—Vacancy from March 3, 1859, until December 5, 1860, when Edward D. Baker took the seat under a legislative election.

It is said, however, that the Senate departed from the rule in Lanman's case in the case of Mr Sevier, appointed as his own successor by the governor of Arkansas in the year 1837.

The report in this case, made by a committee of the Senate, shows that the State of Arkansas was admitted into the Union in the year 1836, and in September of that year elected two Senators, Mr. Sevier and Mr. Fulton. Under the constitutional rule Mr. Fulton was allotted to the second class of Senators and Mr. Sevier to the third, and his term of service expired on the 3d day of March, 1837, during a recess of the legislature.

A committee of the Senate, to whom the credentials of Mr. Sevier were referred, after quoting the decision in Lanman's case, say:

"The decision seems to have been generally acquiesced in, nor is it intended by the committee to call its correctness in question. The principle asserted in that case is that the legislature of a State, by making an election themselves, shall provide for all vacancies that must occur at stated or known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution."

And the committee concludes by saying:

"The case under consideration is wholly different in principle. The time when Mr. Sevier was to go out of office under his election * * * was decided by lot under the provisions of the Constitution on that subject, * * * and therefore they recommend that Mr. Sevier be admitted."

The case in its facts was identical with that of Mr. Cocke, of Tennessee, settled in 1797, but in all material points differs from the one now under consideration.

The committee, from every view of the case, are forced to the conclusion that the vacancy occasioned by the expiration of the term of Senator Wadleigh cannot be filled by executive appointment, and therefore report the following resolution, and recommend its passage:

Resolved, That the Hon. Charles H. Bell is not entitled to a seat as a Senator by virtue of the appointment by the executive of New Hampshire.

E. SAULSBURY.
BENJ. H. HILL.
J. E. BAILEY.
F. KERNAN.
GEO. S. HOUSTON.
Z. B. VANCE.

VIEWS OF THE MINORITY.

1.

The undersigned members of the Committee on Privileges and Elections, to whom were referred the credentials of Hon. Charles H. Bell, claiming to be admitted as a Sen-

ator from the State of New Hampshire, dissent from the conclusions of a majority of the committee.

The Constitution, Article I, section 3, provides as follows:

1 A.

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

"Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The term of office of the Hon. Bainbridge Wadleigh, a Senator from the State of New Hampshire, expired on the 3d day of March, 1879.

By the statute of the United States, approved July 25, 1866, re-enacted Revised Statutes, 814, it is provided:

"The legislature of each State, which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress."

Under the new constitution of New Hampshire a legislature was chosen in November, 1878, for a term to begin in June, 1879. That legislature cannot elect a Senator until June, 1879, because by the constitution of the State its legislative powers will not vest until then. Its predecessor could not elect a Senator at its last session, and cannot now, if called together in special session, because it was not the legislature last chosen before the expiration of Mr. Wadleigh's term.

The governor of New Hampshire, on the 13th of March, 1879, made temporary appointment of the Hon. Charles H. Bell until the next meeting of the legislature. Mr. Bell now presents himself to claim the seat. The only question is, has a vacancy happened by "resignation or otherwise," so that the executive was authorized to make this appointment?

We are aided in determining this question by considering the leading purpose of the constitutional provision, the natural meaning of the words, and the uniform construction given to similar language used elsewhere in the Constitution and the previous judgments of the Senate in like cases.

The purpose of the Constitution is to have the Senate always full. This is the interest not merely of the State whose right to elect is in question, but of the whole country, for whom the Senator is to legislate, whose servant he is, and to whom his service is due. To this end the Constitution provides that "the Senate shall be composed of two Senators from each State," and authorizes Congress to make regulations as to the time and manner of electing them. Congress has exercised this authority in the statutes cited, so that no failure of duty of either branch of the legislature may interrupt the State's representation in the Senate. To meet the case of a vacancy happening in the recess of the State legislature the Constitution clothes the executive with the power of temporary appointment. The purpose to keep the representation of the State always full requires the construction which authorizes such appointment when the vacancy happens at the beginning of the term as much as if it happen at any other time. The authority given to the governor is to appoint "until the next meeting of the legislature," which literally construed would require the Senator so appointed to vacate his seat on the day the legislature meet. Yet the Senate, in furtherance of the controlling purpose of the Constitution that the place shall be always full, has uniformly held that the Senator so appointed retains his seat until the legislature choose his successor or adjourn without making a choice.

The authority to appoint is vested in the executive "if a vacancy happen." There is no distinction indicated between vacancies which happen when the term begins and vacancies which happen later. There can be no reason suggested for such a distinction. It is said that the term "vacancy" is not properly applied to offices whose term has expired by limitation at a fixed time but only to terms which have once been filled.

But the Constitution expressly declares "the seats of the Senators shall be vacated at the expiration of the sixth year," &c. Did the Constitution mean to declare that to vacate a seat does not create a vacancy in it?

But it is said a vacancy which occurs at a certain time fixed by law is not a vacancy which "happens"; that the Constitution meant only to vest the appointing power in the

executive in case of the vacancy occurring by reason of events which cannot be certainly foreseen; and this is the strong point of those who differ with us. On the contrary, we affirm that nothing is better settled in the construction of the Constitution and of legislation under it than that the words "vacancies happening" include the case of offices which have a fixed term which has expired, and which are vacant because no new appointment has been made. Article 2, section 2, of the Constitution, in its provision for the appointment of officers, declares:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

Under this provision the President exercises the undisputed power of filling offices which have a term fixed by law which expires in the recess of Congress. Most important rights of the people and of private citizens depend on the legality of such appointments which the construction contended for by the majority of the committee must overturn. In Revised Statutes, section 1769, "the President is authorized to fill all vacancies which may happen during the recess of the Senate by reason of death, or resignation, or expiration of term of office."

It is not the ending of the term, but the absence from the office of any person authorized to fill it, to which the word "happen," which expresses contingency, is applied. It is certain that the term will end. It is still uncertain whether the office will be vacant, because that depends on the contingent event of the legislature's having filled it. It is in accordance with the custom of our language to apply the word "happen" to the simultaneous occurrence of two events, both of which are certain to take place. "If the fourth of July happen on Sunday, the next day shall be a legal holiday." "If the last day of grace happen to be a holiday, the note shall be payable on the day preceding." *A fortiori* the word may be appropriately used to express the occurrence at the same time of two events, one of which is contingent. If there happen to be no Senator in the office, the authority of the executive exists.

The question has frequently arisen for judgment in the Senate. By a line of decisions unbroken, with one possible exception, it has been held that the governor of a State is authorized to fill a vacancy existing at the beginning of a Senatorial term.

April 27, 1797, William Cocke was appointed a Senator from the State of Tennessee by the governor, his term having expired on the third of the preceding month. On the 15th of May, 1797, he presented his credentials, and was admitted to take the oath of office without objection or debate.

March 3, 1801, the seat of Uriah Tracy, of Connecticut, became vacant by the expiration of his term of office. On the 20th of February, 1801, the governor of Connecticut reappointed him a Senator. Objection being raised to his credentials, he was admitted to the oath by a vote of yeas 13, nays 10.

William Hindman, of Maryland, was afterward, on the next day, admitted to the oath on like credentials, without objection.

John Condit, of New Jersey, November 14, 1803, appointed a Senator from New Jersey to fill the vacancy at the beginning of the term, was admitted to take the oath. Mr Condit's credentials had been presented October 17, previous.

March 4, 1809, Samuel Smith, of Maryland, appointed on that day by the governor of his State to fill the vacancy caused by the expiration of his own term, was admitted to his seat and sworn.

March 4, 1809, Joseph Anderson, of Tennessee, took his seat by virtue of an appointment from the governor of that State.

May 24, 1813, Charles Cutts, of New Hampshire, appointed by the executive to fill the vacancy during the recess of the legislature, was, without question, admitted to take the oath. This vacancy was at the beginning of the term.

March 4, 1817, John Williams, of Tennessee, appointed a Senator by the executive of the State, to hold said appointment until the meeting of the next session of the legislature, was admitted. His credentials were filed on the 10th of the preceding February.

March 4, 1825, James Lanman, of Connecticut, presented his credentials of his appointment by the governor of that State, "to take effect immediately after the 3d of March, 1825, and to hold the seat until the next meeting of the legislature." Mr. Lanman was refused the seat by a vote of 23 to 13. The case was referred to a select committee, who report the facts, but state neither reason nor conclusion. The committee say they have looked into the journals of the Senate, and that the cases of Cocke, Tracy, Anderson, and Williams are the only analogous cases they could find. There is a brief sketch of the debate in Niles' Register, vol. 28, page 32, but no statement of the reason on which any Senator proceeded. There is no historical evidence from which we can determine whether the Senate rejected Mr. Lanman on the ground that the governor could not fill a vacancy happening at the beginning of the term, or on the ground that the governor could not lawfully make the appointment in anticipation, before the vacancy

occurred, and before he could possibly know whether the legislature might be called together before that time. All the precedents which the committee cite, except that of Mr. Cocke, were cases where the appointment was made not when the vacancy happened in the recess of the legislature, but only when the governor thought it might happen. In the case of Cocke the date of the appointment is not given in the journals, although in fact it was after the vacancy. The committee do not cite the case of Hindman, Smith, or Condit, nor the then recent case of Cutts, in deciding which some Senators then in office took part, where the appointments were made after the vacancy existed. There is, therefore, nothing to show whether the Senate meant to overrule all the precedents, some of which were not brought to its attention, or only so many of them as recognized the right of the executive to appoint when a vacancy had not happened.

Judge Story (Constitution, § 727, note 2) says:

"In the case of Mr. Lanman, a Senator from Connecticut, a question occurred whether the State executive could make an appointment in the recess of the State legislature in anticipation of the expiration of the term of office of an existing Senator. It was decided by the Senate that he could not make such an appointment. The facts were that Mr. Lanman's term of service as Senator expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of March. The governor of Connecticut, in the recess of the legislature (whose session would be in May), on the 9th of the preceding February appointed Mr. Lanman as Senator, to sit in the Senate after the 3d of March. The Senate, by a vote of 23 to 18, decided that the appointment could not be constitutionally made until after the vacancy had actually occurred." (See Gordon's Digest of the Laws of the United States, 1827; appendix, note 1, B.)

In regard to the same case, the National Intelligencer of March 8, 1825, says in an editorial note:

"An important constitutional question was yesterday decided in the Senate by the refusal to admit Mr. Lanman to a seat in the Senate under a commission from the governor granted before the expiration of Mr. Lanman's late term of service. This is the first time the question has been adjudicated under such circumstances as to form a precedent; and we presume it may now be considered as a settled construction of the constitutional provision that a vacancy must have literally 'happened' or come to pass before an appointment can be made to fill it."

The State of Arkansas was admitted to the Union in 1836. In October, 1836, the legislature of that State elected Ambrose H. Sevier and William S. Fulton Senators. On the allotment of the Arkansas Senators to their respective classes, as required by the third section of the first article of the Constitution, Mr. Sevier was placed in the class of Senators whose term of service expired on the 3d of March, 1837. The legislature of Arkansas had no opportunity to fill the vacancy, and were not in session after the result of the allotment was known in that State. January 17, 1837, the governor of Arkansas appointed Mr. Sevier to fill the vacancy which would take place on the 3d of March. When Mr. Sevier's credentials were presented at the winter session, Mr. Webster suggested a doubt of the validity of the appointment, in which Mr. Sevier himself concurred. At the March session the credentials were referred to the Committee on the Judiciary. Mr. Grundy, from that committee, reported in favor of Mr. Sevier's admission, and he was admitted.

Mr. Grundy's report states that it is not intended by the committee to call in question the correctness of the decision in the Lanman case; that that case proceeded on the ground "that the legislature should provide for all vacancies which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution."

The report further says:

"The case now under consideration is wholly different in principle. The time when Mr. Sevier was to go out of office was decided by lot."

From this review of the judgments of the Senate, it appears that in every case in which a Senator has been appointed by the executive after the happening of a vacancy by the expiration of a term without an election of a successor by the legislature, the person so appointed has been admitted to his seat. There is no indication that the Senate ever denied or doubted the correctness of this construction of the Constitution, except the unsupported statement of Mr. Grundy of the ground of a decision made twelve years before—a statement which nothing in the journal of the debates confirms, and which is opposed to the understanding of Judge Story and the contemporaneous article in the Intelligencer.

The second section of the first article of the Constitution provides: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." In 1837, the law of Mississippi fixed the time for the election of Representatives in November. The President having called a special session of Congress to meet in September, the governor of Mississippi, on the 13th of June, issued writs for an election in July for two Representatives to Congress to fill said vacancy, until superseded by the members to be elected at the next regular election in November,

At this July election Messrs. Gholson and Claiborne were elected and claimed the seats. Their claim was referred to a committee, of which Andrew Buchanan was chairman, who reported in favor of their right to seats for the full term. They say in their report:

"The Constitution authorizes the executive power of the States respectively to order the filling of all vacancies which have actually happened, in the mode therein pointed out, no matter how the vacancy may have happened, whether by death, resignation, or expiration of the term of members previous to the election of their successors."

In the debate, John Quincy Adams said he believed, in relation to offices, that every one happens to be vacant which is not full; and that, he believed, was the meaning and sense of the Constitution, whether the vacancy occurred from casualty, the regular course of events, expiration of term, or other cause.

The claimants were admitted to their seats. In November following, Messrs. Prentiss and Wood were elected for the same term. At the next December session, the resolution declaring Gholson and Claiborne elected was rescinded, but a resolution was also adopted, by the casting vote of Speaker James K. Polk, that Prentiss and Wood were not members. So that no inference can properly be drawn from that case; and it is of no value, except so far as weight may be attached to the opinions of John Quincy Adams and James K. Polk, both favoring the construction of the Constitution for which we contend.

Appended to the report in the Mississippi case are opinions of two of the most distinguished Attorneys-General of the United States, Roger B. Taney and William Wirt, in which they discuss the meaning of the phrase "vacancies that may happen during the recess" with reference to the power of the President to fill an office which is vacant in the recess, because the Senate adjourned without acting on a nomination, the original vacancy having happened during the session. Both these eminent jurists agree that the term "happen" is equivalent to "happen to exist," "if it come to pass that there be a vacancy." Mr. Taney says:

"The Constitution was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be a true one. It was the intention of the Constitution that the offices created by law should always be full."

We submit, therefore, that the natural and ordinary meaning of the language employed, the purpose which the framers of the Constitution meant to accomplish, the unbroken current of decisions in like cases, and the uniform construction given to the same language when used elsewhere in the Constitution and in legislation in like cases, concur in supporting the interpretation which establishes Mr. Bell's claim. The office of Senator is a continuous office. When the Senator is duly elected by the legislature beforehand no vacancy exists within the meaning of the Constitution. His taking the oath of office relates back to the beginning of the term and preserves the continuousness of the succession. He is when on his way to take the oath deemed to be a Senator and privileged from arrest. A vacancy happens, and only happens, when the legislature has failed to make due election, or the person chosen declines the appointment, or when the office once filled is vacated by death, resignation, or otherwise.

But if we adopt the narrowest possible construction imputed by Mr. Grundy in the Sevier report, the decision in the case of Lanman, the doctrine of the Sevier decision itself, is enough for the purpose of this case. If the failure of the Arkansas legislature to be in session after the expiration of Mr. Sevier's term was decided by lot made the vacancy contingent in the narrowest sense of that term, so that the governor could appoint, certainly the fact that there is no legislature in the State able to act constitutes such a contingency. Whether it so happens that the person once chosen is unable to remain in office, or it so happens that the legislature cannot meet and choose, the contingency of a vacancy in the office has occurred. The six months at the end of the term are no more important than six months at its beginning. The Constitution makes equally careful provision for either.

GEO. F. HOAR.
ANGUS CAMERON.
JNO. J. INGALLS.

THURSDAY, *April* 3, 1879.

On motion by Mr. Saulsbury, the Senate proceeded to consider the resolution reported yesterday from the Committee on Privileges and Elections, declaring that Charles H. Bell is not entitled to a seat as a Senator by virtue of the appointment of the governor of New Hampshire.

On motion by Mr. Hoar to amend the resolution by striking out, after the word "is," the word "not,"

Pending debate,

Ordered, That the further consideration of the resolution be postponed to Monday next.

[The debate is found on pages 184–189 of the Congressional Record referred to in the head-note.]

MONDAY, *April* 7, 1879.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 273–286 of the Congressional Record referred to in the head-note.]

TUESDAY, *April* 8, 1879.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 287–298 of the Congressional Record referred to in the head-note.]

WEDNESDAY, *April* 9, 1879.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 312–325 of the Congressional Record referred to in the head-note.]

THURSDAY, *April* 10, 1879.

The Vice-President announced that the morning hour had expired, and called up the unfinished business of the Senate at its adjournment yesterday, viz, the resolution reported from the Committee on Privileges and Elections, April 2, 1879, declaring "that Charles H. Bell is not entitled to a seat as Senator by virtue of the appointment by the executive of New Hampshire"; and

The Senate resumed the consideration of the resolution; and

The question being on the amendment proposed by Mr. Hoar, viz: After the word "is" strike out the word "not,"

After debate, it was determined in the affirmative—yeas 35, nays 28.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Bayard, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chandler, Dawes, Edmunds, Ferry, Gordon, Groome, Hamlin, Hill of Colorado, Ingalls, Jones of Florida, Kellogg, Kirkwood, Logan, McDonald, McMillan, Morrill, Paddock, Platt, Plumb, Randolph, Rollins, Saunders, Teller, Voorhees, Walker, White, and Williams.

Those who voted in the negative are Messrs. Bailey, Call, Carpenter, Cockrell, Coke, Conkling, Davis of Illinois, Eaton, Farley, Garland, Grover, Harris, Hereford, Hill of Georgia, Houston, Johnston, Jonas, Kernan, Lamar, Maxey, Morgan, Pendleton, Ransom, Slater, Vance, Vest, Wallace, and Withers.

So the amendment was agreed to.

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That Hon. Charles H. Bell is entitled to a seat as a Senator by virtue of the appointment by the executive of New Hampshire,"

It was determined in the affirmative—yeas 35, nays 28.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Bayard, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chandler, Dawes, Edmunds, Ferry, Gordon, Groome, Hamlin, Hill of Colorado, Ingalls, Jones of Florida, Kellogg, Kirkwood, Logan, McDonald, McMillan, Morrill, Paddock, Platt, Plumb, Randolph, Rollins, Saulsbury, Saunders, Teller, Voorhees, Walker, Whyte, and Williams.

Those who voted in the negative are Messrs. Bailey, Call, Carpenter, Cockrell, Coke, Conkling, Davis of Illinois, Eaton, Farley, Garland, Grover, Harris, Hereford, Hill of Georgia, Houston, Johnston, Jonas, Kernan, Lamar, Maxey, Morgan, Pendleton, Ransom, Slater, Vance, Vest, Wallace, and Withers.

So the resolution as amended was agreed to.

Mr. Charles H. Bell then appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[The debate is found on pages 341–355 of the Congressional Record referred to in the head-note.]

MILEAGE OF MR. BELL.

THURSDAY, *June* 19, 1879.

Mr. Saulsbury, by unanimous consent, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Secretary of the Senate be, and he hereby is, authorized and

directed to pay Hon. Charles H. Bell mileage at the rate allowed by law for attendance at this session, the same to be paid out of the 'miscellaneous items' of the contingent fund."

FRIDAY, *June* 20, 1879.

Mr. Rollins presented the credentials of Henry W. Blair, elected a Senator by the legislature of New Hampshire for the unexpired portion of the term of six years commencing March 4, 1879; which were read.

Mr. Blair then appeared, and the oath prescribed by law having been administered to him by the President *pro tempore*, he took his seat in the Senate.

[Special session of Senate, March, 1885.]

HENRY W. BLAIR,

Senator from New Hampshire from June 20, 1879, to March 3, 1891.

March 9, 1885, the credentials of Mr. Blair, appointed by the governor to fill a vacancy happening during the recess of the legislature by the expiration of his previous term, March 3, were presented. A motion that the credentials be referred to the Committee on Privileges and Elections was determined in the negative. A resolution was then submitted that he be admitted to take the oath of office, which was agreed to March 10. It appears from the debates that the case presented the same questions presented by the case of Charles H. Bell (see page 26); that a legislature was elected in November, 1882, to serve for two years, whose term of office began in June, 1883; that another legislature was elected in November, 1884, to serve for two years, whose term of office would begin in June, 1885; that the legislature elected in 1882, acting in accordance with its interpretation of the act of July 25, 1866, and in accordance with a report of this committee made in the Forty-fifth Congress on the same subject, had not elected a successor to Mr. Blair; that the question was whether a vacancy arising under such circumstances was a vacancy "happening by resignation or otherwise, during the recess of the legislature of any State." (Article I, section 3, of the Constitution.) Extracts from remarks given below will show the grounds upon which different Senators proceeded.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 48th Cong., 2d sess. (special session, March and April, 1885), and extracts from remarks of Senators.

The debates are found in the Senate proceedings of March 9 and 10, 1885, in the Congressional Record, vol. xvii, part 1, pages 4 to 6 and 16 to 26.

MONDAY, *March* 9, 1885.

Mr. Pike presented the credentials of Henry W. Blair, appointed a Senator by the governor of New Hampshire to fill the vacancy in the representation from that State happening March 4, 1885, during the recess of the legislature.

The credentials were read; and,

On motion by Mr. Vest that they be referred to the Committee on Privileges and Elections, it was determined in the negative.

Mr. Hoar thereupon submitted the following resolution:

"*Resolved*, That Henry W. Blair, appointed a Senator from the State of New Hampshire, be now admitted to take the oath of office,"

When,

On motion by Mr. Harris, and by unanimous consent,

Ordered, That the consideration of the resolution be postponed to to-morrow.

TUESDAY, *March* 10, 1885.

The Vice-President laid before the Senate the resolution yesterday submitted by Mr. Hoar, that Henry W. Blair be now admitted to take the oath of office as a Senator from the State of New Hampshire; and

On the question to agree to the resolution,

After debate, it was determined in the affirmative—yeas 36, nays 20.

On motion by Mr. Vest, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Aldrich, Allison, Cameron, Chace, Conger, Cullom, Dawes, Edmunds, Evarts, Frye, Hale, Harrison, Hoar, Ingalls, Jones of Florida, Jones of Nevada, McMillan, Mahone, Manderson, Miller of California, Miller of New York, Mitchell, Morrill, Palmer, Pike, Platt, Riddleberger, Sabin, Sawyer, Sewell, Sherman, Spooner, Stanford, Teller, Van Wyck, and Wilson.

Those who voted in the negative are Messrs. Beck, Blackburn, Camden, Cockrell, Coke, Eustis, Gibson, Gorman, Jackson, Jones of Arkansas, Kenna, McPherson, Maxey, Morgan, Payne, Pugh, Ransom, Saulsbury, Vance, and Vest.

So the resolution was agreed to.

Mr. Henry W. Blair then appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[Extract from remarks of Mr. Vest, of Missouri, in opposition to the resolution submitted by Mr. Hoar that Mr. Blair be admitted to take the oath of office. Found in the proceedings of March 10, 1885, in the Congressional Record, vol. xvii, part 1, p. 16.]

"Mr. President, yesterday I asked that the resolution should go over until to-day in order that it might be examined by the new Senators just sworn into this body, and in

order that those of us who were members at the time the Bell case was under discussion and was determined should have an opportunity to refresh our recollection in regard to the points then made and discussed. It is not my purpose to enter into a lengthy résumé of that argument then so exhaustively made. I simply wish to say now that I reaffirm what was my conclusion then as a lawyer in regard to this subject.

"I voted on the Bell case that Mr. Bell was not entitled to a seat in this body; that the governor of a State had no right to fill an entire term by original appointment; that the meaning of the Constitution, which declares 'if vacancies happen by resignation or otherwise, during the recess of the legislature of any State' the executive authority of a State may make a temporary appointment, is that when a vacancy shall occur, not by operation of law, but by some event which applies to the individual asking for the office or applying for admission into this body, by the resignation of a person, by death operating upon him, and that the word 'otherwise' in that connection means by similar casualty—when a vacancy shall happen, when it shall occur, not by operation of statute or of any constitution, but when it occurs by resignation, death, or otherwise.

"The terms of the Constitution as originally made—and I shall be very brief in the discussion of the subject, for I only propose to give my own reasons for casting my vote—the terms of the Constitution are:

"'If vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancy.'

"There are three clauses in the Federal Constitution in which the word 'happen' is used. First, in Article II, section 2, the Constitution says:

"'The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.'

"Article I, section 2, provides:

"'When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.'

"Article I, section 3, which is the clause now under discussion, provides:

"'And if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"In all three of these clauses the word 'happen' is used, but I call the attention of the Senate to the fact that in the first two clauses in regard to vacancies in the House of Representatives and vacancies during a recess of the Senate as to executive officers, the word 'happen' is without limitation, 'where vacancies shall happen,' and there is the termination of the power of the President in regard to executive appointments; but in regard to Senators the Federal Convention put a limitation upon the word 'happen.' They did not stop with declaring where vacancies may happen during a recess of a legislature that then the governor may appoint, but where a vacancy shall happen by resignation or otherwise.

"If the Senators now present are correct who claim the power of a governor to exist to appoint in these cases, we are forced to the conclusion that the words 'by resignation or otherwise' are void and meaningless as used by the framers of the Constitution, or else that the terms are a limitation upon the word 'happen.' They are not found in the other two clauses of the Constitution. What makes this argument more significant and conclusive to my mind is that the original draught of the Constitution, which I have before me, and the debates show that the clause as originally reported to the convention of 1787 was absolute and unlimited, when a vacancy should occur, and Mr. Madison moved to put in these terms of limitation, that where the vacancy should occur by resignation or otherwise, or equivalent terms, then the governor of the State might appoint.

"I know it has been said that contemporaneous construction at the time militates against this view. In the debate which occurred in the Bell case an editorial was read from the National Intelligencer of March 8, 1825, and it was said that this had been adopted by Judge Story and by Mr. Gordon, who was compiling a book in regard to the proceedings of Congress at that time. The most authoritative statement in regard to the meaning of Congress and the debates of Congress at that time is found in Niles's Register, the authority of which I take it will not be questioned on this floor. In Niles's Register I find the following:

"'The following members'—

"Says the Register of March 12, 1825—

"'The following members, also re-elected for six years from this day, took the oath of office, namely: Mr. Lloyd, of Maryland; Mr. Macon, of North Carolina; Mr. Guillard, of South Carolina; Mr. J. S. Johnston, of Louisiana; and Mr. Barton, of Missouri.

"'Some conversation took place on the case of Mr. Lanman, reappointed by the governor in the recess of the legislature, the question being, whether a failure by the legis-

lature to make a choice of a Senator constitutes the contingency in which a governor may appoint a Senator, the language of the Constitution being, "if vacancies happen, by resignation or otherwise," &c.'

"It is said, and conspicuously by the Senator from Massachusetts [Mr. Hoar], that the quotation in the National Intelligencer and in the book by Gordon showed that the Lanman case decided in 1825 did not touch this question, did not determine it, and that the Lanman case, a case from Connecticut, went off on the power of the governor to make an appointment before the vacancy existed. Niles's Register asserts emphatically that the very point now at issue before the Senate was decided in 1825. I know that other cases were decided antecedent to the Lanman case, but they were decided, I affirm, without discussion, without debate.

"In 1825 this precise case was brought before the Senate of the United States, and it was decided then that the governor could not appoint as to a full term. In 1825 for the first time this question was elaborately and exhaustively debated by the ablest lawyers then in the United States, and it was decided that the governor did not have the right to make such an appointment; and I say to-day, as was said in the Bell discussion, that from 1825 to the decision of the Bell case in 1879 not one solitary utterance was ever heard upon this floor or elsewhere which questioned the accuracy of the position I take here now.

"I know it is said that the Sevier case from Arkansas, decided in 1837, antagonizes this view; but the report of Mr. Felix Grundy on the Sevier case asserted that that decision was not in antagonism to the Lanman decision, but that it was made upon the express ground that Sevier had drawn his seat by lot, and that therefore the term "happen" applied to that case; but Mr. Grundy expressly says, and I have his report before me as chairman of the Judiciary Committee, that the Lanman case was the precedent; that it decided the correct doctrine, and it was held so invariably until the decision of the Senate in 1879.

"Mr. Wadleigh, from New Hampshire, in discussing this very question admitted that the Lanman case was decisive of the whole matter. Says Mr. Wadleigh:

"'The Senator from Ohio'—

"Referring to Mr. Thurman—

"'The Senator from Ohio would have us believe that there is some doubt as to whether this legislature or the next is entitled to elect. That is a matter which greatly concerns the people of New Hampshire. It is desirable that that question should be settled at once, so that they may not put themselves in a position from which they cannot be extricated without great embarrassment. Accordingly a bill was presented to this body by the Senator from Wisconsin [Mr. Cameron] and referred to the Committee on Privileges and Elections, which reported unanimously that this legislature cannot elect the Senator, that the next legislature must elect. That shows to us clearly that unless this bill passes there must be a vacancy in this Senate from the State of New Hampshire for three months in the next Congress.'

"In other words, that the governor could not fill the vacancy; and there is upon the other side of this Chamber a succession of weighty authority in the same direction. Mr. Thurman asked:

"'Is there any probability of Congress being in session during those three months?

"'Mr. WADLEIGH. I do not know about that.

"'Mr. WHYTE. I ask the Senator from New Hampshire why the governor of New Hampshire cannot appoint for the vacancy until the legislature meets in June?

"'Mr. BLAINE. He cannot do that if the previous term has fully expired.'

"Which is the very case here.

"'Mr. WHYTE. Suppose this legislature has power to elect and does not elect, is not that a vacancy?

"'Mr. BLAINE. Then the power of the governor does not come in.

"'Mr. WHYTE. It does, apparently.

"'Mr. BLAINE. Not at all.

"'Mr. DAWES. Every precedent of the Senate is against that.

"'Mr. BLAINE. The Senator from Maryland is too good a lawyer to make that assertion.

"'Mr. WADLEIGH. Having examined the precedents, I am inclined to think the governor cannot appoint.

"'Mr. BLAINE. Of course the governor cannot appoint. Nothing is better settled than that. The honorable Senator from Ohio [Mr. Thurman] will give his assent to that, if the term has fully expired.'

"Never until the Bell decision by the Senate was any voice ever raised from 1825 to 1879 which gave to the governor of a State the right to fill a full term.

"I remember very well in the Bell discussion when Senator Conkling, of New York, put a question to Senator Hill, of Georgia, in regard to the power of the governor to fill the term. Senator Conkling said: 'If that power exists, the governor, by collusion

with a majority of the legislature, could from time to time put off an election and fill the vacancy out of his own creatures and to suit himself.' Senator Hill replied to him that that was the identical argument which he proposed to make, and that that was the meaning of the constitutional provision, which did not give this power to the executive of a State.

"But if I had any doubt about the meaning of the Lanman decision, I find it in Mr. Benton's Thirty Years' View, and he was the most accurate man who ever wrote in this country in regard to the proceedings of this body or the other. Mr. Benton says:

"'Mr. Lanman has served a regular term as Senator from Connecticut. His term of service expired on the 3d of March of this year, and the general assembly of the State having failed to make an election of Senator in his place, he received a temporary appointment from the governor. On presenting himself to take the oath of office, on the 4th day of March, being the first day of the special Senatorial session convoked by the retiring President (Mr. Monroe) according to usage for the inauguration of his successor, his appointment was objected to as not having been made in a case in which a governor of a State could fill a vacancy by making a temporary appointment. Mr. Tazewell was the principal speaker against the validity of the appointment, arguing against it both on the words of the Constitution and the reason for the provision. The words of the Constitution are: "If vacancies happen (in the Senate) by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments, until the next meeting of the legislature." "Happen" was held by Mr. Tazewell to be the governing word in this provision, and it always implied a contingency, and an unexpected one. It could not apply to a foreseen event, bound to occur at a fixed period. Here the vacancy was foreseen; there was no contingency in it. It was regular and certain. It was the right of the legislature to fill it, and if they failed, no matter from what cause, there was no right in the governor to supply their omission. The Senators voting in favor of the motion were, &c.'

"Showing from the highest authority that in the Lanman case the identical point at issue here to-day was raised and decided and remained an unbroken precedent from 1825 to 1879.

"But, Mr. President, more than that, and I am speaking as rapidly as possible, for this question has been fully exhausted, and I think the decision in the Bell case will be affirmed here again to-day; and I merely make this statement, as I said before, in order to affirm my own established opinion upon this question and the reasons which I have for it, it has always been held here, it has never been for one instant contradicted, that if the legislature of a State had been in session which could have filled the vacancy, and had the power to fill the vacancy, and refused to do it under the Constitution, then the governor could not possibly have the power to appoint. Now, the legislature of New Hampshire has been in session; the legislature of New Hampshire has had the power to fill this vacancy. The legislature of New Hampshire applied to the supreme court of that State, under the constitution of New Hampshire, to ascertain whether the power existed in the legislative assembly. The supreme court declared to them that the power did exist. They deliberately refused to exercise it; they adjourned; and now it is claimed, in view of these facts, that the chief executive of that State has the right, as I hold, in direct contravention of the terms and spirit of the Constitution, to fill a full term, and that that power exists not *ex vi termini* upon those terms, but according to the meaning of the Constitution itself.

"This is all I desire to say, sir. I shall vote against this gentleman's admission, believing the precedent in the Lanman case to be the correct one; and I shall do so the more cheerfully because I am not ashamed to be found as a lawyer in company with the memory of Carpenter, of Wisconsin, with the opinion of Judge Davis, of Illinois, who voted with me, and with the present Attorney-General of the United States, who made a learned and exhaustive argument upon the same side. I am not ashamed to assert the same opinion in that company and to give feebly the reasons which were then uttered."

[Extracts from remarks of Mr. Hoar, of Massachusetts, in support of the resolution submitted by him that Mr. Blair be admitted to take the oath of office. Found in the proceedings of March 10, 1885, in the Congressional Record, vol. xvii, part 1, p. 17.]

"Mr. President, I do not think it will be profitable to enter upon the very wide field of discussion which the question involved in this case opens. I think the Senate will prefer to rest its decision to-day upon the authority of one of the most authoritative precedents which have occurred in its history.

"If a legislative body exercising quasi-judicial functions like that which is exercised when the Senate determines the right of a claimant to a seat here can ever be bound by a precedent, the Senate has bound itself by the precedent established in the case of Mr. Bell. It was established on full discussion by great lawyers and great Senators. It was established by a decisive majority, in which the division was totally non-partisan. The great

debaters and lawyers to whom my honorable friend from Missouri alluded who differed with the majority of the Senate on that occasion put forth some of their ablest and best intellectual efforts, rendering it certain that the decision to which the Senate then arrived was a decision moved in view of every reason which could be suggested bearing upon the question.

"The people of the State of New Hampshire have governed themselves and must govern themselves and had a right to govern themselves by the decision which the Senate then made, and nobody can hope that if by a slight majority that decision should be reversed to-day it would stand reversed. Therefore the people of the State of New Hampshire and of all other States where like questions may arise would find themselves in the condition of being compelled to act one way one year and another another, as the changing majority or opinion of the Senate may decide this case and that as it should come up year after year.

"When the question which now arises came up six years ago there were found voting in favor of the right, and of course of the duty and obligation, of the governor of a State to appoint a Senator in a case like this gentlemen on both sides of the Chamber. There was the distinguished gentleman who now sits at the left of my friend from Missouri, the Senator from Indiana [Mr. Voorhees], in that vote, relying, as I have no doubt he did, on the decision of one of the very ablest judges then pronouncing the opinion of the supreme court of his own State on the intepretation of precisely or substantially similar language. There was found Mr. Bayard, the present Secretary of State; Mr. Gordon, of Georgia; Mr. Groome, of Maryland; Mr. Jones, of Florida, now occupying a seat in the Senate; Mr. McDonald, then representing also the State of Indiana; Mr. Randolph, of New Jersey; Mr. Walker, of Arkansas, and Mr. W. Pinkney Whyte, of Maryland, who inherited both the name and blood and largely the capacity of one of the greatest constitutional lawyers who ever occupied a seat in this body.

"Now, I think it is enough to rest this case upon the consideration that if the Senate can adjudge anything it has adjudged this; but perhaps it may not be improper to take a very few minutes, not in a discussion in detail, but in a mere statement of the history of this constitutional question.

"The Constitution of the United States contains this provision, which I submit is the controlling and governing provision, that the several States of the Union shall have an equal and constant power in the Senate of the United States by the representation with which two Senators are clothed. That is what the Constitution means to effect. There is not a full Senate, there is not a State represented and having its equal right and authority in the Senate when any single seat is vacant. To that end the Constitution provides as a mechanism for carrying out and accomplishing the purpose that these seats shall always be full, and that every State in this body shall be the equal of every other State. The provision is that the legislature shall choose their Senators—

"'And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"This language *verbatim* is repeated in the Constitution in another place, where it is provided that if vacancies happen in any executive office during a recess of the Senate the President shall have the power to make an appointment until the next session. Under that provision time out of mind, originally on the authority of William Wirt and I believe John Marshall, the President of the United States has been held without dispute to have the right to appoint to an office the legal or constitutional term of whose incumbency ends when Congress is not in session.

"Here, therefore, are two sentences in the Constitution, one intended to preserve the continuance of executive power by the discharge of the duties of the subordinate executive officer, and the other intended to preserve the continuance of legislative power by keeping the Senate full, in regard to which the Senator from Missouri is compelled to claim that there is a totally different meaning. If the executive office is vacant, the small, the subordinate, which does not affect the functions of the Government or the equality of the States, or the completeness of one of the two great legislative bodies of the country, it means that if there happen, or if it so be that there is no officer in existence authorized to exercise those functions, then the President may appoint. And yet the Senator claims that the same language means a totally different thing in the case of the Senate.

* * * * * * *

"Well, Mr. President, I thank the Senator for his interruption. The Senator concedes that a vacancy has happened, within the constitutional meaning of that term, in the representation of the State of New Hampshire. Now, as I understand, he puts his argument solely on the ground that the words which were intended to mean, in my judgment, if a vacancy shall happen in any possible way, that is by resignation (which is one ordinary way of creating a vacancy) or in any other method whatever, then the

right of the governor to fill the Senatorial office by appointment exists, do not apply to this case. Now, it seems to me, and I submit to the good sense of that Senator himself, that it is utterly incredible, first that the founders of the Constitution should ever have intended to let the Senate be full if the vacancy happened during a term and that it should be vacant until a legislature should meet if a vacancy happened at the beginning of a term. It is utterly incredible that they should have entertained that purpose; but entertaining that purpose, it is still more incredible that any one of the learned lawers and able statesmen who framed the Constitution could have undertaken to effectuate it by such language as he has described. Just think of Mr. Madison desiring to provide that this power of the governor of a State to keep full the representation of his State in the Senate should have a limitation upon it that he should not exercise it at the beginning of a constitutional term, and having in mind the limitation and the restraint that he should have undertaken to express it, and to give legal and constitutional effect to it, by simply adding the words, 'by resignation or otherwise.' He would have said, 'by resignation, and not otherwise,' if he had intended to give constitutional effect to that idea.

"The Constitution using, I repeat, substantially the same language to provide for the two cases if a vacancy shall happen, the Senator is driven to say that 'happen' means one thing in case of the Senatorial office and another thing in the case of the executive office. But conceding that the words have the same meaning, he undertakes to resort to language intended to amplify, to make clear, to make universal in the important case of the Senator the existence of the power, and claims that that is used as a limitation or restriction!

"Mr. President, the framers of the Constitution, and the men who filled these seats from the beginning to the year 1825, beyond any question took the view of the matter which was taken by the Senate in the Bell case; and it is conceded, as the Senator from Missouri himself has conceded, that in ten instances Senators were appointed and took and held their seats in consequence of the exercise of the authority of the executives of their States at the beginning of a constitutional term, when the legislature for any reason had failed to provide by an election. These cases are all cited in the report which was made in the case of Mr. Bell six years ago.

"The first is the case of William Cocke, of the State of Tennessee. The State being admitted into the Union in 1796, Cocke having drawn the term which expired on the 3d of March, 1797, he was appointed by the governor to be his own successor on the 22d of April, 1797. The second case was that of Uriah Tracy, a Senator from the State of Connecticut, whose term expired on the 3d of March, 1801, and under an appointment by the governor made on the 4th of March—precisely the case of Mr. Blair—he claimed his seat and was admitted after a very earnest and heated discussion by a party vote of 13 to 10. This precedent was followed the next day by the admission of Mr. Hindman, of Maryland; by the admission of Mr. Condit, of New Jersey, in 1803; Mr. Anderson, of Tennessee, and Mr. Smith, of Maryland, in 1809; Mr. Cutts, of New Hampshire, in 1813; Mr. Williams, of Tennessee, in 1817; all executive appointments to fill places made vacant by the expiration of full terms of service during recesses of the legislature, and all were admitted without discussion and without objection.

"Then in the year 1825 came the case to which the Senator has referred, of James Lanman. Mr. Lanman was appointed by the governor during the recess of the legislature of the State of Connecticut for the beginning of the full term which was to begin on the following 4th of March. The vacancy had not happened when the governor made the appointment, and by an unbroken series of precedents with but one exception it had been held that the governor had no authority to make the appointment under this constitutional clause in anticipation of a vacancy. In the first place it did not come within the letter of the Constitution; and in the next place not only did it not come within the letter of the Constitution, but it was impossible for the governor to know that the legislature would not assemble and fill the place before the constitutional term began. In one of the early cases the governor had made the appointment in anticipation. I think that was not noticed by the Senate; at least no point was made upon it, and the Senator was admitted without objection; but in no other case had that happened.

"In the Lanman case, therefore, there was a clear, unquestionable objection. The debates are not reported. Who knows what the ground was upon which the majority of the Senate proceeded? The National Intelligencer on the next day in a very clear article stated that the Senate had proceeded on the ground which I have stated, that the governor could not exercise his authority until the vacancy actually occurred. Mr. Gordon, of Pennsylvania, in his Digest of the Laws of the United States, who is referred to by Judge Story as a very able and accurate law writer cotemporary with that decision, and whose book was published a few years after, stated that the case went upon the ground that the governor had no right to appoint until the vacancy actually happened. Judge Story in his work on the Constitution of the United States, on the authority of Mr. Gordon's

Digest, Judge Story being a cotemporary of the Senators who made the decision, sitting here in court at the time it was made, undoubtedly hearing and knowing something personally of so interesting a historic event, says that it was put by the Senate upon the ground that the governor had no right to appoint in anticipation of a vacancy. And the first suggestion, so far as I know—I do not remember the Niles's Register statement which the Senator read—that anybody put the Lanman case upon any other ground than the clear, indisputable ground which I have stated is in Mr. Grundy's report made twelve years after. Mr. Grundy, in distinguishing the Sevier case, undertakes to make his distinction from the Lanman case by saying that the Lanman case went upon the ground that the governor could not appoint when the vacancy happened at the beginning of a term.

* * * * * * *

"How weak a proposition—I do not now apply the adjective to my honorable friend's statement, which is a very strong and clear one—but how weak a proposition that is, whoever made it, that a single man should undertake to pronounce the ground upon which forty or fifty Senators proceeded in determining a question of constitutional law, when only one or two of them engaged in the debate. Suppose it to be true that Mr. Tazewell agreed with my honorable friend from Missouri and with the gentleman whose high authority he has cited and so argued, and every other member of the Senate knew perfectly well that whether that was sound or unsound Lanman was not entitled to his seat for the clear and indisputable reason that his appointment had been made by the governor before the vacancy occurred. Does the Senator from Missouri doubt that every one of that majority would have voted against Lanman for the reason that the governor had made the appointment before he had the right to appoint, just as if Mr. Blair had been appointed six months ago by the governor of New Hampshire? That being the case, we are all ageeed that the majority of the Senate would have been constrained to deny the claim of Mr. Lanman. For that reason it seems to me that it is utterly preposterous to say that because one particular Senator made an argument stating another ground also, a majority of the Senate must of course have proceeded on that, and that is a judgment of the Senate of sufficient strength and weight to bear down an uninterrupted series of precedents coming down to the year 1825, and to bear down also the latest and gravest precedent bearing upon the question that happened six years ago.

"Mr. President, this is the general history of this case. It will be found stated at greater length, with all the authorities, all the points as far as I could think of them, in the report made from the Committee on Privileges and Elections by the minority in the Bell case and in the discussion six years ago. If any Senator desires to refresh himself on the question he can look at that report and those debates. But it is, it seems to me, enough, in addition to what I have said, to remark that I cannot conceive it credible that the framers of the Constitution, having for their first and leading object the keeping of the Senate full, the rights of the people and the rights of the States preserved by their full and complete representation, and having given the governor of the State the right to provide for an exigency which would arise at any other period of the term, should have intended to deprive the people of that privilege and the governor of that authority, merely because the vacancy happened at the beginning of the term.

"You have on one side the ten or twelve precedents made by the fathers of the Republic; you have also the decision of the executive department acquiesced in from the foundation of the Government, supported by the authority of John Marshall and William Wirt, in regard to the meaning of precisely similar language in another part of the Constitution; you have the great judgment of the supreme court of Indiana, your own State, Mr. President, made by one of its most accomplished jurists, and you have in addition to that the necessity of preserving the rights of the people of these States; and the one thing opposed is a decision of the Senate, in regard to which no man can know that any single Senator but Mr. Tazewell or possibly Mr. Benton, who wrote about it twenty-five years after, put his decision on this ground, and a decision which the Senate would have been compelled to make on another ground if this ground had never existed; and it is that doubtful, questionable, uncertain precedent upon which the learned Senator and those who think with him rely to bear the weight of this case."

[Remarks of Mr. Pike, of New Hampshire, in support of the resolution submitted by Mr. Hoar that Mr. Blair be admitted to take the oath of office. Found in the proceedings of March 10, 1885, in the Congressional Record, vol. xvii, part 1, p. 23.]

"Mr. President, inasmuch as some criticism has been made upon the legislature of New Hampshire, and it has been stated by some gentlemen that they had not acted in the choice of a Senator when they should have acted, I desire to say a few words.

"We have a legislature once in two years—a biennial legislature. One was chosen in November, 1882, and another was chosen last November, or November, 1884. Now, the question is, which legislature has the right to elect? After our constitution was changed

that became a mooted question in our State. We had the national law, to which I will ask the attention of Senators while I read:

"'The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.'

"By this national law of 1866 the legislature chosen next preceding the expiration of the term was the legislature to elect. Our legislature supposed that the legislature chosen last November in Mr. Blair's case was the one next preceding the end of his term, which was to expire on the 4th of March. A large majority of them acted upon that idea. But precisely the same question arose six years ago at the expiration of Mr. Wadleigh's term, and at the time when Mr. Bell was appointed, about whom so much talk has been made.

"That our legislature might put itself in harmony with the National Government, that it might act in obedience to the national law, application was made to the Congress of the United States, and the recent Senator from Wisconsin, Mr. Cameron, introduced a bill by which the national law that I have read might be so modified as to meet the condition of things in our State. The question came up here and was considered by the Committee on Privileges and Elections of this very Senate as to whether the legislature elected in the autumn before the expiration of Mr. Wadleigh's term, or the legislature elected two years before, was the one that should choose the Senator to succeed him; and that bill and that question were considered by the Committee on Privileges and Elections, and Mr. McMillan, a Senator now upon this floor, made the unanimous report of that committee that the legislature elected immediately preceding the expiration of the term, that is, the legislature in Mr. Bell's case, elected the autumn before, and the legislature in the present (Mr. Blair's) case, elected last autumn, was the legislature that had the power, and the only legislature that had the power, to elect.

"That report was submitted to this body, and by a unanimous vote, as the record shows, not a single Senator here dissenting upon adopting the report of that committee, the legislature of New Hampshire elected last autumn was the one and the only one that could elect a Senator for this term. Now, it seems to me that New Hampshire ought not to be very much criticised when she has made this effort to find what the national will was and to find what the will of the Senate was, because she has obeyed it and because she has not disobeyed it; more especially after the question as to whether the governor had the right to fill the vacancy at the end of Mr. Wadleigh's term in 1879 was raised and it was decided that he had the power.

"Mr. President, I hold a seat on this floor. I was elected two years ago last August by the legislature assembling in June, but my term commenced in the March before. Our legislature acted upon the idea that the national law as they understood required, and as the construction given it unanimously by the Senate required, that the legislature to elect, and the only one which could elect, was the one chosen immediately preceding the end of the term.

"In a discussion six years ago in Mr. Bell's case the then Senator from Delaware, Mr. Bayard, so recently here and so distinguished when here, submitted his views to the Senate, and upon the question what legislature has the right to elect in New Hampshire, whether it be the one elected in November preceding the end of the term or the one elected two years and a half before, said:

"'By that law'—

"Having quoted immediately before the national law which I have read—

"'By that law was indicated the legislature and the only legislature which should fill vacancies in the Senate of the United States, whether occurring by expiration of the term or from any other cause.'

"That was the opinion of the distinguished Senator from Delaware then, as it had been the unanimous opinion of the Senate only four years before.

"Allusion has been made to the supreme court of our State. As I said, there has been considerable division of sentiment in our State, although our legislature has been very largely in favor of giving the construction to the national law that its plain terms seem to indicate it ought to have, and which the Senate has given to it, and which the seating of Mr. Bell affirmed. The opinion of the court was asked three years ago. My recent colleague and the gentleman who asks a seat here introduced this question into the Senate by a resolution asking the Senate to reconsider and revise its opinion if it was erroneous. There may be found in the Congressional Record, which I have here, the opinion of the court upon this question which he cited. The opinion of our court was read by him, and, as I said, it is printed in the Record with other opinions. But notwithstanding that, the Senate decided that the national law was too plain to be misunderstood; that it was necessary it should be construed as it had been construed, and refused to render any relief.

"Mr. President, I have but little more to say. I am not only asserting the fact, but I have the conviction in my own mind that the clause in our National Constitution which says that 'when vacancies happen from resignation or otherwise,' instead of being words of limitation, ought to be construed to have a very different meaning. This is the only branch of the Government where States have an equality, where one State has just as much power as another. The framers of the Constitution were so much in earnest that that should be the fact that they prohibited any amendment to the Constitution depriving the States of their equality of suffrage in this body. My idea is that when the framers of the Constitution said 'when a vacancy happens by resignation, or otherwise,' they meant when it happens by resignation, or otherwise, from any cause whatever; that they are words of enlargement and explanation, so that there might not be any doubt upon the question that this body should have equal representation, that there should be equal suffrage on this floor, and that if a vacancy occurred from any cause the executive should have the right to fill it.

"Now where do we stand on this question? The Government decided first by the national law, and the Senate has decided upon the McMillan report and upon the admission of Mr. Bell, that the legislature having the right was the one elected immediately preceding the end of the term. Then they have settled in Mr. Bell's case another question, as to filling the vacancy happening at the end of the term and before the meeting of the legislature, that the governor had the right to appoint, under which appointment Mr. Bell was seated; and that is precisely the question before us to-day."

[Extracts from remarks of Mr. Edmunds, of Vermont, in support of the resolution submitted by Mr. Hoar that Mr. Blair be admitted to take the oath of office. Found in the proceedings of March 10, 1885, in the Congressional Record, vol. xvii, part 1, p. 23.]

"I wish to say one word, Mr. President, about what is called the act of Congress of 1866. The Constitution provides that Congress may regulate the manner by which and the time at which the legislature of a State shall elect a Senator. That is all the authority which the Constitution of the United States reposes in Congress over that subject. It says in another place, but in the same connection, that the legislature of a State shall ordinarily—I am not now on the question of filling vacancies—elect a Senator for a term of six years. It names nothing but the legislature of a State to do that.

"I was here when the act of 1866 passed, but I had just come into the Senate and I gave it no attention; I probably voted for it if there was a division, it being reported by a committee. But I have been of the opinion ever since I came to examine the subject, and I am of opinion now, as I have stated before, I think, in this body, that the act of Congress, in so far as it undertakes to declare what legislature, whether chosen before or after the expiration of a term, or how long before or how long after, shall elect a Senator, goes beyond its constitutional power. I am also of opinion, and I state it deliberately, and I believe I have stated it before, that when the Congress of the United States undertakes to create a body to elect a Senator which the constitution of the State has not created and which is not its legislature it has gone beyond its power.

"By the constitution, I think, of every State in the Union, certainly every one that I know of, the legislative power is vested in two separate and independent bodies, each one of which acts by itself and for itself, and that is the legislature of the State of which the Constitution of the United States speaks when it says that the legislature shall elect a Senator. Therefore I am of opinion that Congress has no more power to turn the two bodies, the senate and house of representatives of a State, formed under its own constitution as two separate bodies of different numbers and of different constituencies, into one consolidated body voting *per capita*, than it has to declare that a town meeting in the State of Vermont may elect a Senator and call that a legislature, because it is not by the constitution of the State its legislature. But that is apart from this question, and I should not have referred to it only that the act of Congress has been spoken of.

"Now let us come to the question. First, I will begin with the original Constitution, to which my friend from Missouri has made reference, as he supposes supporting his view of the meaning of the words "resignation or otherwise." In the original draught of the Constitution submitted to the convention, as it appears on page 205 of volume 5 of Elliott's Debates, in the Madison Papers, the third section was:

"'On the death, removal, or resignation of any Senator, his place to be filled out of the district from which he came.'

"That was the first draught. The scheme having been entirely changed and abandoned, later on, at page 377, Mr. Rutledge, on the 6th of August, 1787, reported from the committee of detail as follows:

"'ART. V, SEC. 1.—The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.'

"There, as it stood in that final report in detail, final at that time but changed afterward, you will see that there was no limitation or qualification or restriction except 'vacancies.' They might occur during the sitting of a legislature. Whenever they occurred the executive was to fill those vacancies until the legislature should elect, not until its next meeting even; but in order to keep the representation of the States full, in order to create a national government which should have all its faculties and all its members in place to perform their duties, this draught reported by the committee of detail provided for a universal filling of a vacancy by the executive, and provided for his filling it if a vacancy happened or occurred or existed, whatever it was, even if the legislature were sitting.

"Now we come to the amendment of Mr. Madison. That draught was under consideration on the 9th of August. Article V, section 1, the one I have read, was taken up, and I shall read the whole proceeding in connection, without any observation, so that it will appear just as it stands in these debates:

"'Mr. Wilson objected to vacancies in the Senate being supplied by the executives of the States. It was unnecessary, as the legislatures will meet so frequently. It removes the appointment too far from the people, the executives in most of the States being elected by the legislatures. As he had always thought the appointment of the executive by the legislative department wrong, so it was still more so that the executive should elect into the legislative department.

"'Mr. Randolph thought it necessary, in order to prevent inconvenient chasms in the Senate. In some States the legislatures meet but once a year. As the Senate will have more power and consist of a smaller number than the other house, vacancies there will be of more consequence. The executives might be safely trusted, he thought, with the appointment for so short a time.

"'Mr. ELLSWORTH. It is only said that the executive may supply vacancies. When the legislative meeting happens to be near the power will not be exerted. As there will be but two members from a State, vacancies may be of great moment.

"'Mr. WILLIAMSON. Senators may resign or not accept. This provision is therefore absolutely necessary.

"'On the question of striking out "vacancies shall be supplied by the executives"—

"'Pennsylvania, ay, 1; New Hampshire, Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, South Carolina, Georgia, no, 8; Maryland, divided.

"'Mr. Williamson moved to insert, after "vacancies shall be supplied by the executives," the words, "unless other provision shall be made by the legislature" (of the State).

"'Mr. ELLSWORTH. He was willing to trust the legislature, or the executive, of a State, but not to give the former a discretion to refer appointments for the Senate to whom they pleased.

"'On the question on Mr. Williamson's motion, Maryland, North Carolina, South Carolina, Georgia, ay, 4; New Hampshire, Connecticut, Massachusetts, New Jersey, Pennsylvania, Virginia, no, 6.

"'Mr. Madison, in order to prevent doubts whether resignations could be made by Senators, or whether they could refuse to accept, moved to strike out the words after "vacancies" and insert the words "happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature."

"'Mr. GOUVERNEUR MORRIS. This is absolutely necessary; otherwise, as members chosen into the Senate are disqualified from being appointed to any office by section 9 of this article, it will be in the power of a legislature, by appointing a man a Senator against his consent, to deprive the United States of his services.

"'The motion of Mr. Madison was agreed to, *nem con.*'

"Thus you will see, Mr. President, that the motive for inserting the words 'resignation or otherwise' (which was afterward trimmed down by leaving out on the report of the committee on style the words 'refusal to accept;' so as to leave it only 'resignation or otherwise') was distinctly stated by Mr. Madison to be, not that you were to classify a kind of vacancies by resignation, but they were put in expressly for the purpose of recognizing the power of a Senator to refuse to hold on to the office to which he had been appointed.

* * * * * * *

"There never was any question in the debates in the constitutional convention but what it was of the highest importance, the very purpose of the Constitution which provided two Senators from each State, that each State should have all the time, whenever this body met, its full representation, not only for the general benefit of all the people, but sometimes, as was then thought, for its own security, for the preservation of its own rights.

"I think, therefore, that this language of Mr. Madison and the action of the conven-

tion clearly show that the argument of my friend from Missouri is a mistaken one in supposing that the introduction of the word 'resignation' was for the purpose of giving a class, one of a kind of events that might happen, on the occasion of which the executive might act and not otherwise; because Mr. Madison states the purpose to be exactly the other thing, by putting in one of the words of that kind and then putting in the word 'otherwise,' to make it clear that a Senator had a right to resign his place, and then, in order to carry on the whole operations of the Government according to the Constitution, providing that the executive, if the legislature were not sitting, should fill it until the legislature met.

"There was nothing otherwise in the whole discussion, I repeat, from beginning to end; and as the draught originally stood it went to the extent, as every Senator will see, of authorizing the executive to fill a vacancy which happened when the legislature itself was sitting until it did fill it; and the only motive stated for the change, which they all agreed to unanimously, was to put in some one word that would affirm and recognize the right of a Senator to resign his place, and then to provide that the State should not go without being represented.

"Now let us come to the Constitution just for a moment, and I shall have done. The legislature shall elect for the term of six years. That is the power given to the legislature.

"'The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years.'

"If you stop there and give it a literal construction, not looking to the purposes of the Constitution—to have a full Senate—there would be no power in any State legislature in this Union to elect if they allowed the time to go by so that when they elected they could not elect under the Constitution for a term of six years. They must elect for a shorter term; they must in New Hampshire; they must in the hundred cases almost which have happened, when the legislature has failed to make provision in advance, so that the election was for six years. Nobody maintains any such proposition, because it defeats the object the Constitution had in view, which was that each State should have two Senators. Now we come to this language about the executive, and see where we are upon the construction of my friend from Missouri:

"'And if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill'—

"What?—

"'such vacancies.'

"The very ones that are named in the preceding line. Therefore, if the authority of an executive is only to fill a vacancy which occurs by resignation or death or expulsion—the only three ways that I can think of, because a refusal to accept does not create a vacancy, it leaves the old vacancy just where it was—if that is the meaning, then the only authority which is left to the legislature is to fill the very vacancy that the governor had a right to fill temporarily, and no other. So if the governor of New Hampshire at this moment has not the power to fill this vacancy, by the very same sign and on the very same words the legislature of New Hampshire when it meets next June cannot fill it even, for the Constitution says in language as plain as words can make it that the vacancy which the legislature is to fill is 'such' vacancy, that is, a vacancy which occurs by resignation or otherwise, that the executive of the State may fill if it happens during the recess of the legislature. We cannot stand on that construction; nobody pretends that we can.

"By what authority of logic or law is it, then, that we hold that the very same words three lines before limit the power of the executive to a particular class of cases, and that the very same words three lines afterward expand the power of the legislature to every kind of vacancy that may exist? 'That won't do,' to use a phrase of a late eminent Senator of this body. We cannot stand on it.

"We hear much of the word 'otherwise.' If Mr. Madison by proposing, or the convention by adopting, the words 'resignation or otherwise' had meant to classify a series of cases like resignation, why would not Mr. Madison, eminent in his knowledge of the English language and clear in its expression, have said 'likewise'? That is the adverb which would suit the class of cases to which my friend from Missouri refers. 'Other things happening in like manner' is the definition of 'likewise,' while 'otherwise' means things happening in any other manner than by resignation. That is the dictionary and the common sense and the universal knowledge of everybody who knows the English language.

"What was the object of the Constitution? It was that the representation of each State should be full, and the Constitution provided two means of keeping it full. First, by the legislature for the full term electing in advance before any vacancy occurred. That would provide for all that. Then both the executive and the legislature, after a

vacancy did happen at a time when the legislature was not in session, could fill it then and there, by providing that instantly the governor in the first instance and the legislature at its next meeting should fill up that vacancy so as to carry out the great objects of the Constitution.

"Wherefore, then, upon any principle of patriotism, or law, or justice, should we endeavor by construction to narrow down the franchise of a State, if I may call it that, and endeavor to find some class of cases where for some period of time a State shall go unrepresented? I am unable to see it; and this report of the debates in the convention shows clearly to my mind, and I think even to that of my friend from Missouri and my friend from Delaware, that the word 'resignation' was not put in with the object that my friends think it was, but for an entirely different object, as was stated by Mr. Madison himself.

"This question was fairly debated when the gentlemen on the other side were in a majority in this Chamber. Without a party division, gentlemen on both sides, voting according to the light they had and not dividing upon party lines, settled this identical question. The Senate in sitting upon such a question sits as judges. The Constitution says so. We are not defining policies; we are not setting up expediencies; we are not carrying on party warfare: we are sitting as the solemn judges sworn to try and determine the election and qualification of a gentleman who presents himself to be a member of this body. We have come to a decision, just as the Supreme Court of the United States sitting two hundred feet from us comes to a decision in a great variety of cases where the judges differ—five one way four another or whatever it may be, a difference of opinion. The decision of the court is announced. What would become of that court if the next time a similar question came up the whole thing was opened again and the contest was gone over repeatedly from year to year and time to time in order to see which should get in the ascendency upon all questions? Nothing would be settled, and the court would be destroyed, and justice, too, for that matter.

"How is it different here? When we have come to a decision, even in a case of doubt, having come to it fairly, not in a time of party heat, or by a party vote, when we, after full deliberation, have come to a decision which carries out confessedly the objects of the Constitution to keep the representation of a State full, should we not stick to it; or are we, every time a similar question comes up about elections, to reverse our decisions, retry them, hold them of no force, and thus keep this body continually in a turmoil over questions of representations in it that come from the States? However doubtful it might have been—it did not seem to me so, to be sure, but however doubtful it might appear to the minds of gentlemen who voted in the minority—it appears to me that, once decided and decided in favor of representation, it would be better to follow that as an established precedent which carries out the objects the Constitution has in view."

[Fifty-second Congress—First Session.]

HORACE CHILTON,

of Texas.

Mr. Reagan, elected Senator from the State of Texas for the term of six years from the 4th of March, 1887, resigned his office, the resignation to take effect on the 10th day of June, 1891. The executive of the State of Texas, after the receipt of the resignation of Mr. Reagan, appointed Mr. Chilton to fill the vacancy occasioned by said resignation, the appointment to take effect on the 10th day of June, 1891. The certificate bears date April 25, 1891. December 7, 1891, Mr. Chilton appeared and took his seat and on the same day his credentials were referred to the Committee on Privileges and Elections. That committee reported January 25, 1892, that—

"So far as the precedents are concerned, it appears that in three cases persons so appointed have been admitted to their seats without question; that Mr. Tracy was admitted and Mr. Lanman rejected, where the executive made the appointment in anticipation of a vacancy, there being a discussion in the Senate, but no satisfactory evidence of the grounds of the judgment; that in one case, that of Mr. Sevier, a person so appointed has been admitted, when the validity of the appointment was questioned, upon other grounds, without raising this question specifically; and that in modern times the practice has been uniform for the State executive to delay appointment until the actual happening of the vacancy. * * * that where the power is given to fill vacancies in public offices it has been the uniform practice to permit resignations of such offices to be made, to take effect at a future day, and to hold that the appointing power is entitled to make the appointment in advance to fill the vacancy, to take effect when the resignation becomes operative, unless the language of the constitutional or statute provision under which the authority is exercised forbids such construction;" that the same rule should be applied to the case of resignations and vacancies in the Senate, and that, therefore, Mr. Chilton was entitled to retain his seat.

January 27, 1892, the resolution reported by the committee was agreed to.

The history of the case here given consists of a transcript of the journal of the Senate relating to it, with the report of the committee. (Sen. Rep. No. 105, 1st Sess. 52d Cong.)

MONDAY, *December* 7, 1891.

The Vice-President laid before the Senate the credentials of Horace Chilton, appointed a Senator by the governor of the State of Texas to fill the vacancy occasioned by the resignation of John H. Reagan in the term expiring March 3, 1893; which were read and placed on file.

On the same day Mr. Chilton appeared. The oath prescribed by law was administered to him, and he took his seat.

On motion by Mr. Hoar,

Ordered, That the Committee on Privileges and Elections be directed to inquire into the circumstances and validity of the appointment of Horace Chilton as a Senator from the State of Texas.

[The debate on this order may be found Cong. Record, 1st sess. 52d Cong., p. 3, daily edition.]

MONDAY, *January* 25, 1892.

Mr. Hoar, from the Committee on Privileges and Elections who were instructed to inquire into the validity and circumstances of the appointment of Horace Chilton as a Senator from the State of Texas, submitted a report (No. 105) accompanied by the following resolution:

Resolved, That Mr. Horace Chilton, appointed by the executive of the State of Texas, on the 25th day of April, 1891, to fill the vacancy occasioned by the resignation of Hon. John H. Reagan, which had previously been made to take effect on the 10th day of June, 1891, is entitled to retain his seat.

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Teller (chairman), Hoar, Mitchell, Chandler, Higgins, Vance, Pugh, Gray, Turpie.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 25, 1892.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, who were directed by resolution of December 12, 1891, to inquire into and report upon the circumstances and validity of the appointment of Mr. Chilton to a seat in the Senate from the State of Texas, have complied with said resolution and respectfully report:

Mr. Reagan, elected Senator from the State of Texas for the term of six years from the 4th of March, 1887, resigned his office, the resignation to take effect on the 10th day of June, 1891. The executive of the State of Texas, on the 25th day of April, 1891, and after the receipt of the resignation of Mr. Reagan, appointed Mr. Chilton to fill the vacancy occasioned by said resignation. Mr. Chilton's credentials set forth the resignation of Mr. Reagan, and further declare—

"Now, therefore, I, J. S. Hogg, governor of the State of Texas, by virtue of the

authority vested in me by the Constitution and laws of the United States and of the State of Texas, do hereby appoint Horace Chilton, of Smith County, Texas, Senator in the Congress of the United States from the State of Texas, to fill the vacancy occasioned by the resignation of the Hon. John S. Reagan. This appointment to take effect the 10th day of June, A. D. 1891."

The certificate bears date April 25, 1891.

Mr. Chilton is in all other respects duly qualified to be a Senator from the State of Texas. The only question is whether the governor might lawfully make this appointment before the resignation of Mr. Reagan actually took effect.

The provision of the Constitution affecting the question is as follows:

"ART. I, Sec. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, * * * and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

A similar state of facts has arisen in a number of instances since the Constitution went into operation.

The term of Uriah Tracy, Senator from Connecticut, expired March 3, 1801; he was appointed by the governor of Connecticut February 20, 1801, "from the 3d of March next until the next meeting of the legislature of said State," the legislature of the State not being in session at the time of said appointment or thereafter until after said 4th of March. Exception being taken to his credentials, he was admitted to the seat by a vote of 13 yeas to 10 nays, and held the seat during the special session of the Senate, March 4 and 5.

Joseph Anderson, of Tennessee, was appointed by the executive February 6, 1809, to fill the vacancy which would result from the expiration of his term, March 3, 1809. He held the seat under these credentials during the special session of the Senate, March 4 to March 7, 1809.

John Williams, of Tennessee, was appointed by the executive to fill the vacancy which would result from the expiration of his own term, March 3, 1817. Under these credentials he held his seat from March 4 to 6, 1817.

John McPherson Berrien, of Georgia, resigned by letter dated Washington, May 28, 1852, addressed to the President *pro tempore*, and read in Senate same date. (Globe, first session Thirty-second Congress, p. 1493.)

Robert M Charlton, his successor, appeared June 11, 1852, with credentials signed by the governor of Georgia, and dated May 18, 1852, to take effect from and after May 31, 1852. He was sworn and took his seat without objection. (Senate Journal, first session. Thirty-second Congress, p. 468.)

March 4, 1825, James Lanman, of Connecticut, presented credentials showing an appointment made February 8, 1825, by the governor of the State to fill the vacancy about to result from the expiration of his term, March 3, 1825. Objection being made, Mr. Lanman was refused a seat a a vote of 23 to 13. There is no historical evidence from which we can determine on what ground the Senate rejected Mr. Lanman, whether it was on the ground that the governor could not fill a vacancy happening at the beginning of a term, or on the ground that the governor could not lawfully make the appointment in anticipation and before a vacancy occurred, and before he could possibly know whether the legislature might not be called together before that time. Judge Story (Const., sec. 727, n. 2) says:

"In the case of Mr. Lanman, a Senator from Connecticut, a question occurred whether the State executive could make an appointment in the recess of the State legislature in anticipation of the expiration of the term of office of an existing Senator. It was decided by the Senate that he could not make such an appointment. The facts were that Mr. Lanman's term as Senator expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of March. The governor of Connecticut, in the recess of the legislature (whose session would be in May), on the 9th of the preceding February appointed Mr. Lanman as Senator, to sit in the Senate after the 3d of March. The Senate by a vote of 23 to 18 decided that the appointment could not be constitutionally made until after the vacancy had actually occurred."

The following statement appears in the National Intelligencer of Tuesday, March 8, 1825:

"An important constitutional question was yesterday decided in the Senate by the refusal to admit Mr. Lanman to a seat in the Senate under a commission from the governor, granted before the expiration of Mr. Lanman's late term of service. This is the first time this question has been adjudicated under such circumstances as to form a precedent; and we presume it may now be considered a settled construction of the constitutional provision that a vacancy must have literally 'happened' or come to pass before an appointment can be made to fill it. The case has once been questioned and decided differently, but it was in strong party times, all the Federal members voting for the member's taking his seat and all the Democratic members

against it, under which circumstances the decision has not been much respected as a precedent. So far as it was a precedent it is now reversed."

Gorden's Digest of the Laws of the United States, 1827, appendix, note 1 B, states the ground of the decision in the same way, but manifestly bases the statement on the authority of the National Intelligencer.

On the other hand, Mr. Grundy, in his report from the Committee on the Judiciary in the case of Mr. Sevier, Senator from the State of Arkansas, who was appointed by the governor of Arkansas January 17, 1837, to fill the vacancy which would occur on the 3d of March following, by the expiration of Mr. Sevier's previous term, declared that the decision in the Lanman case was on the ground "that the legislature must provide for all vacancies, which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution." He distinguished Mr. Sevier's case from the Lanman case by the fact that the time that Mr. Sevier was to go out of office was decided by lot, he having been one of the Senators appointed by the State on its admission.

Niles's Register of Friday, March 12, states the question in regard to the Lanman case:

"The question was whether the failure by the legislature to make a choice of Senator constitutes the contingency in which the governor may appoint a Senator."

Mr. Benton, in his Thirty Years' View, states that the principal argument against the admission of Mr. Lanman was made by Mr. Tazewell, that argument being that the word "happen" in the Constitution could not apply to a foreseen event, bound to occur at a fixed period, and that therefore it was the right of the legislature only to fill a vacancy which was foreseen, regular, and certain, and that there was no right in the governor to supply that omission.

Mr. Lanman was not admitted to the seat. There is nothing in the contemporary record of the debates or in the resolution which enables us to determine whether the majority of the Senate based its action on the ground stated by Mr. Benton to have been maintained by Mr. Tazewell, or on the ground stated by Judge Story and by the National Intelligencer. The case, therefore, is not an authority on either side of the question. So that it is impossible to determine whether the Senate meant to overrule the Tracy case on one ground or the other.

On the other hand, an examination of the very numerous cases where the executives of States have made appointments when the legislature was not in session shows that in a great many of them the executive has postponed action, where the resignations were made to take effect at a future time or where the previous term had expired by its own limitation, until after the vacancy existed. In all probability this postponement was caused by a belief on the part of the executive that he had no authority to provide for filling a vacancy until it actually occurred, or at any rate, that the question was so far in doubt that it would be unsafe to make the appointment in anticipation.

So far, then, as the precedents are concerned, it appears that in three cases persons so appointed have been admitted to their seats without question; that Mr. Tracy was admitted and Mr. Lanman rejected, where the executive made the appointment in anticipation of a vacancy, there being a discussion in the Senate, but no satisfactory evidence of the grounds of the judgment; that in one case, that of Mr. Sevier, a person so appointed has been admitted, when the validity of the appointment was questioned, upon other grounds, without raising this question specifically; and that in modern times, the practice has been uniform for the State executive to delay appointment until the actual happening of the vacancy.

Under these circumstances, it seems to us that the Senate may now determine the question, unhampered by any precedents of its own.

We suppose that where the power is given to fill vacancies in public offices, it has been the uniform practice to permit resignations of such offices to be made, to take effect at a future day, and to hold that the appointing power is entitled to make the appointment in advance to fill the vacancy, to take effect when the resignation becomes operative, unless the language of the constitutional or statute provision under which the authority is exercised forbids such construction.

The Constitution of the United States, Article II, section 2, in providing for the appointing power, enacts:

"The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

We believe it has been the uniform practice of the Executive from the beginning to accept resignations which are to take effect in the future, and to make appointments, also to take effect in the future, to fill them. We suppose that a like practice also prevails in regard to the heads of Departments in the exercise of the appointing power conferred by law upon them. The language of the provision of the Constitution under consideration, that "if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof

may make temporary appointments until the next meeting of the legislature," seems to us to admit easily of a like construction. We do not suppose that it was the intention of the framers of the Constitution to establish different rules for these two cases.

The Senate has recently, after full consideration, determined that the constitutional provision that the Senate shall choose a president *pro tempore* in the absence of the Vice-President permits the choice of an officer in advance of the actual occurrence of the contingency referred to, who may take the chair whenever the Vice-President may be absent, until the Senate otherwise order. In all these cases, including that which we are now considering, the important consideration is that it must have been the purpose of the framers of the Constitution, as it is clearly for the public interest, that the office as far as possible should always be filled. This consideration applies with peculiar force to the office of Senator. We should be very unwilling to establish a construction of the Constitution which would make it certain that in no case of the resignation of a Senator, however necessary that resignation might be, there should be a succession without a considerable interval.

This would bear with peculiar hardship upon States remote from the seat of government, and might determine the policy of the country in great emergencies and in matters peculiarly affecting particular States, when such States were but partially represented, or possibly not represented at all. The tendency of the opinion of the Senate, as evidenced by its more recent decisions, has been more and more to lean to a construction which, as far as possible, secures that the seats in the Senate should be filled without any interruption in the representation of the State. Thus, in the case of Mr. Bell and Mr. Blair, Senators from the State of New Hampshire, it has been held that the executive might fill the vacancy occurring at the beginning of the constitutional term in consequence of the failure or the inability of the legislature to elect a Senator for that term, in compliance with the statute of 1866 (Revised Statutes, sections 14 and 19), in spite of very weighty and influential opinions to the contrary.

So it has been held and is now the settled construction, that if a vacancy occur during the recess of the Senate, and a person be regularly nominated to the Senate at its next session to fill it, and be rejected, and the Senate adjourn without the office being filled, the President is entitled to make a new appointment in the next vacation. So, if the officer died during the session, and his death be not known until after the adjournment, as is said by the Attorney-General Taney, in his able report (Opinions of Attorneys-General, Vol. 2, p. 523):

"It is admitted by everyone that the President may appoint in such cases, and the practice of the Government has continually conformed to that construction."

"It was the intention of the Constitution," Mr. Taney further says, "that the offices created by law and necessary to carry out the operations of the Government should always be full, or, at all events, that the vacancy should not be a protracted one." (See also, to the same effect, the opinion of William Wirt, 1 Op. Att'ys-Gen., 631.)

It has been suggested that if this construction be established it will be in the power of the governor of the State to provide by appointment for the filling of future vacancies long before they occur, and, therefore, the will of the people of the State, as it exists at or near the time of filling the vacancy, fail of being carried into effect. But the instances must necessarily be very rare indeed where the vacancy can be anticipated beforehand under circumstances which will create such temptation to the executive. Against that, as against many other evils which are possible under a popular government, as under other governments, the protection in general must be in the character and integrity of the persons clothed with high public office.

We, therefore, are of the opinion that Mr. Chilton was lawfully appointed by the executive of the State of Texas to the seat which he now holds, and recommend the adoption of the following resolution:

Resolved, That Mr. Horace Chilton, appointed by the executive of the State of Texas on the 25th day of April, 1891, to fill the vacancy occasioned by the sesignation of the Hon. John H. Reagan, which had previously been made, to take effect on the 10th day of June, 1891, is entitled to retain his seat.

WEDNESDAY, *January* 27, 1892.

On motion by Mr. Hoar,

The Senate proceeded to consider the report of the Committee on Privileges and Elections on the circumstances and validity of the appointment of Mr. Horace Chilton as a Senator from the State of Texas; and

The resolution reported by the committee was agreed to, as follows:

Resolved, That Mr. Horace Chilton, appointed by the executive of the State of Texas, on the 25th day of April, 1891, to fill the vacancy occasioned by the Resignation of the Hon. John H. Reagan, which had previously been made to take effect on the 10th day of June, 1891, is entitled to retain his seat.

[The debate will be found in Cong. Record, 1st sess. 52d Cong., p. 635, daily edition.]

[Special session of the Senate, March 4, 1893, and first session Fifty-third Congress.]

LEE MANTLE, *of Montana.*

The term of Wilbur S. Sanders, a Senator from the State of Montana, expired March 3, 1893. The legislature of said State, which was elected next preceding the expiration of the term of Mr. Sanders, adjourned March 3, 1893, after a full session, without electing a Senator. On the 4th day of March, 1893, John E. Richards, the governor of Montana, appointed Lee Mantle to fill the vacancy caused by the expiration of the term of Mr. Sanders. On the 9th day of March, 1893, the Senate of the United States having been convened in special session, the credentials of Mr. Mantle were presented and ordered to lie on the table, and were afterwards referred to the Committee on Privileges and Elections. March 27, 1893, the committee submitted a report, which was chiefly devoted to a discussion of the question of the right of the executive of a State to appoint a Senator to represent the State in the Congress of the United States at the expiration of the term of a Senator in case the legislature having authority to choose a successor to the Senator whose term so expires fails to do so. The conclusion of the committee was in favor of the right of the executive of the State to appoint under such circumstances. The report was accompanied by a resolution declaring Mr. Mantle entitled to be admitted to a seat as a Senator from the State of Montana.

From the views expressed in this report a minority of the committee dissented, affirming the view that where the legislature of a State has had an opportunity to elect a Senator and has failed to do so, it is not thereafter competent for the executive of the State to appoint a person to the United States Senate to fill the vacancy caused by the expiration of the term of a Senator. The views of the minority were also accompanied by a resolution that Mr. Mantle was not entitled to take his seat in the Senate as a Senator from the State of Montana.

The question raised by the report of the committee and the resolutions thus submitted was debated in the Senate at considerable length, and on the 28th day of August, 1893, it was decided by a vote of 32 to 29 that Mr. Mantle was not entitled to a seat in the Senate.

The history of the case here given consists of a statement of the proceedings in the Senate in relation thereto as published in the Congressional Record, the report of the Committee on Privileges and Elections, the views of the minority of the committee, a statement of the days on which the debate occurred with a reference to the record of the same, a portion of the remarks of Senators in such debate, the vote on the substitute for the resolution submitted by the committee, the record of the proceedings on the motion to reconsider such vote, and the proceedings on the final adoption of the substitute for the resolution submitted by the committee.

PROCEEDINGS IN THE SENATE.

THURSDAY, *March 9, 1893.*

Mr. Teller presented the credentials of Hon. Lee Mantle, who had been appointed a Senator from the State of Montana by the governor of that State. He asked that the credentials be read and lie on the table until the Committee on Privileges and Elections should be formed, and then be referred to that committee. The credentials were read as follows:

"Whereas a vacancy hath happened in the office of Senator in the Congress of the United States from the State of Montana by the expiration of the official term of Wilbur S. Saunders, which said vacancy happened at noon on the 4th day of March, 1893, which said date was during a recess of the legislature of said State, which said recess still continues and said vacancy still exists; and

"Whereas by section 3 of the Constitution of the United States it is provided as to Senators in the Congress of the United States 'if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature,' and the exigency therein contemplated hath occurred.

"Now, therefore, I, John E. Richards, governor of the State of Montana, by virtue of the power in me vested, have appointed and do hereby appoint Lee Mantle to be a Senator in the Congress of the United States from the State of Montana to fill such vacancy until the next meeting of the legislature of the State of Montana.

"In witness whereof I have hereunto set my hand and caused the seal of the State of Montana to be hereto affixed, at Helena, in said State, at 12.30 o'clock on the 4th day of March, in the year of our Lord 1893, and of the Independence of the United States of America the one hundred and seventeenth.

"[SEAL.] "J. E. RICHARDS, *Governor.*

"By the governor:

"L. ROTWITT, *Secretary of State.*"

After a brief discussion the credentials were ordered to lie on the table

(Cong. Rec., vol. 25, p. 5.)

MONDAY, *March 27, 1893.*

Mr. Hoar, from the Committee on Privileges and Elections, to whom was referred the credentials of Lee Mantle, claiming a seat in the Senate from the State of Montana, submitted a report with a resolution accompanying the same, which resolution he asked to have read. The resolution was read as follows:

"*Resolved*, That Lee Mantle is entitled to be admitted to a seat as a Senator from the State of Montana."

At the request of Mr. Vance and Mr. Hoar the report, with the accompanying resolution, was ordered to lie on the table to be printed with the views of the minority, when submitted. (Cong. Rec., vol. 25, pp. 32 and 33.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Vance (chairman), Gray, Pugh, Turpie, Palmer, Hoar, Mitchell of Oregon, Chandler, and Higgins.]

IN THE SENATE OF THE UNITED STATES.

MARCH 27, 1893.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report to accompany Senate resolution relative to admitting Lee Mantle, of Montana, to a seat as a Senator:

The Committee on Privileges and Elections, to whom were referred the credentials of Lee Mantle, claiming a seat in the Senate from the State of Montana, respectfully report:

The term of Mr. Sanders, Senator from Montana, ended March 3, 1893. The legislature of said State, who were, under Revised Statutes, sections 14, 15, entitled to elect his successor, had adjourned without an election. Thereupon the governor of Montana, on the 4th day of March, 1893, appointed Mr. Mantle to hold the office of Senator until the next meeting of the legislature.

We think said appointment valid.

The provisions of the Constitution under which the question arises are as follows (Art. I, sec. 3):

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

"Immediately after they shall have assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

In the construction of every contract the leading purpose which it was intended to accomplish is to be kept constantly in mind. This purpose is to be appealed to to supply all omissions, to reconcile all inconsistencies, to give a meaning to all ambiguities, and even, in clear cases, to compel a construction opposed sometimes to a clear meaning of particular words and phrases. Human language is imperfect and human intellects differ in respect to the meaning which they attach to language of ordinary clearness. Without this principle of construction it would be impossible for men to deal with each other with any security or to be held justly and reasonably to any obligation whatever.

This principle is of tenfold more importance in a construction of a constitution of government. Without it the grossest injustice and oppression must be wrought under the fundamental law of the State, to be followed inevitably in their turn by revolution, disorder, and anarchy. "Never forget," said Chief Justice Marshall in McCulloch *v.* Maryland, "that it is a constitution we are construing." What is the great and leading purpose which the provision now under consideration was designed to accomplish? It is that the Senate of the United States shall be full, always full. Each State was to be represented there by two Senators. No State was ever to be deprived of its equal vote in the Senate except by its own consent to a change in the Constitution itself. This consideration was held to be of infinitely more importance than the question whether the appointment should be made by the legislature or by the executive. Indeed, the latter plan had many advocates in the convention itself.

The executive is supposed to be the foremost citizen of the State. He at that time made all appointments of the States' officers, both judicial and administrative, except a few which the people reserved to themselves, and a still smaller number which were committed to the legislatures. It can not be doubted that if the question had been submitted to the men who framed the Constitution or to the people who adopted it of a choice between a vacancy in the Senate and an appointment for limited periods by the executive, the answer in favor of the latter arrangement would have been unanimous.

The equality of the State representation in the Senate, which can only be secured by keeping both seats full, is of first importance. But the presence of two Senators instead of one is a consideration of very great importance indeed. There are few members of that body whose party feeling would carry them so far as to induce them to prefer the absence of a colleague to the presence of one of opposite political faith. There are a thousand occasions when the power of consulting with an associate devoted to the interests of the same community and conversant with its wishes is of inestimable importance. The author of the Christian religion, when he sent forth his apostles to convert mankind, sent them two and two.

The possibility of vacancies by refusal or resignation of the office of Senator, as well as by the ordinary contingencies of human life, seemed much more important to our fathers than is does to us. There was not such eager desire for public office in their generation as is now unhappily prevalent. If you look over the list of early Senators you will be surprised at the number of resignations. If you read the biography of the men of that day, you will be surprised at the number of men to whom the opportunity of serving in this body was open who refused it. Massachusetts before the Revolution made provision by law for imposing a fine upon persons who declined to serve in the legislature.

Mr. Webster, in his great debate with Mr. Calhoun, considered very seriously and at some length the possibility that the States might refuse to continue their representation here. He appealed to the sense of duty of the members of the State governments and to the obligations resting upon their consciences from their oaths to support the Constitution of the United States. He says:

"The Constitution utters its behests in the name and by authority of the people, and it does not exact from States any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty and individual obligation. Sir, the States can not omit to appoint Senators and electors. It is not a matter resting in State discretion or State pleasure. The Constitution has taken better care of its own preservation. It lays its hand on individual conscience and individual duty. It incapacitates any man to sit in the legislature of a State who shall not have first taken his solemn oath to support the Constitution of the United States as they are to support their own State constitution. Nay, sir, they are as solemnly sworn to support it as we ourselves are, who are members of Congress.

"No member of a State legislature can refuse to proceed, at the proper time, to elect Senators to Congress, or to provide for the choice of electors of President and Vice-President any more than the members of this Senate can refuse, when the appointed day arrives, to meet the members of the other House to count the votes for those officers and ascertain who are chosen. In both cases the duty binds, and with equal strength, the conscience of the individual member, and it is imposed on all by an oath in the same words. Let it then never be said, sir, that it is a matter of discretion with the States whether they will continue the Government or break it up by refusing to appoint Senators and to elect electors. They have no discretion in the matter. The members of their legislatures can not avoid doing either, so often as the time arrives, without a direct violation of their duty and their oaths; such a violation as would break up any other government."

We therefore begin our inquiry with the primal and controlling mandate of the Constitution resting upon us, that this body should be kept full, and that the separate representation therein of each State is the most important and unchangeable single obligation which the instrument creates.

It is said that it can not have been the purpose of the Constitution that the seats in the Senate are to be kept full regardless of the authority by whom the appointment is to be made; and this is undoubtedly true. The Senators appointed to represent the sovereignty of a State were of course to be appointed by some authority that should itself duly and adequately represent that sovereignty. The executive power of the State clearly is such an authority. The executive of the State was, when the Constitution was framed, intrusted with the appointment of many important State officers, judicial and executive.

As has been said, many persons favored the plan of conferring the appointment of Senators wholly upon the State executives, who in those days, almost without excep-

tion, appointed the judicial and military officers of the State. It can not be doubted, as we have already said, that if the alternative had been directly submitted to the framers of the Constitution, of the continuance of a vacancy or that it should be filled by appointment by the State executive whenever and however it happened, they would, without hesitation, have preferred the latter. There can be no considerable reason given for supposing if a vacancy happen at the end of a term by death, resignation, or otherwise, that they desired it to be filled by the executive, the legislature not being in session, and that the same desire would not apply with equal force to a vacancy happening at the beginning of a term, the legislature not being in session, and having for any reason failed to make an appointment.

It is said that a failure by the legislature to elect a Senator is a refusal by the State to be represented. The answer to that is twofold:

First. That the Constitution of the United States did not mean to permit a State to refuse to be represented, and this constitutional purpose has been carried out as far as possible by the statute of 1866.

Second. The inability of the majority of a State legislature, where there is more than one candidate, to agree upon a Senator is by no means equivalent to a refusal of a State to elect one. The election, until the recent statute of 1866, was ordinarily made by two separate bodies, each counting one and each requiring a majority for its action. The majority in one branch might consider the election of a particular person or some one entertaining like political views most essential to the public welfare, while a majority in the other branch might as conscientiously hold to the belief that the election of such a person or one of like opinions would be a great public disaster. Both bodies might be equally eager to elect, but in the case supposed an agreement becomes a moral impossibility. The same condition of things may frequently take place, and has frequently taken place since the method of electing by joint ballot was established in States where there are more than two political parties, every one of them zealously holding to its own political opinions. The only solution of this difficulty is the power to appoint by the executive.

We set out, then, in the argument with the clear, unquestionable purpose of the Constitution to keep the Senate full, and the fact that every other purpose of the Constitution relating to such matters is accomplished by holding that the power in question resides in the governor.

It is next to be observed that the language of the Constitution is quite as well suited to confer the power upon the governor of appointing to a vacancy occurring at the beginning of a term, or to a vacancy which began to exist when a legislature was actually in session and continued after the adjournment of the legislature, as any language likely to be used. The language of the Constitution is: "If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." Now an ordinary and well-established meaning of the word "happen" is "take place," "occur," "come to pass." It is frequently applied, according to the best usage, to things into which the element of accident or uncertainty does not in the least enter. The definition of the Century Dictionary, edited by one of our most accomplished philologists, Professor Whitney, is as follows: "To occur by chance; occur unexpectedly or unaccountably; *in general, to occur; take place.*" The definition of the Imperial Dictionary is as follows: "To chance; to be or to be brought about unexpectedly or by chance; *to take place; to occur;* as, I *happened* to be there; this *happens* often."

"There shall no evil happen to the just." Proverbs xii, 31.

Johnson's: "To fall out; to chance; *to come to pass.*" "Bring forth your strong reasons * * * and shew us what shall *happen.*" Isaiah xli, 21, 22.

"Say not I have sinned, and what harm hath *happened* unto me?" Eccles. v, 4.

Starmouth: "To come by chance; to fall out; to befall; to light upon; *to occur.*"

Webster: 1. "To come by chance; to come without previous expectation; to fall out." 2. "To take place; to occur." "They talked together of these things which had *happened.*" Luke xxiv, 14.

Worcester: 1. "To fall out; to chance; to come to pass; to take place; to befall; to betide; *to occur.*" "Shew us what shall happen." Isaiah xli, 22.

There are plenty of familiar instances of this use of the word "happen"—if the Fourth of July happen on Sunday, if it happen to be high tide—so that, as it seems to us, the words of the Constitution convey to an ordinary apprehension the simple meaning *if there be* a vacancy, by resignation or otherwise, the executive may make temporary appointments, etc.

It is noticeable that the word "vacancies" is in the plural. "The seats shall be vacated," etc. "If vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive may make temporary appointments"—not a single appointment—"until the next meeting of the legislature, which shall then

fill such vacancies." The language of the Constitution, it seems to us, was carefully designed to apply to the case, not of a single vacancy, which might occur only in a single recess of the legislature, but to every case where a legislature having adjourned without action a second or third vacancy should occur which, under the language of the Constitution, may be provided for by temporary *appointments*.

Is it not the very subtlety of refinement, when the Constitution declares that seats shall be "vacated" in two, four, and six years and that vacancies shall be filled by executive appointment until the legislature meets, to hold that the words "vacate" and "vacancies" have a totally different meaning?

We have, then, a constitutional purpose which can only be completely effected by the construction which we contend should be given. We have also language in the Constitution adapted, without any forced or strained construction, to effect or accomplish that purpose.

We find next that where the same language is used in other places in the Constitution the settled construction is that upon which we now insist. Section 2, in providing for the House of Representatives, declares that: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." Is there any question, when under the old rule it required elections by the people to be by majorities, and there was a failure to choose a Representative by reason that there were three candidates, neither of which had a majority over the other two, that it was the duty and prerogative of the executive authority of the State, under this clause of the Constitution, to issue a writ of election to fill the vacancy?

Article 2, section 2, of the Constitution, in providing for the appointment of executive officers, declares: "The President shall have the power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

It is well settled, in accordance with the opinion of Attorneys-General Wirt, Taney, Legare, Mason, Cushing, Bates, Stanberry, Evarts, and Devens, that where an office becomes vacant during the session of the Senate, and the Senate adjourns before it has been filled, that a vacancy happens *during the recess* of the Senate, within the meaning of this clause of the Constitution; and that the President's power to fill the vacancy comes into life.

Upon this construction of the Constitution the late Mr. Justice David Davis received a commission and sat upon the bench of the Supreme Court of the United States by virtue thereof.

Mr. Attorney-General Taney, in his opinion, cites the opinion of President John Quincy Adams to the same effect as his own. Indeed, all the opinions of the Attorneys-General before referred to were acted upon by the Presidents of the United States to whose administration they belonged, constituting together a vast weight of constitutional authority. All these opinions are cited in a very able discussion of this question by Attorney-General Devens. (Opins. Attys. Gen., vol. 16, p. 522.)

In the case of the State ex rel. Yancey *v.* Hyde (121 Ind., 20), the act of the general assembly of Indiana having created an office to be filled by a director elected by the legislature, it was held, Berkshire, J., giving the opinion, that so much of the act as provided for the appointment of the officer by the legislature was unconstitutional and void, the appointment to office not being a legislative function—the Constitution vesting the appointing power in the executive.

Second. That the appointment of such officer by the legislature being void, there was a vacancy in the office at the beginning of the term, which the governor was competent to fill, under the powers given him by the Constitution to fill vacancies in public offices.

The following is the provision of the constitution of Indiana above referred to, section 18, Article V:

"When, during the recess of the general assembly, a vacancy shall happen in any office the appointment to which is vested in the general assembly or when at any time a vacancy shall have occurred in any other State office or in the office of judge of any court, the governor shall fill such vacancy by appointment."

It will be seen that that case deals with precisely the same question which arises here.

In the case of the State *v.* Gorby (122 Ind., 17), it was held as follows:

"Where an office is created by law, to be filled immediately, no legitimate mode being provided for filling the same, it is vacant on the taking effect of the law, and the governor may fill such vacancy by appointment. So, the legislature having created the office of director of the department of geology, an administrative State office, but having no power to fill it, the office was vacant and the governor had the right to fill the vacancy until a general election by the people."

We have, then, first, a clear and controlling constitutional purpose that every State shall be at all times represented in the Senate by two Senators.

Second. A declaration by the Constitution that that purpose is to be accomplished by the authority of the executive of the State when the legislature has failed to elect a Senator.

Third. The use of language in the Constitution which, according to good and established usage, is sufficient in its ordinary meaning to confer this power on the executive in the case of a vacancy existing for any cause whatever, and at any time whatever while the legislature is not sitting, whether contingent or otherwise.

Fourth. Where like phraseology is used in the Constitution in regard to other offices it has been uniformly held to have the meaning we attribute to it here.

Fifth. The construction given by the very able supreme court of Indiana to language substantially identical.

Sixth. The Senate has for many years past invariably recognized the controlling obligation of this purpose of the Constitution, even where the language is doubtful or where a literal construction would lead to another result.

(*a*) Where the Constitution says, "If vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies," it is held that a Senator so appointed by the executive may sit until the legislature elects a successor or adjourns without such election, in order *that the Senate may be full.* (See the case of Mr. Winthrop; Taft, Senate Election Cases, 10.)

(*b*) Where the Constitution says, "That if vacancies happen, etc.," it is held that the executive may appoint in advance of such vacancy, *that the Senate may be full.* (Case of Mr. Chisholm, Fifty-second Congress; case of Mr. Pasco, Fifty-third Congress.)

(*c*) Where the Constitution says, "If vacancies happen, etc.," this is held to cover the case of a vacancy by expiration of a term certain and to permit the executive to appoint for the beginning of the following term in case the legislature has not elected, *that the Senate may be full.* (Case of Mr. Bell; Taft, Senate Election Cases, 26; case of Mr. Blair, *ib.*, 36; case of Mr. Marston.)

(*d*) Where the Constitution says that "the Senate shall choose * * * a President *pro tempore* in the absence of the Vice-President," it has been held that the Senate may elect such officer in advance of such absence, *that the office may be full.* (Election of Mr. Ingalls; election of Mr. Manderson; election of Mr. Harris, March, 1893.)

(*e*) Where the Constitution says, speaking of the appointment of civil officers, "The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session," it is held that if a vacancy happen when the Senate is in session and continue after its adjournment, the President may fill up such vacancy, *that the office may be full.*

(*f*) Where the Constitution says, "When vacancies happen in the representation from any State, the executive thereof shall issue writs of election to fill such vacancies," it is held that if there should be a vacancy at the beginning of a Representative's term, by failure to elect under the majority rule, or by death, or refusal to serve, or otherwise, the executive of the State may issue such writ of election, *that the office may be full.*

It has, moreover, been expressly held by the Senate, in the case of Mr. Sevier, of Arkansas—determined in 1837—that where the legislature of Arkansas, being in session when Mr. Sevier's term ended, adjourned without electing his successor, the governor could appoint. The only distinction between that case and the present one is that Mr. Sevier, being a Senator elected by the State upon its admission, drew by lot a term which expired during the session of the legislature and the legislature adjourned before the expiration of his term had come to its knowledge.

The case of Lanman, Taft, Senate Election Cases, page 5, has been distinctly overruled by the Senate, either by the Bell case and those which followed it, or the cases of Chisholm and Pasco above cited.

It is shown by an unbroken line of decisions, with one possible but doubtful exception, that the Senate has maintained the authority of the executive to appoint to a vacancy which occurs at the beginning of a Senatorial term by reason of the failure to elect. We do not think it necessary to insist upon the importance of an adherence by this high court to precedents in judicial matters such as the title to its seats. Unless the Senate, when acting judicially, adhere to its precedents, the rights of the States must depend upon the changing political majorities in this Chamber. It seems quite as important that the construction given by the Senate to the Constitution in proceedings of a judicial nature should be inflexibly adhered to, except in cases of clear error, in spite of the grave and serious temptation which must beset this tribunal beyond all others to depart from them in times of high political excite-

ment. To do justice and declare the law and the fact, without respect of persons or parties, will be the peculiar glory of a tribunal which itself consists of parties deeply interested in the determination. We therefore recommend the adoption of the following resolution:

Resolved, That Lee Mantle is entitled to be admitted to a seat as a Senator from the State of Montana.

Appendix A.

The question has frequently arisen for judgment in the Senate. By a line of decisions unbroken, with one possible exception, it has been held that the governor of a State is authorized to fill a vacancy existing at the beginning of a Senatorial term.

April 27, 1797, William Cocke was appointed a Senator from the State of Tennessee by the governor, his term having expired on the 3d of the preceding month. On the 15th of May, 1797, he presented his credentials, and was admitted to take the oath of office without objection or debate.

March 3, 1801, the seat of Uriah Tracy, of Connecticut, became vacant by the expiration of his term of office. On the 20th of February, 1801, the governor of Connecticut reappointed him a Senator. Objection being raised to his credentials, he was admitted to the oath by a vote of yeas 13, nays 10.

William Hindman, of Maryland, was afterwards, on the next day, admitted to the oath on like credentials, without objection.

John Condit, of New Jersey, November 14, 1803, appointed a Senator from New Jersey to fill the vacancy at the beginning of the term, was admitted to take the oath. Mr. Condit's credentials had been presented October 17, previous.

March 4, 1809, Samuel Smith, of Maryland, appointed on that day by the governor of his State to fill the vacancy caused by the expiration of his own term, was admitted to his seat and sworn.

March 4, 1809, Joseph Anderson, of Tennessee, took his seat by virtue of an appointment from the governor of that State.

May 24, 1813, Charles Cutts, of New Hampshire, appointed by the executive to fill the vacancy during the recess of the legislature, was, without question, admitted to take the oath. This vacancy was at the beginning of the term.

March 4, 1817, John Williams, of Tennessee, appointed a Senator by the executive of the State, to hold said appointment until the meeting of the next session of the legislature, was admitted. His credentials were filed on the 10th of the preceding February.

March 24, 1825, James Lanman, of Connecticut, presented his credentials of his appointment by the governor of that State, "to take effect immediately after the 3d of March, 1825, and to hold the seat until the next meeting of the legislature." Mr. Lanman was refused the seat by a vote of 23 to 13. The case was referred to a select committee, who report the facts, but state neither reason nor conclusion. The committee say they have looked into the journals of the Senate, and that the cases of Cocke, Tracy, Anderson, and Williams are the only analogous cases they could find. There is a brief sketch of the debate in Niles's Register, volume 28, page 32, but no statement of the reason on which any Senator proceeded. There is no historical evidence from which we can determine whether the Senate rejected Mr. Lanman on the ground that the governor could not fill a vacancy happening at the beginning of the term, or on the ground that the governor could not lawfully make the appointment in anticipation, before the vacancy occurred, and before he could possibly know whether the legislature might be called together before that time. All the precedents which the committee cite, except that of Mr. Cocke, were cases where the appointment was made not when the vacancy happened in the recess of the legislature, but only when the governor thought it might happen. In the case of Cocke the date of the appointment is not given in the journals, although, in fact, it was after the vacancy. The committee do not cite the case of Hindman, Smith, or Condit, nor the then recent case of Cutts, in deciding which some Senators then in office took part, where the appointments were made after the vacancy existed. There is, therefore, nothing to show whether the Senate meant to overrule all the precedents, some of which were not brought to its attention, or only so many of them as recognized the right of the executive to appoint when a vacancy had not happened.

Judge Story (Constitution, sec. 727, note 2) says: "In the case of Mr. Lanman, a Senator from Connecticut, a question occurred whether the State executive could make an appointment in the recess of the State legislature in anticipation of the expiration of the term of office of an existing Senator. It was decided by the Senate that he could not make such an appointment. The facts were that Mr. Lanman's term of service as Senator expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of March. The governor of Connecticut, in

the recess of the legislature (whose session would be in May), on the 9th of the preceding February appointed Mr. Lanman as Senator, to sit in the Senate after the 3d of March. The Senate, by a vote of 23 to 18, decided that the appointment could not be constitutionally made until after the vacancy had actually occurred." (See Gordon's Digest of the Laws of the United States, 1827; Appendix, note 1, B.)

In regard to the same case, the National Intelligencer of March 8, 1825, says in an editorial note:

"An important constitutional question was yesterday decided in the Senate by the refusal to admit Mr. Lanman to a seat in the Senate under a commission from the governor granted before the expiration of Mr. Lanman's late term of service. This is the first time the question has been adjudicated under such circumstances as to form a precedent; and we presume it may now be considered as a settled construction of the constitutional provision that a vacancy must have literally 'happened,' or come to pass, before an appointment can be made to fill it."

The State of Arkansas was admitted to the Union in 1836. In October, 1836, the legislature of that state elected Ambrose H. Sevier and William S. Fulton Senators. On the allotment of the Arkansas Senators to their respective classes, as required by the third section of the first article of the Constitution, Mr. Sevier was placed in the class of Senators whose term of service expired on the 3d of March, 1837. The legislature of Arkansas had no opportunity to fill the vacancy, and were not in session after the result of the allotment was known in that State. January 17, 1837, the governor of Arkansas appointed Mr. Sevier to fill the vacancy which would take place on the 3d of March. When Mr. Sevier's credentials were presented at the winter session, Mr. Webster suggested a doubt of the validity of the appointment, in which Mr. Sevier himself concurred. At the March session the credentials were referred to the Committee on the Judiciary. Mr. Grundy, from that committee, reported in favor of Mr. Sevier's admission, and he was admitted.

Mr. Grundy's report states that it is not intended by the committee to call in question the correctness of the decison in the Lanman case; that that case proceeded on the ground "that the legislature should provide for all vacancies which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution."

The report further says: "The case now under consideration is wholly different in principle. The time when Mr. Seiver was to go out of office was decided by lot."

From this review of the judgments of the Senate it appears that in every case in which a Senator has been appointed by the executive after the happening of a vacancy by the expiration of a term without an election of a successor by the legislature the person so appointed has been admitted to his seat. There is no indication that the Senate ever denied or doubted the correctness of this construction of the Constitution, except the unsupported statement of Mr. Grundy of the ground of a decision made twelve years before, a statement which nothing in the journal of the debates confirms, and which is opposed to the understanding of Judge Story and the contemporaneous article in the Intelligencer.

The second section of the first article of the Constitution provides: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." In 1837 the law of Mississippi fixed the time for the election of Representatives in November. The President having called a special session of Congress to meet in September, the governor of Mississippi, on the 13th of June, issued writs for an election in July for two Representatives to Congress to fill said vacancy until superseded by the members to be elected at the next regular election in November.

At this July election Messrs. Gholson and Clairborne were elected and claimed the seats. Their claim was referred to a committee, of which Andrew Buchanan was chairman, who reported in favor of their right to seats for the full term. They say in their report:

"The Constitution authorizes the executive power of the States respectively to order the filling of all vacancies which have actually happened, in the mode therein pointed out, no matter how the vacancy may have happened, whether by death, resignation, or expiration of the term of members previous to the election of their successors."

In the debate, John Quincy Adams said he believed, in relation to offices, that every one happens to be vacant which is not full, and that, he believed, was the meaning and sense of the Constitution, whether the vacancy occurred from casualty, the regular course of events, expiration of term, or other cause.

The claimants were admitted to their seats. In November following Messrs. Prentiss and Wood were elected for the same term. At the next December session the resolution declaring Gholson and Clairborne elected was rescinded, but a resolution

was also adopted by the casting vote of Speaker James K. Polk, that Prentiss and Wood were not members. So that no inference can properly be drawn from that case, and it is of no value, except so far as weight may be attached to the opinions of John Quincy Adams and James K. Polk, both favoring the construction of the Constitution for which we contend.

Appended to the report in the Mississippi case are opinions of two of the most distinguished Attorneys-General of the United States, Roger B. Taney and William Wirt, in which they discuss the meaning of the phrase "vacancies that may happen during the recess" with reference to the power of the President to fill an office which is vacant in the recess, because the Senate adjourned without acting on a nomination, the original vacancy having happened during the session. Both these eminent jurists agree that the term "happen" is equivalent to "happen to exist," "if it come to pass that there be a vacancy." Mr. Taney says: "The Constitution was formed for practical purposes, and a construction that defeats the very object of the grant of power can not be a true one. It was the intention of the Constitution that the offices created by law should always be full."

We submit, therefore, that the natural and ordinary meaning of the language employed, the purpose which the framers of the Constitution meant to accomplish, the unbroken current of decisions in like cases, and the uniform construction given to the same language when used elsewhere in the Constitution and in legislation in like cases, concur in supporting the interpretation which establishes Mr. Bell's claim. The office of Senator is a continuous office. When the Senator is duly elected by the legislature beforehand no vacancy exists within the meaning of the Constitution. His taking the oath of office relates back to the beginning of the term and preserves the continuousness of the succession. He is when on his way to take the oath deemed to be a Senator and privileged from arrest. A vacancy happens, and only happens, when the legislature has failed to make due election or the person chosen declines the appointment or when the office once filled is vacated by death, resignation, or otherwise.

But if we adopt the narrowest possible construction imputed by Mr. Grundy in the Sevier report, the decision in the case of Lanman, the doctrine of the Sevier decision itself, is enough for the purpose of this case. If the failure of the Arkansas legislature to be in session after the expiration of Mr. Sevier's term was decided by lot made the vacancy contingent in the narrowest sense of that term, so that the governor could appoint, certainly the fact that there is no legislature in the State able to act constitutes such a contingency. Whether it so happens that the person once chosen is unable to remain in office, or it so happens that the legislature can not meet and choose, the contingency of a vacancy in the office has occurred. The six months at the end of the term are no more important than six months at its beginning. The Constitution makes equally careful provision for either.

VIEWS OF THE MINORITY.

The undersigned, a minority of the Committee on Privileges and Elections, not being able to agree with the opinion of the majority, beg leave to set forth their reasons for their disagreement, as follows:

Fortunately, there is no disagreement as to the facts in the case of Mr. Mantle, appointed a Senator by the governor of the State of Montana. The legislature of that State failed to elect, after a full session, a successor to the Hon. W. F. Sanders, whose term expired March 4, 1893. The session of the legislature of that State expired on the 3d of March and it adjourned sine die. The credentials of Mr. Mantle are dated March 4, and certify to his appointment to fill the vacancy which resulted from the expiration of the term of Mr. Sanders.

Substantially the same facts, with the change of names snd dates, attend the appearing here as Senator of the Hon. A. C. Beckwith, of Wyoming, and, with the exception of a single circumstance, the same facts appear in the case of the Hon. John B. Allen, of Washington, who was appointed his own successor by the governor of that State under date of the 10th day of March, 1893. The fact that distinguishes this case from the other two is that the legislature of Washington was in session on the 4th of March, when Mr. Allen's term expired, and remained in session until the 9th of the same month, when it adjoured sine die, without having elected his successor. Unless, therefore, this circumstance should make a difference in the law of the case, they may all three be considered under one head.

The question in each case is, could the governor of the State appoint a Senator at the beginning of a new term, the legislature being in session and refusing or failing to elect? The Constitution of the United States pertaining to this subject, Article I, section 3, provides:

"The Senate of the United States shall be composed of two Senators from each

State chosen by the legislature thereof, for six years; and each Senator shall have one vote.

"Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

In connection therewith and supplementary thereto, may be quoted the provisions of the act of 1866, which we conceive necessary to be considered in the same examination.

This act of Congress makes clear and gives constuction to two points not entirely clear by the express terms of the Constitution, namely, it provides what particular legislature shall elect a successor to one whose term is about to expire; and, secondly, it provides that a legislature in session, when a vacancy occurs, shall fill that vacancy. And this construction of the Constitution has been universally followed ever since.

Its provisions are as follows:

Section 14 of that act says:

"The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress, etc."

Section 16 of the same act provides that—

"Whenever on the meeting of the legislature of any State a vacancy shall exist in the representation of said State in the Senate, the legislature shall proceed on the second Tuesday after meeting and organization to fill such vacancy in the manner described in the preceding section for the election of a Senator for a full term."

We submit that according to the ordinary acceptation of this language, and by all the well-established rules of construction as laid down by the courts, its plain and obvious meaning can not be mistaken and must be obeyed. There are only two ways by which a citizen can be constituted a Senator of the United States. One, and the primary one, is by the election of the legislatures of the several States—no one doubts that.

The original terms of the Senators of any State must begin by being chosen by the legislature. The other way of becoming a Senator is by appointment of the executive to fill a vacancy which has happened by resignation or otherwise during a recess of the legislature, and which appointments it is provided may be made until the said legislature shall next assemble. These two methods of constituting a Senator were well described by Mr. Pettit in his report on the Phelphs case, as primary and contingent; and as there were two ways of constituting Senators, so there were, obviously, but two ways of creating vacancies; one, the primary way, by the expiration of the constitutional term for which the Senator was elected, the other the accidental, or unforeseen, or unexpected "happening" of some casualty to or upon the incumbent, such as death before his term ended, resignation, expulsion, disqualification, or any other cause that should take him out of the office to which he was elected.

Now, the Constitution having made specific and express provision for filling the original term of each Senator by the legislature, there remained nothing else to provide for except those accidental interruptions of a term which should "happen" to create a vacancy. The manner of this happening and the kind of vacancy or of the cause which might create such a vacancy is signified by the example given, as by "resignation or otherwise." The rule of legal interpretation undoubtedly is that where specific words are used, followed by more general words, the general words are qualified by the specific words. It is thus stated by Willis, justice, in Fenwick *v.* Schmaltz (L. R. 3, C. P. 315, cited in Endlich, p. 568):

"A general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there is something to show that a wider sense was intended."

Also see the language of Lord Cairns in Ashbury Company *v.* Rich (L. R. 7, H. L. 653, cited by Sutherland, p. 352). The memorandum of the company said that it was formed for the purpose, among others, of carrying on the business of mechanical engineers and general contractors. A question arising, what was the scope of the concluding words, "general contractors," Lord Cairns said:

"Upon all ordinary principles of construction, those words must be referred to the part of the sentence which immediately precedes them; therefore the term 'general

contractors' would be referred to that which goes immediately before, and would indicate the making, generally, of contracts connected with the business of mechanical engineers. If these words were not to be interpreted as I have suggested, the consequence would be that they would stand absolutely without any limit of any kind."

In the Countess of Rothes *v.* Krikaldy Water Works Commissioners (L. R. 7 App., Cass, 706), the doctrine was announced that "when a specific enumeration concludes with a general term, it is held to be limited to things of the same kind. It is restricted to the same genus as the things enumerated." (See Sutherland Statutory Construction, *passim;* Endlich on the Interpretation of Statutes, *passim*, and the cases there cited.) The books are full of them. There is no learning more familiar. To the same effect is the case of Ham *v.* The State of Missouri, in 18 Howard, page 126. The plaintiff in error was indicted for a trespass on land belonging to the State of Missouri, which had been granted in 1820 to that State for school purposes, being every sixteenth section of certain boundaries of land. Ham pleaded that by another act in 1811 the Congress of the United States had reserved and set apart from entry and sale certain lands against which there were outstanding claims until said claims had been settled. The terms of the grant to the State of Missouri were of every sixteenth section, "unless the same had been sold or otherwise disposed of." Ham's counsel argued that this reservation from public entry and sale was equivalent to having been "otherwise disposed of," but the court held to the contrary, in the following language:

"The language and plain import of the sixth section of the act of the 3d of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposion, final and irrevocable, of the land. The phrase, 'or otherwise disposed of,' must signify some disposition of the property equally efficient and equally incompatible with any right of the State, present or potential, as deducible from the act of 1820 and the ordinance of the same."

Here is an unequivocal avowal by the highest court in the United States of the existence of the rule, that the general term must be restricted and governed by the particular term, the particular term here being "sale." The court declared that the disposition "otherwise" must be equivalent and equally efficient in all its legal effects to a sale.

The case of the Thames Insurance Company *v.* Hamilton was an action upon a policy providing for insurance against all the perils of the sea, and of "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof." The damage alleged was to a donkey engine, which was used in pumping water into the main boiler, and which burst, owing to a valve being closed which ought to have been open.

In the course of the judgment Chancellor Hallsbury said:

"If understood in their widest sense the words are wide enough to include the injury; but two rules, now fairly established as a part of our law, may be considered as limitlng these words. One is that words, however general, may be limited with reference to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them. (See Sutherland on Statutory Construction, p. 357.)"

It is not necessary to give more illustrations from the authorities in regard to this rule. Now, apply it to the clause of the Constitution in question.

The method of choosing Senators for a full term had already been provided for by the preceding clause of the section; there remained no other necessity of providing for the filling of Senators' seats except in case of an accidental happening, and this is provided for by the words, "if vacancies shall happen by resignation or otherwise during the recess of the legislature," etc. Plainly and unmistakably the manner in which such vacancies were to happen are exemplified by the word "resignation," and the addition of the general words, "or otherwise," referred only to the unenumerated methods of a similar kind, by which such accidental vacancy might occur. If we apply the ordinary rules of construction there is no escape from this; but, if, as contended, the word "otherwise" embraces any possible vacancy, then it would be without any limitation or qualification whatever, and the word "resignation" would be eliminated and destroyed. It may be added also, without irreverence, that our respect for the learning and common sense of the framers of our Constitution would be likewise destroyed. If they had intended to provide that the governors should fill every vacancy that could possibly happen during the recess of the legislature, then they would have said so, as they did in the case of a similar provision for filling vacancies in the House which happen in the representation of any State, as provided in the fourth clause of section 2.

But it is said that the word "happen" does not necessarily refer to a casualty or an unexpected event; that in our language we make use of that word indifferently for "occur" "or come to pass." It is respectfully submitted that this is not true. An event that is provided for by law to take place at stated periods known to all men is not correctly spoken of by people of ordinary education as "happening," because there is no element of uncertainty in it. The examples given of statutes providing for certain things to be done on a certain day of a month "if it happen not on a Sunday," etc., will not bear out the assertion. It is true that it *might* be known to all men who are astronomers, and would sit down and make calculations that a certain date in a certain year would fall on Sunday; but the great masses of mankind do not think of it in that way. They speak as though the thing were absolutely uncertain. But we do not say, for instance, that any natural event, which all men know and look for, did "happen" to come at the time on which it was expected; we do not say that the sun "happened" to rise on a certain day; we do not say that water "happens" to flow down a descent by the force of gravity. That is a known law of nature. We do not say that Christmas "happens" to come on the 25th of December—by the universal consent of Christendom that event comes on that day without peradventure. We do not say that a note "happens" to fall due on the day which is specified in the instrument, though it no doubt is often said that it "happened" to fall due when the maker did not have the money to pay it.

We do not say that Congress happened to meet on the first Monday in December—that is the law. We do not say that a Senator's term in this body happened to expire on the 3d day of March, for that is the law written in the Constitution. We do say, per contra, that Senator A. B. "happened" to die before his term had expired; we do say that Senator C. D. "happened" to resign before his term had expired; we do say that Senator E. F. "happened" to become disqualified by accepting an incompatible office or to be expelled before his term had expired, and so on. In the common acceptation of mankind these phrases are used and understood without controversy. So obvious is their meaning that those who contend for the power of the governor to appoint for any vacancy whatever occurring in the recess of the legislature of a State, are compelled to resort to the argument *ab inconvienenti*. They say that the paramount purpose of the Constitution is to keep the Senate full, and they dwell upon the importance of the constitutional provision that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

If they mean by this that the purpose of the Constitution is to keep the Senate full by any and all means whatsoever, the statement is not correct. That the Constitution expresses a strong or controlling purpose to keep the representation of each State full in the Senate is manifested by its specific provisions for filling regular terms both at the beginning and as they legally expire, and by providing for any accidental or unforeseen casualties by which seats thus filled might become vacant otherwise than by legal expiration of terms. Further than this no man can say that the Constitution makers intended to go. It can not for a moment be supposed that they contemplated or intended to provide for a case where either the legislature or the governor of a State should wantonly or with any other motive or for any reason either refuse or fail to perform their duty in the creation of Senators. This would have been to express a doubt and want of faith in the perpetuity of the structure which they were building. On the contrary, it is just and reasonable to suppose that, having invested each State with certain specific rights as to representation in this body, and imposed upon them the duty of exercising these rights in a certain specified way, patriotism and self-interest would combine to secure the enjoyment of these rights more effectually than any provision which they could possibly insert in the Constitution.

The paramount purpose of the Constitution, if there be such a thing expressed in any one particular paragraph, we should say, was to keep the Senate full of Senators legally placed there according to the terms of this instrument; to establish a government in accordance with the provisions it lays down. It is illogical in the extreme to contend that the method of supplying a casual vacancy in the Senate contains the controlling purpose of the Constitution. If the frequency and emphasis of the words are considered, much stronger would be the argument that the election of Senators by the legislatures of the States is the controlling purpose. Look at the language: "The Senate of the United States *shall* be composed of two Senators from each State, *chosen* by the legislature thereof"—not appointed by governors or anyone else—"immediately after they shall be assembled in consequence of the first *election*"—not first appointment—"after dividing them into three" classes—the language is—"so that one-third may be chosen"—not appointed—"every two years. And if vacancies happen by resignation, etc., the executive *may* make temporary appointment until the next meeting of the legislature, which *shall* then fill such vacancies."

The power of the executive is, "may make temporary appointments," while the

injunction to the legislature is "shall be chosen"—the one is mandatory and the other is permissive; and yet they say the permissive power controls and is paramount to the mandatory power of the legislature to elect. This language clearly is only intended to give State executives a right to keep the Senate full by appointments, and nothing more.

Again, the next clause says, "that the Senator shall be an inhabitant of that State for which he shall be chosen"—not appointed. In section 4, it is provided again,

"The times and places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

In every mention in the Constitution of the creation of Senators, but one, an election is contemplated.

Nor is the argument that no State without its consent shall be deprived of its suffrage in the Senate of any greater force. It almost excites a smile to suggest the idea that a State is deprived by the action of Congress, in any possible way, of her equal suffrage in the Senate if her legislature refuses to elect a Senator and send him here, or if the governor, in the case of a failure of the legislature to elect, shall refuse to appoint a Senator and send him here. Both of these things have happened, and nine States at different times have been for one or more years with but one Senator in these Halls, and no harm happened to State or nation. If a man refuses to go to the ballot box and vote it can hardly be said with any show of propriety that he is "deprived" of his suffrage. He deprives himself. Much is said of the danger and inconvenience arising from the fact that a State would have but one Senator for a short period in this body. It is the opinion of the undersigned, deliberately and solemnly given, that the danger arising in such a manner is not for a moment to be compared with the danger which comes from any departure from the Constitution of the country, in any form, or upon any pretext whatsoever. We know too well that every one of these becomes the basis for a new and wider departure and a justification for any and all violations of the organic law.

We can not but regard as monstrous the doctrine that, while in construing a simple instrument between individuals concerning property, you must give effect to every word, if possible, and make general terms to be limited and controlled by specific words, yet, in construing this great contract, this fundamental law, upon the observance of which shall depend the perpetuity of a great nation, such construction may be given as shall defy all the canons of the courts and destroy specific words of plain and obvious meaning. No stab more vital could be inflicted upon the very existence of the American Union. Nor can we tolerate the idea that we are in any case at liberty to compel a construction of the Constitution in a manner opposed to a clear meaning of particular words and phrases. It is fraught with the elements of tyranny and of destruction to the Government established by that Constitution, and can be justified by no supposed necessity whatever.

The spectacle here presented of three States, at the same time, and in the same manner, and by the same or similar combinations, refusing to perform their constitutional duty of electing Senators to this body, for the purpose of throwing the appointment into the hands of the executive under the vicious precedents which have lately been established, is little short of a scandal upon constitutional government. It enables us to see with what ease a few ambitious and aspiring men in every legislature, by a combination with the executive, can defeat the will of the people and the plain purpose of the Constitution.

In the case of Mr. Allen the vacancy existed while the legislature was in session. In the case of the others, Mr. Mantle and Mr. Beckwith, the legislatures of their States adjourned the day before the vacancies occurred, despite their sworn duty, both under the Constitution and the act of 1866, to provide for filling those vacancies during their sessions.

If legislatures can thus be permitted to tamper with the Constitution and laws of their country and be rewarded with success and impunity, we respectfully submit that a great blow has been inflicted upon the good order and legal government of our country and the permanency of its institutions.

In the discussion of this question in the debates hitherto much importance has been attached to the meaning of the word "happen." We deem it impossible to escape its original and plain meaning. That meaning is to be found in the dictionaries of our tongue. According to Webster it is the intransitive verb based upon the old Saxon noun *hap*, defined to be "that which happens or comes suddenly or unexpectedly;" also, "the manner of occurrence or taking place; chance; fortune; accident; casual event; fate; lot." The verb "to happen," from the noun hap, defined by same, first, "to come by chance; to come without previous expectation; to fall out;" second, "to take place; to occur," and the example given under the second

definition is, "They talked together of all these things which had happened." (St. Luke.)

To the same effect is the Century Dictionary, the noun "hap" being defined to be "chance; luck; fortune," and the intransitive verb "happen" means by same, first, "to occur by chance; occur unexpectedly or unaccountably; in general, to occur; take place;" second meaning, "to chance; be by chance or unexpectedly; as, he happened to be at home."

The Imperial Dictionary says of the noun "hap" that it means "that which takes place or comes suddenly or unexpectedly;" also, the manner of occurrence or taking place; chance; fortune; accident; casual event; vicissitude; and the intransitive verb "happen," by this authority, "to happen; to befall; to come by chance."

As apropos to this word it may be well to refer to another rule of construction, to the effect that the intent of a legislature is to be found in the ordinary meaning of the words of the statute. (Woodworth *v.* State, 26 Ohio.)

It is thus clear by authority what is a matter of common knowledge, that the primary and ordinary signification of the word "happen" relates to that which is unexpected or accidental, and that its use as synonymous with "take place" or "occur" is secondary.

The accepted canons of construction require that unless there is an indication in the text construed that the meaning of a word therein used is other than the ordinary one, it must be taken to have been used in its ordinary sense.

The majority insist that the word "happen" in the clause of the Constitution in question is used in its secondary meaning of "take place" or "occur."

But in this the undersigned can not concur. They feel constrained, inasmuch as the Constitution itself has not made clear that the word is used in any other than its ordinary sense, to attribute to it that ordinary meaning. That meaning of the word happen controls the scope of the word "otherwise," so that the clause in question must be read according to the ordinary meaning of this word "happen," thus: "And if vacancies unexpectedly occur by resignation, or otherwise, during the recess of the legislature of any State," etc. It is obvious in this reading that the word otherwise refers to vacancies that unexpectedly occur.

In applying these definitions and legal rules to the clause we are discussing, if the words "or otherwise" are not limited to vacancies occurring in a manner similar to a "resignation" of a Senator, it would seem impossible to make an idea plain by the use of language. It can not refer to a vacancy occurring by the regular expiration of a term. That suggestion is excluded by the previous mention in special words of those terms, provision in like special words being made for filling them; therefore the next clause is independent and entirely disconnected from that preceding it, inasmuch as it refers and must refer to the filling of a vacancy happening otherwise than by the expiration of a regular term. The enlarging or general words used by the authorities must relate to the same kind of things to which the special words relate. They must be *ejusdem generis*, as the law says. Now the only possible kindred between the accidental and the regular termination of Senatorial seat is that they are both *vacancies*, but they are not *ejusdem generis*, in that the one is a vacancy created by law and the other is a vacancy created by accident, and are entirely different in their legal effects. The one is a basis for the exercise of executive power; the other is not.

Apropos to the argument of the controlling purpose of the Constitution being to keep the Senate full—suppose the governor of a new State should appoint two Senators to begin with and send them here with their credentials, alleging that there was a vacancy, and with or without an apology for the absence of a legislative election? Must we receive them because of the importance of keeping the Senate full; or because without its consent we must not deprive a State of its equal suffrage in the Senate? Surely it will not be so contended. It has been decided, and we believe at the present moment the contrary is not contended by anyone, that if the governor of a State has exercised his power of appointment until the meeting of the legislature, and the legislature has assembled and adjourned without filling that vacancy, that the governor can not again exercise the appointing power.

This was decided in the case of Jared Williams, from New Hampshire, 1854, and so far as we can learn has never been overruled.

Mr. Edmunds admitted this in the discussion of the Bell case. Mr. Wadleigh admitted this in the discussion of Mr. Cameron's bill, which was intended to cure the defect caused by the adoption of the new constitution of New Hampshire, which prevented an election of a Senator at the proper time.

Mr. Blaine admitted it in the same discussion. Mr. Edmunds's language is as follows:

"The Constitution is looking to have each State represented in this body all the time, and by some method that the Constitution provides and looks to to do it, and, there-

fore, when it uses the word "otherwise," it uses the comprehensive term, so that, in whatever way the State ceases to have opportunity to express its full voice here in this council of States, it shall be filled temporarily by the governor until the legislature, the chief and sovereign power in the State, at its next meeting can have an opportunity to fill it. Then, if they fail in their constitutional duty, the Constitution as it was made has not thought fit to give the governor any other power. That is the state of the case."

If this be true what becomes of the argument?

The long and the short of it, as was stated by Mr. Carpenter in the discussion of the Bell case, is simply "that the Constitution of the Union guaranties to every State the *right* of perpetual representation in this body." There is no other guaranty on the part of the Constitution toward a State representation in the Senate. If the State neglect or refuse to avail itself of that right there is no obligation on the part of the Senate or of any other authority to force or compel by forced construction or any other means to insure that perpetual representation than simply this plain provision of the Constitution. We can neither compel a legislature to elect, nor a governor to appoint. In a government based on the consent of the governed something must necessarily be left to the patriotism and common sense of those to whom the government is intrusted.

The precedents set by this body upon the subject of executive appointments are quite numerous. The oldest case was that of Kensey Johns, of the State of Delaware. He was appointed by the governor to fill a vacancy occasioned by the resignation of George Read, in December, 1793. The legislature met in January, 1794, and adjourned in February of the same year without having elected a successor to Mr. Read. Mr. Johns was appointed by the governor on the 19th of March to fill said vacancy. He was refused his seat on the ground that since the occurrence of the vacancy a session of the legislature had intervened. The vote for the resolution refusing him his seat was 20 ayes to 7 nays. Among those participating in this early case in 1794 were several Senators who had taken part in the formation of the Constitution, as we are informed.

The next case was that of Mr. Tracy, from Connecticut, whose term expired March 3, 1801, who was appointed his own successor by the governor of the State on the 20th of February, 1801, and appeared to take his seat on March the 4th following. He was admitted by a vote of 13 yeas to 10 nays. It appears that there was little or no debate. From 1799 to 1817 it appears that several Senators, by appointment, were sworn in without objection. These, though fairly citable for the purpose of showing the opinion of the Senate at that time, can not properly be cited as adjudicated cases. This admitting, without objection, such Senators, received its death blow in 1814 by the discussion of Mr. Gore's resolution concerning the President's power to fill original vacancies. Although they were never finally acted on, the light thrown on the subject no doubt influenced the subsequent action of the Senate.

The next, and perhaps the leading case, which was fully and ably discussed and solemnly decided, was that of James Lanman, of Connecticut, in 1825. Mr. Lanman's term expired March 3, 1825; on March 4 of the same year he was appointed by the governor to fill the vacancy. His credentials were dated February 8, but he appeared to take his seat at an extra session of the Senate convened by the President on March 4. His credentials upon objection were referred to a special committee, Senators Eaton, Edwards, and Tazewell, which committee reported the facts and precedents, but divided as to conclusions, the majority of the committee, Eaton and Tazewell, favoring the rejection of Lanman, the minority, Edwards, favoring his admission to a seat. Whereupon Edwards submitted, not as the report of the committee, but on his own account, the following resolution:

"*Resolved*, That Hon. James Lanman, appointed a Senator by the governor of the State of Connecticut, be now admitted to the oath required by the Constitution."

And the vote being taken, after discussion, the resolution was rejected, yeas, 18; nays, 23; the majority of the select committee, Eaton and Tazewell, voting in the negative.

The case of Ambrose H. Sevier, from the State of Arkansas, came up at a special session of the Senate in March, 1837. The State of Arkansas had been admitted to the Union in June, 1836, and in October of the same year the legislature elected Ambrose H. Sevier and William S. Fulton Senators. On the allotment of these Senators to their respective class, as required by the Constitution, Mr. Sevier was placed in the class whose term expired on the 3d of March, 1837. The legislature of Arkansas, though in session at the time, had no opportunity to fill the vacancy, having adjourned before the result of the allotment at Washington became known to them. Mr. Sevier was appointed to succeed himself and fill the vacancy occasioned by drawing that lot. His credentials were dated January 17, 1837, and at the

special session in March, after the occurrence of the vacancy, his credentials were referred to the Committee on Judiciary for special report.

That committee decided that his case came fairly within the provisions of the Constitution contained in the third section of the first article, which declares "that a vacancy happened by resignation or otherwise," and reported a resolution that he be permitted to take the oath required by the Constitution, which resolution was adopted—yeas, 26; nays, 19. The committee consisted of Messrs. Grundy, Chittenden, Morris, King of Georgia, and Wall, and they based their report upon the ground that the vacancy was occasioned by the lot which assigned the short term to Mr. Sevier, and, therefore, was a happening within the meaning of the Constitution. They reaffirmed and acquiesced in the doctrine laid down in the Lanman case, and declared that by making this decision they did not call its correctness in question. The principle asserted in that case is, said the committee, "that the legislature of the State, by making elections themselves, shall provide for all vacancies which may occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution."

This decision of the Lanman case was acquiesced in for about fifty years, being reaffirmed again and again. So well was it recognized and obeyed that in nine different States between the years 1843 and 1859 the governors thereof refused to appoint Senators, the legislature having failed to elect.

In 1879 the case of Charles H. Bell from New Hampshire came up for consideration. Mr. Bell was appointed by the governor to fill a vacancy happening during the recess of the legislature by the expiration of Mr. Wadleigh's term on March 3, 1879. By a change in the constitution of the State of New Hampshire, the date of the election of the legislature for that State, and of its subsequent assembling, was so changed as to render it impossible for the legislature last preceding the election of the Senator to fill the vacancy occasioned by the expiration of Mr. Wadleigh's term, as required by the act of 1866, thus leaving a vacancy between the beginning of the new term and the assembling of the legislature which had been chosen next preceding the commencement of said term. Mr. Bell was appointed to fill this vacancy. After discussion he was admitted, but the undersigned contend that this was not an overruling of the long-established and acquiesced-in principle of the Lanman case, because the legislature of New Hampshire had not had the opportunity to elect a Senator. By the act of 1866 the outgoing legislature could not make the election because it was not the one elected next preceding the vacancy. The legislature elect could not choose the Senator because, by the constitution of New Hampshire, it could not assemble until June following the vacancy; so the legislature was in no fault.

The case of Blair was on all fours with Bell, being appointed by the governor of New Hampshire under precisely the same circumstances, and, of course, followed the decision in the Bell case. It may be said, therefore, generally, that the first well-debated and solemnly decided case by those who were near to the framers of the Constitution, took decided ground against the power of the governor to appoint, where it was possible for the legislature to perform its duty; and with a few exceptions between the year 1800 and 1817, the acquiescence in the doctrine established by the case of Kensey Johns was unbroken, down to the year 1879, if it was broken then, by the admission of Mr. Bell, and we insist it was not for the reasons above stated.

The minority report of Senators A. P. Butler and J. A. Bayard in the case of Samuel S. Phelps, which was sustained, denying Mr. Phelps his seat, is well worthy of consideration. They say:

"The Senate of the United States is composed of organized constituencies—the State legislatures; to them belong the power primarily of electing their Senators when they are in session, at the happening of vacancies, at their first meeting when it happens in their recess, and on them devolves the exclusive jurisdiction of filling such vacancies. Their right and authority to fill or supply vacancies, which have been primarily filled by executive appointment, are as absolute and exclusive as was their right in an original election. When their power is brought into existence, it must supersede all others, with this qualification, and that according to precedent, they have a session to make the choice. In our view it does not depend on the actual exertion of the power to elect, but upon its existence. A Senator, under an executive appointment, may or may not represent the political views of his State. He may be the mere personal favorite of the governor. The Senate, as far as practicable, should be made to represent its constitutional constituency, and in this respect should preserve the republican feature of our Union." (See Senate Election Cases, p. 20.)

The undersigned, therefore, asserting neither that the Constitution should be

strictly constructed nor freely construed, but that it should be construed according to the usual and accepted rules of interpretation, so as to give effect to its plain and unmistakable meaning; and believing earnestly that an executive appointment to fill a vacancy caused by the expiration of a regular term of a Senator, the legislature of the State being in session at the time when by law it should have filled such vacancy itself, and failing to perform that duty is not within the scope and meaning of the power granted to State executives by article 1, section 3, of the Constitution, submit the following resolution:

Resolved, That the Hon. Lee Mantle is not entitled to take his seat in this body as a Senator from the State of Montana.

Z. B. VANCE.
GEORGE GRAY.
JOHN M. PALMER.
JOHN H. MITCHELL.

PROCEEDINGS IN THE SENATE.

The resolution reported by the Committee on Privileges and Elections in the case of Lee Mantle was the subject of debate in the Senate March 29, 1893 (Cong. Rec., vol. 25, pp. 38–47), March 30, 1893 (*Ibid.*, pp. 50–66), April 3, 1893 (*Ibid.*, pp. 68–74), April 4, 1893 (*Ibid.*, pp. 75–79), April 5, 1893 (*Ibid.*, pp. 80–89), April 6, 1893 (*Ibid.*, pp. 93–96), August 7, 1893 (*Ibid.*, p. 225), August 14, 1893 (*Ibid.*, pp. 289, 290), August 15, 1893 (*Ibid.*, pp. 332–337), August 16, 1893 (*Ibid.*, p. 393), August 17, 1893 (*Ibid.*, pp. 421–429), August 21, 1893 (*Ibid.*, pp. 540–545), and August 23, 1893 (*Ibid.*, pp. 676–688).

[Extracts from remarks of Mr. Pugh in support of the resolution that Mr. Mantle be admitted to a seat as a Senator from the State of Montana. Found in the Congressional Record, vol. 25, pp. 38–40.]

"Mr. President, the importance of the question presented by the reports of the majority and minority of the Committee on Privileges and Elections will be conceded, and the necessity for a solution of it by the Senate that will be accepted hereafter as final can not be questioned. The conditions and results inseparable from the discussion, consideration, and determination of the right of the appointee of a governor to fill the vacancy existing in the Senate have unfortunately been influenced more or less by the fact that the appointee was a Democrat or Republican, as is shown by the division of the votes of Senators on party lines; and when once committed it is difficult for the Senator, on reconsideration of the same question, to give due weight to arguments against the soundness of his former decision. The question as it is now presented is freer from political surroundings and in a better condition to be decided on its real merits than at any time when heretofore determined.

"The first inquiry to which I direct the attention of the Senate is as to the facts in each of the three cases of the States of Montana, Wyoming, and Washington. In each of the cases the terms of the Senator elected by the legislature of his State expired on the 4th day of the present month. In each of the States the legislature had met and organized some time prior to the 4th of March, when the seat of one of the Senators from each State was vacated by operation of the Constitution. In each of the States the legislature, in accordance with the act of Congress of 1866, proceeded to elect a Senator to fill the vacancy, and continued in daily session to elect until the existence of the legislature was terminated by an express provision of the constitution of each State, and when thus terminated the power of the legislature in each State expired, leaving the seats of each of the Senators vacated and the three States without their constitutional representation.

"In the case of Montana and Wyoming, the sessions of the legislature expired by constitutional limitation a few days before the 4th of March, when the seats of the Senators were vacated. In the case of the State of Washington, the legislature expired by constitutional limitation after the 4th of March; so that in the former two States the vacancy occurred after the termination of the life of the legislature, and, of course, during its recess, while in the State of Washington the vacancy in the Senate occurred while the legislature was in session.

"The foregoing are the undisputed facts and all the facts upon which the question of constitutional law arises—whether the governors of the States are invested with the power of filling the vacancies in the Senate of the United States admitted to exist in the manner and under the circumstances I have stated. We can look nowhere for the power to fill these vacancies in the Senate except in the Constitution of the United States.

"In the first article and third section of the Constitution we find the following words:

" 'The Senate of the United States shall be composed of two Senators from each

State, chosen by the legislature thereof for six years, and each Senator shall have one vote.

"'Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"The above quotations are all the provisions of the Constitution relating to filling and keeping the Senate full of two Senators from each State at all times. It will be observed that there are only two modes provided of securing to each State at all times a full representation of two Senators: (1) By having them 'chosen' permanently by the legislature of the State, and (2) when 'vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"How is the representation kept full in the House of Representatives? The second section of the Constitution provides for representation in the House on the basis of population, and that 'each State shall have at least one representative,' and 'when vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies.'

"'Each House shall be the judge of the elections, returns, and qualifications of its own members.'

"How are all the offices of the United States kept full so that the public service suffer no detriment?

"The second section of Article II provides that the President 'shall nominate, and by and with the advise and consent of the Senate shall appoint * * * all officers of the United States,' and 'the President shall have power to fill all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.'

"The foregoing extracts from the Constitution embrace everything in it relating directly or indirectly to every aspect of the questions before the Senate. The next source of information to which I call the special attention of the Senate is what was said and done in the convention that framed the above provisions of the Constitution to shed light on their objects and true meaning.

"In Elliott's Debates, found in the Madison Papers, at page 377, Mr. Rutledge, on the 6th of August, 1787, reported from the committee of detail as follows:

"'Article V, section 1. The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.'

"This provision, reported by the committee of detail, was under consideration on the 9th of August. The whole proceeding on Article V, section 1, as I have quoted it, appears as follows, just as it stands in the debates:

"'Mr. Wilson objected to vacancies in the Senate being supplied by the executives of the States. It was unnecessary, as the legislatures will meet so frequently. It removes the appointment too far from the people, the executives in most of the States being elected by the legislatures. As he had always thought of the appointment of the executive by the legislative department wrong, so it was still more so that the executive should elect into the legislative department.

"'Mr. Randolph thought it necessary in order to prevent inconvenient chasms in the Senate. In some States the legislatures meet but once a year. As the Senate will have more power and consist of a smaller number than the other House, vacancies there will be of more consequence. The executives might be safely trusted, he thought, for so short a time.

"'Mr. Ellsworth. It is said that the executive may supply vacancies. When the legislative meeting happens to be near the power will not be exerted. As there will not be but two members from a State, vacancies may be of great moment.'

"You will see that the word 'happens' is used by Mr. Ellsworth in reference to the meeting of the legislature, which is always fixed by law.

"'Mr. Williamson. Senators may resign or not accept. This provision is therefore absolutely necessary.

"'On the question of striking out 'vacancies shall be supplied by the executives,' the vote stood—Pennsylvania, aye—1; New Hampshire, Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, South Carolina, Georgia, no—8; Maryland, divided.

"'Mr. Williamson moved to insert after 'vacancies shall be supplied by the executives,' the words, 'unless other provision shall be made by the legislature of the State.'

"'Mr. Ellsworth was willing to trust the legislature or the executive of a State, but not to give the former a discretion to refer appointments for the Senate to whom they pleased.

"'On the question of Mr. Williamson's motion, Maryland, North Carolina, South Carolina, and Georgia, aye—4; New Hampshire, Connecticut, Massachusetts, New Jersey, Pennsylvania, and Virginia, no—6.'

"Now Mr. Madison speaks, and I desire Senators to hear him:

* * * * * * *

"'Mr. Madison, in order to prevent doubts whether resignations by Senators, or whether they could refuse to accept, moved to strike out the words after 'vacancies' and insert the words 'happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature.'

"Making the power of the legislature and the governor to fill vacancies that happen coequal.

"Mr. HOAR. Will the honorable Senator from Alabama permit me to make a suggestion, which I dare say may be in his plan of remarks, that that difficulty arose from the rule in the English House of Commons, which is familiar to all Senators, which did not permit a member of the House of Commons to vacate his office by resignation.

"Mr. PUGH. And thereby create a vacancy.

"Mr. HOAR. To this day I believe the fiction is kept up, and when a member of the House of Commons desires to vacate his seat he accepts another office—the Chiltern Hundreds; he gets out of it in that way. That was what made the language seem necessary to Mr. Madison.

"Mr. PUGH. It was upon that state of facts that doubts arose as to the right of a Senator to resign and thereby create a vacancy.

"'Mr. GOUVERNEUR MORRIS. This is absolutely necessary; as members chosen in the Senate are disqualified from being appointed to any office by section 9 of this article, it will be in the power of the legislature, by appointing a man as Senator against his consent, to deprive the United States of his services.

"'The motion of Mr. Madison was agreed to *nem. con.*'

"Here is proof as strong as language can make it that no opposition was ever expressed in the convention that framed the Constitution, except by one State, to granting power to the executives of the States to fill vacancies that happen in the Senate from any cause at any time. No mention is made of how a vacancy should happen, or that it should be of any particular kind or character, to be imparted to it by the cause or event or fact that produced it. There was no attempt to limit the executive power to fill vacancies.

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"The existence of the vacancy from any cause was the crucial test of executive power to fill it. Then why were the words 'by resignation or otherwise' inserted? Plainly and undoubtedly for the purpose, as declared then and there by Madison, the author and mover of the language, and by Gouverneur Morris, the supporter of Madison's motion, of removing all doubt as to the right of Senators to resign, and not doubts as to the power of the executives to fill vacancies to keep the Senate full to preserve the equality of representation.

"The manifest and declared purpose of inserting the words 'by resignation or otherwise' was to protect the rights of Senators, and not to interfere with or limit or qualify the power of the governors to fill all vacancies that happen to exist in the Senate. The word 'resignation' removed all doubts as to the rights of Senators by express specification, and the words 'or otherwise' were added to preserve the power of the executives to fill vacancies to the full extent that it would exist by the use of the words which eight States refused to strike out on the motion of a single State.

"Mr. President, I have read to the Senate every provision of the Constitution and all that was said by the authors of these provisions at the time they were adopted, and it seems to me that there is nothing upon which to base a reasonable doubt, and all the minority of the committee can do is to turn the Senate into a college of philologists, to teach each other etymology, syntax, and prosody, and speculate on what Washington, and Franklin, and Madison, and Ellsworth, and Gouverneur Morris really intended that then existing and future generations who were to be governed under the Constitution to be submitted to each State for ratification should under-

stand from the language of the Constitution, and where the power was invested to keep the Senate and House and executive offices full, so that each State should have two Senators in the Senate and at least one Representative in the House and every executive office an incumbent.

"The language of the Constitution was not selected by philologists or technical lawyers, but by statesmen, who used plain, comprehensive words to give expression to their strong common sense and practical knowledge of the fundamental objects and uses of free representative government.

"The words in the Constitution that give rise to all the contention and difference of opinion as to where the power resides to fill vacancies in the Senate are the following:

"'And if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"I have shown all the history of the use of those words. It is an axiomatic rule of construction of words and sentences, wherever found, to ascertain the intention, purpose, and object of those using the language, and then, if practicable, to adopt the meaning that will execute the intention and accomplish the object of the authors.

"There can be no controversy about the importance of the object intended to be accomplished by declaring that 'the Senate of the United States shall be composed of two Senators from each State, and each Senator shall have one vote.' How shall two Senators be assured to each State at all times? Was it considered possible under any circumstances or conditions existing or that could exist at any time that a State could be deprived of its full representation of two Senators?

"If such a possibility could have been discovered by the framers of the Constitution in the insufficiency or uncertainty in the meaning of the words used to provide against such a material and revolutionary probability or possibility, would they have failed to avoid it by the insertion of words that would have excluded all doubts as to the happenings of such possible consequences? It is a reflection upon the capacity and intelligence of the framers of the Constitution to charge that their paramount object to keep the Senate full is to be defeated by their intentional or careless or ignorant selection of words to carry out their main purpose that they ought to have known were wholly inadequate to accomplish such object. What language of the Constitution can be tortured into the discovery of the intention, desire, or anticipation of its framers that the power should exist anywhere in the framework of our dual system of government by action or nonaction of any of the agencies provided to keep the Senate full to deprive any State of equal representation in that great lawmaking body?

"It is claimed by the philologists in the Senate who deny the power of the governors of Montana, Wyoming, and Washington to fill the vacancies in the Senate from those States that no such vacancies exist in the Senate, because the vacancies there did not 'happen' in a constitutional sense; that the only 'vacancies' the governors can fill are those that 'happen' in the sense that word was used in the Constitution, and that is, that 'happen' is a descriptive term, used by the framers of the Constitution to define particular kinds of vacancies—vacancies having a specific character imparted to them by the cause or event or fact that produced them; that the cause, event, or fact that produced the vacancies that 'happen' in a constitutional sense is an accidental cause, an accidental event, an accidental fact happening by chance, that no power of foresight, forethought, or anticipation could discover, such as the resignation, death, or removal of a Senator.

"The existence of vacancies in the Senate from those States mentioned must be admitted as a physical fact, shown by occular demonstration. Each of these States has only one Senator, when the Constitution in mandatory language requires that each of them shall have two Senators. Neither is it denied that the constitutional right to two Senators is just as much impaired by a vacancy that exists from any cause as it is by a vacancy that happens by chance or accident. The framers of the Constitution must have known that any other vacancy was the same in effect as a vacancy that happens by chance or accident. They provided for a vacancy that happened by chance or accident, but a vacancy that was an anticipated certainty, like the termination of a six-year term on the 4th of March, they made no provision for filling except by an election by the State legislature.

"A vacancy that happened by chance or accident pending a six-year term could be filled in two ways—by an election by the legislature or by an appointment by the governor. But vacancies that exist by operation of law, it is claimed by the minority, can only be filled by the legislature, and that vacancies that happen in a six-year term by the occurrence of an unexpected fact can be filled by the governor or the legislature. There is no conceivable reason for, and no possible evil to be remedied by, this difference in the power to fill vacancies in the Senate. There is about as

much substance in the difference and reason for it as there is in the difference between tweedledum and tweedledee.

"If we take Washington and Franklin among the dictionaries, with which the philolgists in the Senate must presume these illustrious statesmen were familiar and must have frequently consulted to find fit and proper words to convey their exact meaning, we are unable to discover any word in the English language that could be preferred to the word 'happen' to give expression to their full meaning as to the 'vacancies' the executives were to have power to fill in the Senate.

"Mr. Whitney, the author of the Century Dictionary, has shown as much learning and research in his analysis of English words to ascertain their derivation and most reliable meaning as any philologist who ever published a dictionary. He enjoyed the advantage of having studied the dictionaries and works of all his predecessors, and his Century Dictionary is established as among the highest standard authorities.

"In the Century Dictionary the word 'happen' is defined in its particular and general meaning, and it embraces completely the accidental and chance causes and the causes that can be anticipated. 'Happen,' says the Century Dictionary: '1. To occur by chance; occur unexpectedly or unaccountably; in general, to occur; to take place.' In other words, and unmistakably, the general difinition in the dictionaries, 'vacancies that happen to exist,' as decided by every Attorney-General of the United States in analogous cases where the same words are used in the Constitution."

[Extracts from remarks of Mr. Mitchell, of Oregon, in opposition to the resolution that Mr. Mantle be admitted to a seat as a Senator from the State of Montana. Found in the Congressional Record, vol. 25, pp. 51, 54–57, 65.]

"Mr. President, the question involved in the proposition now before the Senate is not only one of the highest privilege, but of transcendent importance. It is one the solution of which does not depend on the determination of any question of fact, but rests solely upon constitutional and statutory construction. It is, therefore, a question in the consideration and determination of which no element of partisanship can be permitted, and I am sure will not be permitted, to enter. It may seem somewhat strange that there should be, after the lapse of over one hundred years since the adoption of our Constitution, room for any serious differences of opinion as to whether the executive of a State has or has not the constitutional power in a given case to confer upon a citizen by appointment the right to a seat, temporarily or otherwise, in this body; and yet the report in the case under consideration and the debate now in progress clearly show that this is so.

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"We are told with great confidence that the theory of the Constitution is that it was so constructed in its various provisions relating to the choosing of United States Senators that the Senate shall always have its full complement of members present in this body, so that, in the language of the report of the majority, the Senate 'shall be kept full—always full.' Grant, for the sake of the argument, that this is so; and grant further that it is always a matter of deep regret that there should be a vacant seat from any State for any considerable length of time; yet in all confidence I submit that an occasional vacancy for a brief time in the representation of a State or two States, or a half dozen States for that matter, is an evil infinitesimal in degree and character, in importance and consequences, compared with that overshadowing evil which must necessarily result from the recognition of a construction or the approval of a doctrine that will eventuate in admitting to a seat in the Senate a single member who is lacking in the proper constitutional title. There is but one way, it is respectfully submitted, by which Senators can be rightfully chosen under our present Constitution, either for a full term or to fill a vacancy, and that is by the legislatures of the States, respectively.

"The executive of a State has no constitutional power to choose a Senator for a State; no, not for even the briefest possible period of time. That belongs alone and exclusively under the Constitution to the legislature. The executive, however, is, by a certain carefully prescriped, clearly defined, limited constitutional grant, clothed with the prerogative which he alone can exercise, as I shall confidently contend, only *after* a Senator has been thus chosen by the proper constitutional authority—the legislature—and a vacancy in that Senator's term so chosen subsequently happens 'by resignation or otherwise' by which he can, in the event such vacancy or vacancies happen 'during the recess of the legislature,' not choose a Senator, not even fill the vacancy, but make 'temporary appointments until the meeting of the legislature, which shall *then* fill such vacancy.'

"The primary and constitutional power, therefore, both of choosing Senators for full terms, whether these terms be for two, four, or six years, and also of *filling*

vacancies which may occur in those terms, belongs under the Constitution *exclusively* to the legislature of the State, and the only constitutional power inhering in the executive of a State in respect of this important function is not to choose a Senator, not to fill a vacancy, because these are functions clearly vested by the Constitution *exclusively* in the legislature, but to make 'temporary appointments' in case vacancies happen by resignation or otherwise during the recess of the legislature.

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"In the light of these observations let us consider the provisions of the Constitution under consideration and endeavor to arrive at a conclusion as to their correct interpretation.

"The minority of the committee hold to the view that inasmuch as the Constitution in plain and specific terms provides in the first instance for certain definite specific terms of Senators—first of six years, then four, then two years—by virtue of the classification to be made immediately after assembling in consequence of the first election, and then provides—

"'If vacancies happen by resignation or otherwise during the recess of the legislature of any State'—

that the vacancy contemplated and referred to is a vacancy occurring by resignation or otherwise in one or the other of these fixed and definitely described terms, and that it has no reference whatever to any condition that may exist at the expiration of any of these regular terms, and this is so for a great number of reasons; first, because it is the constitutional duty of the legislature of a State, not only in virtue of the provisions of the Constitution itself, but doubly so in virtue of the act of Congress of July 25, 1866, to provide by election in advance of such a vacancy for a successor to a Senator whose full term is about to expire; and it was never contemplated, as we submit, that the legislature, no less than the executive, of a State would fail to perform this great constitutional function.

"In other words, we confidently insist for the reasons already fully indicated that the vacancy referred to in the Constitution is a something that must be carved out of a *term* to which a Senator has been chosen. It is a vacancy that must 'happen,' not by a predetermined fact, not by the occurrence of something we all know long in advance of its occurrence is absolutely sure to occur at a certain date, but a vacancy which 'happens by resignation or otherwise'—that is, which happens in *some such manner* as a *resignation*, in some *like manner*, some unexpected manner, in some manner that we did not anticipate, some manner we did not expect, some like unexpected and unanticipated manner, such as death, abandonment, expulsion, or other like unexpected occurrence, and not only by resignation, but *otherwise*.

"The able Senator from Alabama [Mr. Pugh] in his speech on yesterday, devoted considerable space to a consideration of the proceedings of the convention which framed the Constitution, and thought he could see in these an argument in favor of that construction of that portion of the instrument relating to temporary appointments of Senators by the executives of States so ably contended for by him. A consideration of these proceedings is both interesting and instructive; but as I shall contend, and as I believe I can demonstrate, so far from furnishing any argument in favor of the construction for which he contends, they furnish a very strong argument against that construction. In the original 'plan of a Federal constitution,' submitted to the convention by Mr. Charles Pinckney on the 29th day of May, 1787, it was provided that the Senate of the United States should be chosen by the House of Delegates. That plan contemplated assigning to each State, not an equal number of Senators, but to some States a greater and some a less number, and the provision in that plan relating to vacancies read as follows:

"'As their terms of service expire the House of Delegates shall fill them up by elections for —— years; and they'—

"That is, the House of Delegates—

"'shall fill all vacancies that arise from death or resignation for the time of service remaining of the members so dying or resigning.'

"This plan, therefore, provided, as in the Constitution as it stands to-day, on this subject, a *tribunal*—not the legislature of a State, it is true, but the House of Delegates—as the House of Representatives was called at that time, whose constitutional duty it should be to not only choose the Senators originally, but their successors from time to time as their terms might expire, and then provided that that same tribunal should fill all vacancies occurring from death or resignation, thus keeping up clearly the distinction between the filling of a term originally and the filling of vacancies that might occur *in such term* precisely as we claim is the case in the Constitution as finally adopted.

"In the report of the committee of detail submitted to the convention by Mr. Rutledge August 6, 1787, the clause on this subject read as follows:

"'The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. *Vacancies may be supplied by the executive until the next meeting of the legislature.* Each member shall have one vote.'

"It will thus be seen that in the original draft from the committee of detail, the simple term 'vacancies' without any limitation or qualification whatever was employed. Neither the word 'happen' nor the words 'by resignation or otherwise' were included. It was simply, '*Vacancies* may be supplied by the executive until the next meeting of the legislature.'

"When the matter came up for discussion in the convention Mr. Wilson, of Pennsylvania, objected to vacancies in the Senate being supplied by the executives of the States. He said it was unnecessary, as the legislatures will meet so frequently. 'It removes,' said he, 'the appointment too far from the people, the executives in most of the States being elected by the legislatures. As he had always thought the appointment of the executive by the legislative branch wrong, so it was still more so that the executive should elect into the legislative department.'

"While Mr. Randolph argued that it was necessary in order to prevent, to use his own language, 'inconvenient chasms in the Senate.'

"'True," Mr. Williamson said, as stated by Senator Pugh in his argument yesterday, 'that Senators might resign *or not accept.*' He said that, but he did *not* say, 'true, a *legislature may fail to elect.*' He did not state that as a reason why this power should be given to an executive. Nobody said that in the convention. They did say that a man chosen might die or might *refuse to accept*, but no one ever suggested in the convention a case where the legislature should *fail to elect*, and not one of the distinguished Senators who favor the report of the committee in this case can point it out.

"Mr. VANCE. If my colleague on the committee will allow me, I should like to ask him a question, which I think is pertinent in this connection.

"Mr. MITCHELL, of Oregon. Certainly.

"Mr. VANCE. Can the Senator point out any case in the Constitution where a duty is primarily imposed upon an officer therein named, the performance of that duty is conferred upon another officer contingent upon the failure of the first officer to perform his duty?

"Mr. MITCHELL, of Oregon. There is no such case in the Constitution. It can not be found. I have been trying here for the last half hour or more to demonstrate that very thing. I have been trying to prove that the men who framed the Constitution, after having designated a tribunal to perform a constitutional function, never dreamed of providing a substitute to perform that constitutional function in the event of a failure upon the part of the tribunal thus constitutionally provided to do its duty.

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"Now, whatever may have been the intention of the committee of detail, whether they intended that the words 'vacancies shall be supplied by the executives' should include a case of a vacancy occurring at the expiration of a term, it is absolutely clear beyond all question that the clause as reported by the committee of detail would, by proper construction, include a case such as that now before the Senate, and had the convention stopped in its attempt to reform this particular provision of the report of the committee of detail with the vote refusing to strike out these words 'vacancies shall be supplied by the executives,' then I, for one, would have no trouble whatever in agreeing with the majority of the committee. But, unfortunately for the argument of the committee and of the able Senators from Alabama [Mr. Pugh] and from Massachusetts [Mr. Hoar], the convention, while they determined by this decisive vote that the executives of States should be empowered to fill vacancies, determined later on that they would define and fix by appropriate language the *character of the vacancies* which should thus be filled by the executives of States. And several propositions were submitted looking to limiting and qualifying the words 'vacancies shall be supplied by the executives.'

"One motion made by Mr. Williamson was to insert, after the words 'vacancies shall be supplied by the executives,' the words 'unless other provision shall be made by the legislature,' and this proposition was combated by Mr. Ellsworth, who declared that he was willing to trust the legislature of a State, but not to give the former—the legislature—a discretion to refer appointments for the Senate to whom they pleased. Consequently the motion of Mr. Williamson was voted down by 4 ayes and 6 noes. Then it was that Mr. Madison moved to strike out of the clause, as reported by the committee of detail, all after the words 'vacancies' and insert in lieu thereof the words 'happening by *refusals to accept*, resignations, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies happen, or by the executive thereof until the next meeting of

the legislature.' True, this proposition of Mr. Madison was in the first instance agreed to *nem. con.*

"Now, Mr. President, if we were to admit that if the clause had remained in that form, that then the construction contended for by the committee and by the Senators from Massachusetts and Alabama would be the correct one; but this I deny and will conclusively show, I think, in a moment, unfortunately again for the argument of the committee and of the distinguished Senators who hold to that view, this portion of the Constitution was not left in this form, but as signed by the members of the Convention was remodeled and put in form as it stands to-day.

"In other words, the clause 'by refusals to accept,' which was a part of Mr. Madison's motion, was stricken out, so that while by the report of the committee of detail, as well as amended by the motion of Mr. Madison, the executives of States were authorized until the next meeting of the legislature to fill a vacancy that might occur, not only by resignation or some such like cause, but also by vacancy caused by *refusal to accept* on the part of a person theretofore *duly chosen* Senator by the *legislature*, the provision, as finally remodeled, was entirely changed in this respect. Whatever, therefore, may have been the intention originally, or even throughout, of some of the members of that Convention, it seems to me perfectly clear that the final action of the Convention—and that is what we must look to to get the final conclusion of the mind of the Convention—limited the vacancies which could be filled by the executive to those carved out of a term by resignation or some other like cause, such as death, abandonment, or expulsion.

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"And now, in attempting a construction of these constitutional provisions, it is worth while to inquire if it were the intention of the framers of the Constitution to confer authority on the executives of States to make temporary appointments in *all* cases of vacancies in a seat that might *occur*, or, if you please, happen, why were the four words 'by resignation or otherwise' inserted in the Constitution?

"With these four words omitted there would be much reason for holding that the governor would have the power to temporarily appoint whenever there was a vacancy occurring during a recess of the legislature, no matter how happening, no matter how occurring—whether by death, resignation, expulsion, or the expiration of a term. In other words, in such a case one might well hesitate to deny that the clause would mean what the majority of the committee contend it now means with these four words in. All would agree that an authority to fill vacancies *occurring*, if the word 'occur' instead of 'happen' had been used, would include all vacancies, no matter how occurring.

"Most of us would, perhaps not all, agree that vacancies happening where there were no words of limitation upon the term 'vacancies' would include all vacancies in a seat, no matter how occurring, and this is my view. And I will here state, in giving construction to this clause of the Constitution, I do not personally, perhaps, place so much weight as some do on the word 'happen' as in and of itself, when unqualified by other words, as so distinctly controlling the interpretation, as I do on the words 'by resignation or otherwise.' The word 'happen,' I admit, may have different meanings, the meaning depending entirely on the sense in which it is used, on the connection in which it is employed, on the subject-matter to which it relates, on the event to which it is applied, and the qualifying words employed in connection with this word.

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"But what is the meaning of the word 'otherwise' in the connection in which it is employed in the phrase 'If vacancies happen by resignation or *otherwise?*'

"The distinguished Senators from Massachusetts and Alabama, and other Senators who support the majority report, claim that the word 'otherwise' in this connection means '*in any other manner*,' while we of the minority contend that under the well-settled and universally recognized rules of constitutional and statutory construction it means '*in like manner*,' or some such manner as resignation.

"It is a well-settled rule of judicial decision that where specific words are used, followed by more general words, the general words are qualified by the specific words. Innumerable authorities might be quoted to sustain this position. In Bishop on Statutory Crimes, page 246, we find this:

"'Lord Bacon observed that "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases enumerated." This doctrine is in part the foundation of the celebrated rule that where particular words are followed by general ones, as if after the enumeration of several classes of persons or things the words are added "*and all others*," these general words are restricted in meaning to objects of the like kind with those specified. Therefore, under statute 29, Charles II, chapter 7, Section I, providing that no tradesman, artificer, workman, laborer,

or *other person whosoever* should exercise his ordinary calling on the Lord's Day, the words "*other person*" were held not to include a farmer, who is not a person of the like denomination with those persons specifically mentioned. For, as Bayley, J., said: "If all persons were meant, there was no need of the specific enumeration."'

"The books are full of illustrations similar in their nature and all tending to precisely the same end.

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"But, Mr. President, I am done, and I do not fail to realize that notwithstanding the opinions held by the minority of the committee, of which I am an humble member, the die in all probability is already cast, and a majority of this Senate will probably vote to admit to seats in this body the three appointees of the States respectively of Montana, Wyoming, and Washington. But let me, Mr. President, remind you and this Senate when you do this you vote to overturn the deliberate precedent established by this Senate, after full consideration, over sixty-eight years ago; you vote to reject the interpretation placed on the Constitution of the United States by such great constitutional lawyers and statesmen as Webster and Clay, as Butler and Cabot, as Ellsworth and Frelinghuysen, as Monroe and King, as Cass and Calhoun, as Douglas and Seward, as Underwood and Mason, as Badger and Bayard, as Carpenter and Conkling, as Davis and Lamar, as Garland and Eaton, as Kernan, Morgan, and James G. Blaine, of Maine.

"You establish a rule by virtue of which the great fundamental principle of the Constitution, which vests in the legislatures of States the exclusive power of choosing Senators, will be subverted. You will establish a precedent which inside of ten years will, in my judgment, result in witnessing one-third of this great body seated here by no other title than that conferred by temporary appointments of the executives of States; you will establish a precedent which will tend to demoralization in State legislatures, which will transfer the jurisdiction as to the election of United States Senators from the legislatures of the States respectively, where the Constitution has vested it, to the governors of States, and you will inflict a fatal stab at the great structure of republican government under which we live, and encourage, protect, and defend antagonisms to the best interests of the States respectively, and to the greatest and best of all the republics that has ever existed since the world began."

[Extracts from remarks of Mr. Vance in opposition to the resolution that Mr. Mantle be admitted to seat as a Senator from the State of Montana. Found in the Congressional Record, vol. 25, pp. 540–542.]

"Mr. President, the question involved in this case, briefly as I can state it, is this: The term of Mr. Sanders, the late Senator from Montana, ended March 3, 1893. The legislature of that State, whose duty it was to elect his successor, by the act of 1866, adjourned on the same day without an election. On the next day, March 4, 1893, Mr. Mantle was appointed to succeed Mr. Sanders. Is he entitled to a seat in this body? In other words, the regular term of a Senator expiring on a certain day, the legislature being in session, which by law should have elected his successor, and failed to do so, shall the governor appoint? The minority on the Committee on Privileges and Elections say he shall not. The majority say he may.

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"I want to say, *imprimis*, that I deny there is any specially imposed constitutional obligation upon us to keep the Senate full, greater or more binding than there is in regard to any other department or offices of the Government.

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"If there be any duty specially imposed as to keeping the Senate full, it is imposed upon those who are charged with the creation of Senators by the Constitution, and not upon us. We sit here only to judge of the election and qualification of those who come to us claiming to be Senators; it is in no sense our duty to supply the defects and cure the failures of constitutional Senator makers to perform their sworn functions.

"Now, how are the Senators to be chosen? That is set forth in Article I, section 3, of the Constitution, as quoted above. Before applying the technical rules of construction to the words therein contained, let us look at them in a plain, commonsense light, as they would appear to any unprejudiced citizen of ordinary intelligence; and to aid us in that view, let us consider the circumstances under which this article of the Constitution was adopted.

"We may suppose that the members of that convention had assembled and organized and digested a skeleton outline of the form of government which they wished to establish. We will suppose that they had determined upon dividing its powers into three branches—the executive, legislative, and judicial; that the legislature should consist of two houses or bodies, a Senate and House of Representatives; that the Senate should consist of two Senators from each State, with one vote each. That

was brief and simple. The next question arose, How should they be chosen? It was decided that they should be chosen—that is, elected—by the legislature of each State for a term of six years.

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"This was the programme for establishing a complete, continuous body called the Senate of the United States, with a single exception—no provision had been made so far for the casual interruption of a term, such as death, or resignation, or expulsion, or any other change in the condition of a Senator which rendered his service impossible. Naturally, these accidental and unlooked-for circumstances were considered. The question was asked, Should any of these things happen to a senator when the legislature of his State was not in session, what then? Should that State have no representation in that body for no fault of its own?

"Surely not; and so they provided that in such a case the governor of such a State may appoint temporarily, until the legislature meets, which shall then fill the vacancy. In all these contingencies it will be observed that the legislature was treated as the primary source of power in reference to the selection of Senators; the appointing power conferred upon the governor was only in case of accident or some mischance happening to the occupant of a term once filled which would deprive the State of a representative in the Senate.

"It seems impossible to reasonably conceive that at this point there was anything else to provide for except these contingencies attending human life and the conduct of human affairs. They had already provided for the election of the first Senators, fixed their terms, and how and when in regular course their successors should be chosen; and it is a reflection upon their intelligence to say that they in the same breath added a clause giving the governor power to fill these identical vacancies without even the averment that the legislature had failed or refused to do its duty. To make sure they gave a sample of the kind of vacancy which might 'happen.'

"There was death—no member doubted that was something which might happen to a Senator, and therefore need not be named. There was expulsion, which might also happen to a Senator—there was no doubt about that; but there was a doubt whether a Senator could resign his office on account of the doctrine which governed the British Parliament. To establish the contrary doctrine they mentioned 'resignation' as one of the vacancies which might 'happen,' and added the words 'or otherwise' to include other contingencies, as death, expulsion, and the like, not needed to be named.

"Surely, in the face of their express provisions for filling regular terms by the legislature, if they had intended to include the filling of such terms in the powers granted to the governors, they would have said so in plainer terms than the words 'or otherwise,' and would not have left so important a grant of power to depend upon a construction, and a doubtful construction at that, and one in the face of the ordinary meaning of the words used and of well-established law. Nor can the plea of ignorance of the meaning of these words, or the usage of the law in the construction of them, be for a moment considered.

"The Senator from Virginia [Mr. Hunton] says technical rules ought not to be applied in construing the language of those who framed the Constitution, because many of them were not lawyers. If this be true, it is also true that many of them were lawyers, and as eminent as any in America. Mr. Madison himself was a member of the Committee on Style or Revision, and, we may assume, carefully scrutinized and corrected the language of the clauses as they were adopted. As they put it, it seems to me language could not be plainer.

"If they had intended that the words 'or otherwise' should include every possible vacancy, they would not have used the words, 'which happened by resignation or otherwise' at all, but would have simply said, 'if vacancies occur' the governor shall appoint, etc. Nor would they have used the word 'happen' as applied to a vacancy created by law on a given day, which had no element of chance about it; nor would they have used the word 'if' vacancies happen, because a regular term was sure to expire on a certain day, and create a vacancy. There was no contingency about it as is implied by 'if.' They would have simply said 'when' vacancies occur. As one would not say, 'If the sun rises to-morrow I will do so,' but, 'When the sun rises to-morrow I will do so.'

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"I can not better close my remarks on this head than by quoting from the speech of George E. Badger, of North Carolina, delivered in the Phelps case in 1854. He was, perhaps, the greatest lawyer my State has produced, and was possessed of an intellect as profound as that of Bacon, analytic as that of Fearne, and acute as that of Pascal:

"'The vacancies which the executive is authorized to fill are never vacancies which happen by the efflux of time. They are not foreseen vacancies; they are

vacancies that happen by resignation or otherwise. Mr. President, from an exceeding desire to give this clause of the Constitution such a construction as would keep the Senate always full, I labored hard a year or two ago, when we had questions of this kind before us, to find out some method of supporting in my own mind a construction that a vacancy happening by efflux of time, and not filled beforehand by the legislature, might be brought within this limited power conferred on the executive.

"'But, sir, I have been obliged to abandon it. "By resignation or otherwise," is the language. We must expound the word "otherwise" to apply to vacancies happening by similar events; that is, unforeseen events—death, resignation, appointment to an office which disqualifies; but it can not be applied to the expiration of a term of a Senator which leaves a seat vacant on this floor. My opinion, therefore, is that the governor of a State has no power to fill a vacancy in this body which is brought about by the expiration or efflux of the time for which the Senator was elected—in other words, at the termination of his term in the Senate. It must be a vacancy in the term happening during the recess of the legislature; it must be a vacancy in the term happening by resignation or other casualty. That I understand to have been the express and solemn decision of the Senate in Lanman's case in 1825, overruling one or two earlier decisions which had passed, perhaps, without full consideration.'

"The danger of the inconvenience supposed to arise from the Senate not being 'always full' is not to be compared for a moment with the danger which would ensue if the practice were followed of filling the Senate with members who are not entitled by the prescriptions of the Constitution to sit here. Into this temple of our liberties no man should be permitted to enter except by the door of the Constitution.

"Doubtless, when providing the way by which it might be entered, our fathers had in mind the divine Wisdom, which saith:

"'Verily, verily, I say unto you, he that entereth not by the door into the sheepfold, but climbeth up some other way, the same is a thief and a robber. But he that entereth in by the door is the shepherd of the sheep.'

"There should be no politics in the decision of this question. No other consideration should enter into it but that of a sincere desire to maintain the letter and the spirit of the Constitution. Doubtless many of the complicated decisions which this body has made have arisen from the pressure of temporary circumstances of one kind or another. It is a great question which should be decided with proper solemnity. The ambition of men which leads them often to the obstruction of the proper and legal election of Senators to this body in the hope of securing favor from a single man—the executive—should be rebuked, and they should be taught to know that this great tribunal will not make itself an accomplice in their schemes and combinations, if we wish to avoid scandals and to preserve the character and dignity of the United States Senate."

[Remarks of Mr. Hoar in support of the resolution that Mr. Mantle be admitted to a seat as a Senator from the State of Montana. Found in the Congressional Record, vol. 25, pp. 687, 688.]

"Mr. President, this seems to me as simple and plain a question as ever was confused by metaphysics or clouded by legal argument. The Constitution of the United States says that when there is a vacancy in this body by death, resignation, or otherwise——

Mr. MITCHELL, of Oregon. "It does not say that. The word 'death' is not in the Constitution."

Mr. HOAR. "Well, 'resignation or otherwise,' then. It may be filled when caused by resignation or otherwise. As my friend says, 'death' is not mentioned; and if the word 'otherwise' means 'in the same way as resignation,' you can not fill the vacancy when a Senator dies, according to his suggestion.

"Mr. President, one of two things is true; either when the framers of the Constitution said 'otherwise' they meant 'in any other way,' and intended to provide for all kinds of vacancy; or the framers of the Constitution meant to provide that there should be certain cases, naturally to be expected, easy to be foreseen, impossible not to have been thought of by them, in which the States should not be equally represented in the Senate.

"Will anybody doubt that those circumspect and wise and experienced men knew very well that State legislatures, bodies who, if their two branches acted separately, were to record the action of two artificial beings who were very likely to differ, and if they acted as they have done since 1866, in joint convention, were to be composed of a number of men who might be divided into three or four parties, and so could not agree—is there a member of the Senate who will stand up here and say that he doubts seriously that the framers of the Constitution did not mean to anticipate and provide for that condition of things?

"If they did mean to provide for it, is there a man bold enough to justify his vote on this question by announcing that he believes in that case our fathers did not mean to have the Senate filled? They provided that ninety-nine one-hundredths of the American people could not for ninety-nine hundred or ninety-nine thousand years, if this nation should endure so long, under any conceivable circumstance or for any conceivable reason, have two Senators for forty-three States and the forty-fourth State have but one. The one constitutional impossibility, so far as the wit of man could devise, and the power of a national constitution could enact, was that when this Senate was to act on the important questions affecting the rights of the States and the people two voices should answer for each.

"Now, that is the whole of it; and when there is a vacancy by resignation or 'otherwise,' a word comprehending every possible or conceivable case, the governor, if the legislature has not done it, is to appoint. Upon the meaning of the word 'otherwise' and upon the truth of these two simple propositions this whole debate has, in fact, turned. There have been winding and turning and searching of precedents and splitting of hairs; but when any Senator objecting to the admission of Mr. Mantle is asked: Do you admit that the decision in the New Hampshire case was right? he is obliged to answer as the Senator from Connecticut [Mr. Platt] answered, 'I voted for it because I thought it would be a hard case, but I have now concluded it was wrong.' This is the substance of what the Senator says.

"Why, Mr. President, the Senator from Connecticut and, I think, one other Senator sought to convict me of an inconsistency because when in the middle of the debate, the question not being before the Senate, when we were discussing something else (as he thinks, when we were discussing the New Hampshire case), Mr. Carpenter, of Wisconsin, asked me if I claimed or thought that if the legislature met and separated the governor could then appoint. It was such a case as every lawyer in this body is familiar with. Somebody comes up to you when your head is full of something else, in the street or in the town meeting, and says: 'Squire, how would it be, supposin'?' I never heard of the lawyer who admitted that the opinions he gave under such circumstances were of much value. Almost as soon as I took my seat after that speech, on reflection, I came to the conclusion that I had made an erroneous answer, and I have acted on another principle in the Senate ever since.

"If my honorable thinks that I am to be held in law, or in morals, or in consistency, or in responsibility to public opinion by the answer which I gave to that shrewd question put by that shrewd gentleman at that time, what is his condition, who comes in here to take back four solemn votes of his own on cases before the Senate and in issue—the Bell case, the Blair case, the Marston case, and the Pasco case, two of them cast after the most deliberate and solemn debate—a debate participated in by the great constitutional lawyers of the country?

"Mr. President, if there were nothing else in this case but these four great and recent precedents, I should argue both to the understanding and the conscience of the members of this body to stand by them. No court, no legislative body, no tribunal can maintain the respect of the people long that does not maintain its own consistency and that does not regard its own solemn judgments.

"He and I struggled for half a winter to maintain that principle in the case of Mr. Kellogg, of Louisiana, against the gentlemen on the other side of the Chamber, angered, possessed with the feeling that Mr. Kellogg had been improperly admitted; and when the majority changed and the Democrats came in, they still held (and held fast, under the lead of the Senator from Georgia [Mr. Gordon], the Senator from South Carolina [Mr. Hampton], and the Senator from Delaware [Mr. Bayard], now in honorable service abroad, and the great jurist from Mississippi [Mr. Lamar], who recently went to his reward to the grief of all his countrymen North and South) to the doctrine of sustaining the deliberate judgments of the Senate.

"My honorable friend from Connecticut speculates about the possibility of a legislature being influenced by corrupt reasons and refusing to elect a member of this body in order that the governor may appoint some ambitious person who is in league with him, and he thinks there may be a very bad result from our adhering to the solemn judgments of the Senate on that account. I should like to know what possibility of corrupt influence bringing popular liberty and republican government itself into discredit can be greater than the influence which, if this disregard of our precedents is established as a policy, will be brought to bear on the members of this body to seat or unseat men who have a rightful title to seats here according as they expect they will vote one way or the other on some exciting question pending.

"I think that the attitude of my honorable friend from Connecticut, who has voted four times for this doctrine and now seeks to reverse it (honest as every man who knows him knows everything he does and thinks is honest), is still an attitude more fraught with a graver public danger than any he has suggested as flowing from one or the other exposition of the Constitution in this matter. My honorable friend says

that, although he thinks the New Hampshire cases were wrong, still there is a distinction between those cases and the one before the Senate.

"Mr. PLATT. I have not said that I thought the New Hampshire cases were wrong.

"Mr. HOAR. I asked the Senator whether he thought it was a sound constitutional decision, and he said, no.

"Mr. PLATT. I understood the Senator's question to be on the point as to whether, if the case was admitted to be decided on the question that a governor could appoint at the commencement of a term, I thought it was wrong.

Mr. HOAR. The Senator thought it was wrong.

"Mr. PLATT. I did not say that.

"Mr. HOAR. The Senator said he did not think it was right on any ground; but, if he thinks so, on what ground?

"Mr. PLATT. I do.

"Mr. HOAR. On what ground?

"Mr. PLATT. On the ground that the State of New Hampshire had not had an opportunity to make the election.

"Mr. HOAR. Now, just let us look at that a moment and see where the true principle comes in. The Senator says if a State legislature has tried its best to make an election, as in the case of Montana, where the legislature met and balloted at the time fixed, and balloted day after day and week after week, and failed because the members of that legislature could not find a man on whom a majority could conscientiously agree, an inability which to every just and honest man is absolute in the conduct of the affairs of life, he will keep the man out; but when the whole people of a State deliberately put it into their constitution that their legislature shall not meet at the proper time and shall not elect at the proper time, so that not only has there been no attempt on the part of the legislature to do its duty, but the people say that the legislature shall not try to do its constitutional and lawful duty, then in such case my honorable friend from Connecticut says of course he will let the man in.

"The Constitution then, according to my honorable friend from Connecticut, is this: When the framers of the Constitution, Oliver Ellsworth, James Madison and their associates, said if there is a vacancy 'by resignation or otherwise,' they did not mean in any other way but in the same way as resignation, if any other same way could be conceived of; that they intended that in a certain easily to be foreseen condition there should be vacancies in this body, and then further they provided that if a State legislature tried its best to elect and could not, the governor should not have any power to appoint and the State should go unrepresentated, but if the people of a State put it into their constitution that the legislature should not even try to elect a Senator, then it is such a hard case that the man ought to be admitted.

"Mr. President, that is the whole of it. You may discuss and refine and bring into this matter the subtlety of dialetics and split hairs, if when the framers of the Constitution said, 'resignation or otherwise,' they meant 'resignation or any other conceivable case,' then this case belongs to Mr. Mantle. If they meant to narrow the provision to the case of a vacancy by resignation or something like it, to the case of the abandonment of his post for a good or evil reason by the Senator, and in the great field of other possibilities, and intended that the State should lose its equality and its sovereignty, and that it should not be represented here, then the case is not with Mr. Mantle.

"If the words, 'happen by resignation or otherwise,' include the case at the beginning of a term where the State has sent nobody here and it was impossible to send anybody here, then this case belongs to Mr. Mantle upon the precedents; but if it be sound doctrine that it is a hard case and the State shall be excused and the governor shall appoint when it does not try, and the people say the legislature shall not try to elect its Senators, then the case is not with Mr. Mantle upon our precedents. If the case be that upon precedent, upon principle, upon authority, the people of these three States have a right to have their constitutional voice uttered, then for one—other gentlemen will do as they please—I should feel myself degraded and man-sworn if I voted to keep them out because I do not like the votes they are expected to give."

WEDNESDAY, *August 23, 1893.*

Mr. Vance offered the following substitute for the resolution submitted by the committee:

"*Resolved*, That Hon. Lee Mantle is not entitled to a seat in this body as a Senator from the State of Montana."

The question of agreeing to the substitute offered by Mr. Vance being submitted to the Senate, the same was agreed to by the following vote:

Yeas—Messrs. Berry, Blackburn, Caffery, Coke, Cullom, Dixon, Faulkner, Gallin-

ger, George, Gibson, Gray, Harris, Kyle, Lindsay, McMillan, McPherson, Manderson, Mills, Mitchell (Oregon), Mitchell (Wisconsin), Murphy, Palmer, Pasco, Peffer, Platt, Proctor, Ransom, Smith, Stockbridge, Vance, Vest, Vilas, Washburn, White (California), White (Louisiana)—35.

Nays—Messrs. Bate, Butler, Cameron, Carey, Daniel, Davis, Dubois, Frye, Hansbrough, Hawley, Higgins, Hill, Hoar, Hunton, Irby, Jones (Arkansas), Jones (Nevada), Lodge, Martin, Perkins, Power, Pugh, Roach, Shoup, Squire, Stewart, Teller, Turpie, Walthall, and Wolcott—30.

(Cong. Rec., vol. 25, pp. 688, 689.)

Mr. Manderson moved to reconsider the vote by which the substitute was agreed to. Mr. Vance moved to lay that motion on the table.

(Cong. Rec., vol. 25, p. 689.)

The motion to reconsider was laid before the Senate August 24, 1893 (Cong. Rec., vol. 25, pp. 782, 783), and August 28, 1893 (*Ibid.*, pp. 989, 994, 995).

The motion to reconsider the vote by which the substitute offered by Mr. Vance was agreed to, was laid on the table by the following vote:

Yeas—Messrs. Berry, Caffery, Call, Camden, Coke, Cullom, Dixon, Faulkner, Gallinger, George, Gray, Lindsay, McMillan, McPherson, Mills, Mitchell (Wisconsin), Murphy, Palmer, Pasco, Platt, Proctor, Ransom, Smith, Stockbridge, Vance, Vest, Vilas, Voorhees, Washburn, White (California), and White (Louisiana)—31.

Nays—Messrs. Bate, Butler, Cameron, Davis, Dubois, Frye, Hansbrough, Hawley, Hill, Hunton, Irby, Jones (Arkansas), Jones (Nevada), Martin, Morgan, Peffer, Perkins, Pettigrew, Power, Pugh, Roach, Sherman, Shoup, Squire, Stewart, Teller, Walthall, and Wolcott—28.

(Cong. Rec., vol. 25, p. 995.)

The resolution as amended, as follows—

"*Resolved*, That Hon. Lee Mantle is not entitled to a seat in this body as a Senator from the State of Montana"—

was then adopted by the following vote:

Yeas—Messrs. Aldrich, Berry, Caffery, Call, Camden, Coke, Cullom, Dixon, Faulkner, Gallinger, George, Gray, Lindsay, McMillan, McPherson, Mills, Mitchell (Wisconsin), Murphy, Palmer, Pasco, Platt, Proctor, Ransom, Smith, Stockbridge, Vance, Vest, Vilas, Voorhees, Washburn, White (California), and White (Louisiana)—32.

Nays—Messrs. Bate, Butler, Cameron, Davis, Dubois, Frye, Hansbrough, Hawley, Higgins, Hill, Hunter, Irby, Jones (Arkansas), Jones (Nevada), Martin, Morgan, Peffer, Perkins, Pettigrew, Power, Pugh, Roach, Sherman, Shoup, Squire, Stewart, Teller, Walthall, and Wolcott—29.

(Cong. Rec., vol. 25, pp. 995, 996.)

WEDNESDAY, *August 30, 1893.*

Mr. Pugh submitted the following resolution, which was referred to the Committee on Privileges and Elections:

"*Resolved*, That there be allowed out of the contingent fund of the Senate, to Lee Mantle, the sum of $5,000 in full compensation for all his time and expense in prosecuting his claim to a seat in the Senate as a Senator from the State of Montana."

(Cong. Rec., vol. 25, p. 1048.)

WEDNESDAY, *September 6, 1893.*

Mr. Vance, from the Committee on Privileges and Elections, submitted the following report:

"The Committee on Privileges and Elections, to whom was referred a resolution providing for compensation for Lee Mantle for his time and expense in prosecuting his claim to a seat in the United States Senate from Montana, report that he be allowed $2,500."

Which report was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

(Cong. Rec., vol. 25, p. 1238.)

THURSDAY, *September 7, 1893.*

The foregoing resolution, providing for compensation to Lee Mantle for his time and expense in prosecuting his claim to a seat in the Senate of the United States as a Senator from the State of Montana, was favorably reported by the Committee to Audit and Control the Contingent Expenses of the Senate, and laid over for the day.

(Cong. Rec., vol. 25, pp. 1300, 1301.)

TUESDAY, *September 19, 1893.*

On motion of Mr. Vance, the resolution allowing compensation to Lee Mantle was taken up and read, as follows:

"*Resolved*, That there be allowed out of the contingent fund of the Senate to Lee Mantle the sum of $5,000 in full compensation for all his time and expense in prosecuting his claim to a seat in the Senate as a Senator from the State of Montana."

The resolution was reported from the Committee on Privileges and Elections with an amendment in line 2, before the word "dollars," to strike out "five thousand" and insert "two thousand five hundred."

The amendment was agreed to.

The resolution as amended was agreed to.

(Cong. Rec., vol. 25, p. 1569.)

[Special session of the Senate March 4, 1893, and first session Fifty-third Congress.]

ASAHEL C. BECKWITH, *of Wyoming.*

The term of Francis E. Warren, Senator from the State of Wyoming, expired on the 3d day of March, 1893. The legislature of said State which was in session next preceding the expiration of the term of said Francis E. Warren adjourned without an election. March 9, 1893, the governor of the State of Wyoming appointed Asahel C. Beckwith to fill the vacancy caused by the expiration of the term of Mr. Warren. On the 15th day of March, 1893, the credentials of Mr. Beckwith were presented and ordered to lie on the table pending the appointment of a Committee on Privileges and Elections, and were afterwards referred to such committee. March 27, 1893, the Committee on Privileges and Elections made a report affirming the right of Mr. Beckwith to a seat in the Senate as a Senator from the State of Wyoming. The report was not adopted, the question in the case being substantially the same as in the case of Lee Mantle, supra, and as in the case of John B. Allen, post. Under date of July 11, 1893, Mr. Beckwith sent to the Senate a communication stating that he had resigned his appointment as Senator from the State of Wyoming.

The history of the case here given consists of a statement of the proceedings in the Senate, as published in the Congressional Record, the report of the Committee on Privileges and Elections, and the communication from Mr. Beckwith stating the fact of his resignation.

PROCEEDINGS IN THE SENATE.

WEDNESDAY, *March 15, 1893.*

Mr. Vance presented the credentials of Hon. Asahel C. Beckwith, appointed a Senator from the State of Wyoming. He asked that the credentials be read and referred to the Committee on Privileges and Elections when appointed, and that meanwhile they lie on the table.

The credentials were read and ordered to lie on the table, as follows:

"STATE OF WYOMING, EXECUTIVE DEPARTMENT.

"*To all persons to whom these presents shall come, greeting:*

"Know ye, that the executive of said State hereby appoints Asahel C. Beckwith, a duly qualified citizen of said State and an inhabitant thereof, a Senator from the said State of Wyoming, to fill the vacancy happening in the Senate of the United States by the expiration of the term of Francis E. Warren on the 3d day of March, in the year of our Lord 1893, during the recess of the legislature of said State, and by the nonelection of said Francis E. Warren's successor.

"To have and to hold the said office of Senator of the United States until the next meeting of the legislature of said State.

"In testimony whereof I have caused these letters to be made patent and the great seal of the State to be hereunto affixed.

"Given under my hand at the city of Cheyenne on the 9th day of March, A. D. 1893.

"JOHN E. OSBORNE, *Governor.*

"By the governor:

"AMOS W. BARBER, *Secretary of State.*"

(Cong Rec., vol. 25, p. 15.)

MONDAY, *March 27, 1893.*

Mr. Hoar, from the Committee on Privileges and Elections, to whom was referred the claim of Asahel C. Beckwith to be admitted to a seat in the Senate from the State of Wyoming, submitted a report, accompanied by a resolution, which resolution was read, as follows:

"*Resolved,* That Asahel C. Beckwith is entitled to be admitted to a seat as a Senator from the State of Wyoming."

On motion of Mr. Hoar the report and the accompanying resolution were ordered to lie on the table.

(Cong. Rec., vol. 25, p. 33.)

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Vance (chairman), Gray, Pugh, Turpie, Palmer, Hoar, Mitchell of Oregon, Chandler, and Higgins.]

IN THE SENATE OF THE UNITED STATES.

MARCH 27, 1893.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of Asahel C. Beckwith, claiming a seat in the Senate from the State of Wyoming, respectfully report:

The term of Mr. Warren, Senator from Wyoming, ended March 3, 1893. The legislature of said State, who were, under Revised Statutes, sections 14, 15, entitled to elect his successor on the —— day of ———, 1893, adjourned without an election. Thereupon the governor of Wyoming, on the 9th day of March, 1893, appointed Mr. Beckwith to hold the office of Senator until the next meeting of the legislature.

We think said appointment valid for the reasons set forth in the report in the case of Mr. Mantle, claiming a seat from the State of Montana.

We recommend the adoption of the accompanying resolution:

"*Resolved*, That Asahel C. Beckwith is entitled to be admitted to a seat as Senator from the State of Wyoming."

PROCEEDINGS IN THE SENATE.

MONDAY, *August 7, 1893.*

The Vice-President laid before the Senate the following communication, which was read and ordered to lie on the table:

"[The Beckwith Commercial Company, merchants. Incorporated 1887.]

"EVANSTON, WYO., *July 11, 1893.*

"DEAR SIR: Owing to a combination of circumstances over which I had no control, I have been obliged to hand in my resignation to Governor Osborne of my appointment as United States Senator from Wyoming.

"I beg to remain, your obedient servant,

"A. C. BECKWITH.

"Hon. ADLAI E. STEVENSON, Washington, D. C."

(Cong. Rec., vol. 25, p. 198.)

WEDNESDAY, *September 6, 1893.*

The Secretary read the following resolution reported from the Committee on Privileges and Elections:

"*Resolved*, That there be allowed out of the contingent fund of the Senate, to A. C. Beckwith, the sum of $2,000, in full compensation for all his time and expense in prosecuting his claim to a seat as Senator from the State of Wyoming."

The resolution was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

(Cong. Rec., vol. 25, p. 1238.)

TUESDAY, *September 19, 1893.*

The Secretary read the following resolution reported from the Committee on Privileges and Elections on the 6th instant:

"*Resolved*, That there be allowed out of the contingent fund of the Senate, to A. C. Beckwith, the sum of $2,000, in full compensation for all his time and expense in prosecuting his claim to a seat as a Senator from the State of Wyoming."

The VICE-PRESIDENT. An amendment was proposed to this resolution by the Senator from Wyoming [Mr. Carey], which will be read.

The SECRETARY. In line 2, before the word "dollars," strike out "two thousand" and insert "two thousand five hundred."

After debate, the amendment was rejected and the resolution was agreed to.

(Cong. Rec. vol. 25, pp. 1568 and 1569.)

[Special session of the Senate, March 4, 1893, and first session, Fifty-third Congress.]

JOHN B. ALLEN, *of Washington.*

The term of John B. Allen, Senator from the State of Washington, expired March 3, 1893. The legislature of said State assembled January 9, 1893, and finally adjourned March 9, 1893, without electing a Senator to fill the vacancy occasioned by the expiration of the term of said John B. Allen. On the 10th day of March, 1893, the governor of the State of Washington appointed said John B. Allen to fill the vacancy occasioned as aforesaid. March 20, 1893, the credentials of Mr. Allen were presented in the Senate of the United States and referred to the Committee on Privileges and Elections. On the 27th day of March, 1893, the committee submitted a report in the case, accompanied by a resolution that Mr. Allen be admitted to a seat in the Senate as a Senator from the State of Washington. On the 28th day of August, 1893, an amendment to this resolution was proposed, declaring that Mr. Allen was not entitled to a seat in the Senate as a Senator from the State of Washington. The amendment was adopted August 28, 1893, by a vote of 32 yeas to 29 nays, and the resolution as amended, that Mr. Allen was not entitled to a seat as a Senator from the State of Washington, was agreed to without a division. This action was taken immediately after the vote was taken in the Senate on the admission of Lee Mantle, and was evidently based on the same ground as the action of the Senate in that case.

The history of the case here given consists of a statement of the proceedings in the Senate in relation thereto as published in the Congressional Record, the report of the Committee on Privileges and Elections, the vote on the motion to amend the resolution reported by the committee, and a statement of the result of the vote on the resolution as amended.

IN THE SENATE OF THE UNITED STATES.

MONDAY, *March 20, 1893.*

Mr. Squire presented the credentials of John B. Allen, appointed by the governor of Washington a Senator from that State, which were read and referred to the Committee on Privileges and Elections, as follows:

"STATE OF WASHINGTON, EXECUTIVE DEPARTMENT.

"*To the President of the Senate of the United States, and to all to whom these presents may come, greeting:*

"Whereas the term of office of Hon. John B. Allen as a Senator in Congress from the State of Washington expired March 3, A. D. 1893; and

"Whereas the legislature of the State, which assembled January 9, A. D. 1893, finally adjourned March 9, A. D. 1893 without electing a Senator in Congress from said State to fill the vacancy occasioned by the expiration of the term of Senator Allen; and

"Whereas by reason of the premises a vacancy exists and happens, during the recess of the legislature, in the office of Senator in Congress from the State of Washington:

"Now, therefore, I, J. H. McGraw, executive of the State of Washington, by reason of the premises, and by virtue of the authority in me vested as such executive by the Constitution of the United States, do hereby appoint said John B. Allen, a native-born citizen of the United States over the age of 30 years and an inhabitant of the State, a Senator in Congress from the State of Washington to fill such vacancy until the next meeting of the legislature of the State.

"In witness whereof I have hereunto set my hand and caused the seal of the State of Washington to be affixed hereto, at Olympia, this 10th day of March, A. D. 1893, and of the Independence of the United States the one hundred and seventeenth.

J. H. McGRAW.

"[SEAL.]

"By the governor:

"J. H. PRICE, *Secretary of State.*"

(Cong. Rec., vol. 25, p. 20.)

MONDAY, *March 27, 1893.*

Mr. Hoar, from the Committee on Privileges and Elections, to whom was referred the credentials of John B. Allen, appointed a Senator from the State of Washington, submitted a report accompanied by a resolution. The resolution was read, as follows:

"*Resolved*, That John B. Allen is entitled to be admitted to a seat as a Senator from the State of Washington."

The report with the accompanying resolution were ordered to lie on the table.

REPORT OF THE COMMITTEE.

[The committee consisted of the same Senators named in the statement preceding the report in the case of Lee Mantle and in the case of Asahel C. Beckwith, *supra*.]

IN THE SENATE OF THE UNITED STATES.

MARCH 27, 1893.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report to accompany Senate resolution relative to admitting John B. Allen to a seat as a Senator:

The Committee on Privileges and Elections, to whom were referred the credentials of John B. Allen, claiming a seat in the Senate from the State of Washington, respectfully report:

The term of Mr. Allen, Senator from Washington, ended March 3, 1893. The legislature of said State, who were, under Revised Statutes, sections 14, 15, entitled to elect his successor, on the 9th day of March, 1893, adjourned without an election. Thereupon the governor of Washington, on the 10th day of March, 1893, appointed Mr. Allen to hold the office of Senator until the next meeting of the legislature.

We think said appointment valid for the reasons set forth in the report in the case of Mr. Mantle, claiming a seat from the State of Montana.

We recommend the adoption of the accompanying resolution.

"*Resolved*, That John B. Allen is entitled to be admitted to a seat as a Senator from the State of Washington."

PROCEEDINGS IN THE SENATE.

MONDAY, *August 28, 1893.*

Mr. VANCE. The case from the State of Washington is pending, and if it is the pleasure of the Senate to take it up, I ask that it be now voted on.

The VICE-PRESIDENT. The resolution will be read.

The Secretary read the resolution reported by Mr. Hoar from the Committee on Privileges and Elections, March 27, 1893, as follows:

"*Resolved*, That John B. Allen is entitled to be admitted to a seat as a Senator from the State of Washington."

Mr. VANCE. I suppose the result can be reached, not by offering a substitute, but by taking a direct vote on the report. ["No," "No."]

The VICE-PRESIDENT. The question is on agreeing to the resolution of the committee.

Mr. VANCE. In deference to those who prefer to follow the precedent, I move to amend by inserting the word "not."

The VICE-PRESIDENT. The amendment proposed by the Senator from North Carolina will be stated.

The SECRETARY. After the word "is," in the first line of the resolution, insert the word "not," so as to read:

"*Resolved*, That John B. Allen is not entitled to be admitted to a seat as a Senator from the State of Washington."

The VICE-PRESIDENT. The question is on agreeing to the amendment of the Senator from North Carolina [Mr. Vance].

The vote on the amendment resulted as follows:

Yeas—Messrs. Aldrich, Berry, Caffery, Call, Camden, Coke, Cullom, Dixon, Faulkner, Gallinger, George, Gray, Lindsay, McMillan, McPherson, Mills, Mitchell (Wis.), Murphy, Palmer, Pasco, Platt, Proctor, Ransom, Smith, Stockbridge, Vance, Vest, Vilas, Voorhees, Washburn, White (Cal.), and White (La.)—32.

Nays—Messrs. Bate, Butler, Cameron, Davis, Dubois, Frye, Hansbrough, Hawley, Higgins, Hill, Hunton, Irby, Jones (Ark.), Jones (Nev.), Martin, Morgan, Peffer, Perkins, Pettigrew, Power, Pugh, Roach, Sherman, Shoup, Squire, Stewart, Teller, Walthall, Wolcott—29.

So the amendment was agreed to and the resolution as amended was agreed to.

(Cong. Rec., vol. 25, p. 996.)

WEDNESDAY, *August 30, 1893.*

Mr. Squire submitted the following resolution, which was referred to the Committee on Privileges and Elections:

"*Resolved*, That there be allowed out of the contingent fund of the Senate to John B. Allen the sum of $5,000, in full compensation for all his time and expense in prosecuting his claim to a seat in the Senate as a Senator from the State of Washington."

(Cong. Rec., vol. 25, p. 1048.)

WEDNESDAY, *September 6, 1893.*

Mr. Vance, from the Committee on Privileges and Elections, submitted the following report, which was read and referred to the Committee to Audit and Control the Contingent Expenses of the Senate. The report was as follows:

The Committee on Privileges and Elections, to whom was referred the resolution providing compensation for John B. Allen for his time and expense in prosecuting his claim to a seat in the United States Senate from Washington, report that he be allowed $2,500.

(Cong. Rec., vol. 25, p. 1238.)

TUESDAY, *September 19, 1893.*

The Secretary read the following resolution reported from the Committee on Privileges and Elections on the 6th instant:

"*Resolved*, That there be allowed out of the contingent fund of the Senate to John B. Allen the sum of $5,000, in full compensation for all his time and expense in prosecuting his claim to a seat in the Senate as a Senator from the State of Washington."

The resolution was reported from the Committee on Privileges and Elections with an amendment, in line 4, before the word "dollars," to strike out "five thousand" and insert "two thousand five hundred."

The amendment was agreed to, and the resolution as amended was agreed to.

(Cong. Rec., vol. 25, p. 1569.)

After the vote in the Senate in the cases of Lee Mantle and John B. Allen, and on the 26th day of September, 1893, Mr. Dubois submitted the following resolution; which was read and ordered to be printed and to lie over until the following day:

"Whereas several sovereign States are without full representation in the Senate, which they are entitled to: Therefore, be it

"*Resolved*, That the consideration of legislation relating to the Federal election laws, tariff, and finance, matters which materially affect the partially unrepresented States, be postponed in the Senate until Monday, the 15th day of January, 1894, to enable the States of Washington, Montana, and Wyoming to have the votes, influence, and protection in the Senate which are guaranteed to each sovereign State by the Constitution of the United States."

(Cong. Rec., vol. 25, pp. 1776, 1777.)

On Wednesday, September 27, 1893, the foregoing resolution was laid before the Senate and debated, but no vote was taken thereon.

(Cong. Rec., vol. 25, pp. 1828–1838.)

[Extracts from remarks of Mr. Dubois in support of the resolution introduced by him that the consideration of legislation relating to the Federal election laws, tariff, and finance be postponed in the Senate until Monday, the 15th day of January, 1894. Found in the proceedings of September 27, 1893, in the Congressional Record, vol. 25, pp. 1829, 1830.]

"Mr. President, it seems to me that this resolution is very appropriate and germane at this time. It is worthy the most serious consideration of the Senate. Here are three States deprived of their importance and strength when matters of weighty moment to them are being discussed, preparatory to being decided upon. It is no fault of the people of these States that they are not fully represented here. It is their misfortune, which you can cure.

"In two of the three States there were three political parties represented in the legislature in such proportions that neither party had a majority, and, in consequence, an election should not have been had. In the other, one party had a majority, but individual ambitions and animosities prevented an election. It is quite likely that a strong belief that the governor had the power to appoint a Senator temporarily in case the legislature failed to elect may have influenced some legislators.

"It was not the intention of the people of these States that they should have but one Senator here. The great interests which these communities have in the pending and contemplated legislation precludes such an idea. Scarcely any States are more concerned about tariff legislation than Washington and Wyoming, while both have even greater interest in any legislation relating to financial matters. The very life-blood itself of Montana is in its mines, while it will also be directly affected by any tariff laws which may be passed.

"This Senate decided that, under the conditions which existed, the appointees of the governors of these three States were not entitled to seats in the Sena . I do not wish nor intend to criticise that decision. You will recall, however, that a majority of the Committee on Privileges and Elections voted in favor of seating the governors' appointees, and that the Senate rejected them by a bare majority of three, obtained with great difficulty.

"The report of the majority of the committee was submitted by the senior Senator from Massachusetts [Mr. Hoar], who also supported the report in remarks of great clearness and strength.

* * * * * * *

"The majority of the Committee on Privileges and Elections submitted their report through the Senator from Massachusetts and say:

"'We think said appointment valid.

"'The provisions of the Constitution, under which this question arises, are as follows (Art. I, sec. 3):

"'"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote."

"'What is the great and leading purpose which the provisions now under consideration was designed to accomplish? It is that the Senate of the United States shall be full, always full. Each State was to be represented there by two Senators. No State was ever to be deprived of its equal vote in the Senate, except by its own consent to a change in the Constitution itself.'

"The report says further:

"'The equality of the State representation in the Senate, which can only be secured by keeping both seats full, is of first importance. But the presence of two Senators instead of one is a consideration of very great importance indeed. There are a few members of that body whose party feeling would carry them so far as to induce them to prefer the absence of a colleague to the presence of one of opposite political faith. There are a thousand occasions when the power of consulting with an associate devoted to the interests of the same community, and conversant with its wishes, is of inestimable importance.'

* * * * * * *

"I will further say that, every Senator agreeing that the Constitution intended that each State should be represented by two Senators at all times, I submit in all candor that we should postpone the consideration of questions of such great importance to these partially represented States as are now pending until they have an opportunity to be fully represented.

"If the statement should be made that there is no measure before the Senate to change the Federal election laws or remodel the tariff, the answer is that it is well known that the question of changing the election laws is now being debated in the other House, and that in all probability the measure will reach the Senate long before the bill which is being discussed here relating to finance is brought to a vote. It is also well known that tariff hearings are being had before the Ways and Means Committee of the other House, as a preliminary to the framing and passing of a new tariff bill.

"If it be urged that the legislatures of these States will not be called together or if called together will not elect, the answer is that the Senate of the United State will have done its patriotic duty in endeavoring to preserve the rights guaranteed to those States by the Constitution. I have no reasonable doubt myself that the governor and legislatures of these States will lay aside every other consideration save that of duty to their respective States and have their full quota of Senators here at the appointed time if you pass the resolution which I have proposed.

"The legislatures have not been called together, it is true, but that is easily accounted for. There is a widespread opinion throughout those States, reflected in their newspapers, that the unseating of the applicants from those States was part of a plan to deprive them of a portion of their representation and then force measures through here inimical to their interests. I do not subscribe to those views; I repudiate them; but that is the prevalent opinion throughout that section of the country; and in consequence of that the legislatures of those States have not been called, in addition, of course, to the fact that it will be difficult to elect under the conditions which exist in the legislatures.

* * * * * * *

"I will close by saying that our forefathers constructed the Constitution on broad and patriotic principles, having always in view the rights of individuals and States, and we should be imbued with the same spirit in interpreting the Constitution. It were better than this legislation should fail than that we should be open to the suspicion of having used the power of numbers to wrong three sovereign States."

[Fifty-fifth Congress—First and second sessions.]

HENRY W. CORBETT, *of Oregon.*

The term of John H. Mitchell as a Senator from the State of Oregon expired March 3, 1897. Under the constitution and laws of the State of Oregon, the legislature of said State convened January 11, 1897. On that day the senate, constituting one branch of such legislature, met and effected a permanent organization. The house, constituting the other branch of said legislature, met on the same day and effected a temporary organization, and at a later day attempted a permanent organization, but its validity was in dispute and the house as thus organized was not recognized by the coordinate branch of the legislature—the senate—nor by the executive branch of the government of the State.

During the last week of February, 1897, both branches of the legislature dispersed and the members returned to their homes without having transacted any business of a legislative character. There was no election of a United States Senator by concurrent vote. What was claimed to be a lawful joint assembly was held; but that joint assembly did not elect a Senator and adjourned without day on the 24th day of February, 1897.

On the 6th day of March, 1897, Henry W. Corbett was appointed by the governor of the State of Oregon United States Senator to fill the place made vacant by the expiration of the term of Hon. John H. Mitchell.

The credentials of Mr. Corbett were presented in the Senate on the 15th day of March, 1897, and were referred to the Committee on Privileges and Elections. On the 19th day of March, 1897, a statement signed by the governor and the secretary of state of the State of Oregon was presented in the Senate and was referred to the Committee on Privileges and Elections.

On the 26th day of January, 1898, the committee submitted a report accompanied by a resolution that Mr. Corbett was not entitled to a seat in the Senate as a Senator from the State of Oregon. A majority of the committee were of the opinion that under the decisions of the Senate in several like cases, the case of Mr. Corbett called for the application of the rule of stare decisis, the point in the case being "whether the executive of a State can appoint a Senator to fill a vacancy caused by the expiration of the regular term of a Senator when the legislature chosen next preceding the expiration of the term fails to elect a Senator to fill such vacancy."

A minority of the committee were of the opinion that the appointment of Mr. Corbett was legal and entitled him to a seat in the Senate.

After the question of the right of Mr. Corbett to a seat in the Senate had been thoroughly debated, the resolution reported by the committee was adopted by a vote of 50 yeas to 19 nays.

The history of the case here given consists of a statement of the proceedings in the Senate in such case as published in the Congressional Record, the report of the Committee on Privileges and Elections, the views of the minority of the committee, a statement of the days on which the question was debated in the Senate, with a reference to the record of the same as published in the Congressional Record, extracts from the remarks of certain Senators in such debate, the vote on the amendment offered to the resolution submitted by the Committee on Privileges and Elections, and the vote on the resolution declaring Mr. Corbett not entitled to a seat in the Senate as a Senator from the State of Oregon.

PROCEEDINGS IN THE SENATE.

MONDAY, *March 15, 1897.*

Mr. McBride presented the credentials of Henry W. Corbett, appointed by the governor of Oregon a Senator from that State.

The credentials were read and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, pp. 11, 12.)

FRIDAY, *March 19, 1897.*

Mr. Chandler presented a statement signed by the governor and secretary of state of Oregon, which was read and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, p. 66.)

TUESDAY, *March 30, 1897.*

Mr. McBride presented a certificate from the governor of Oregon, amending the credentials of Henry W. Corbett, appointed a Senator from that State. The amended credentials were read and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, pp. 460, 461.)

JANUARY 26, 1898.

Mr. Caffery presented the report of the Committee on Privileges and Elections in the matter of the claim of Henry W. Corbett to a seat in the Senate as Senator from the State of Oregon. The report was received and ordered printed in the Record.

Subsequently Mr. Hoar presented the views of the minority of the committee, which were ordered printed in connection with the report of the committee.

(Cong. Rec., vol. 31, pp. 1017, 1018.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Chandler (chairman), Hoar, Burrows, Pritchard, Spooner, Faulkner, Caffery, Allen, and Pettus.]

Report (to accompany Senate Res. No. 253):

The Committee on Privileges and Elections, to whom were referred the credentials of Henry W. Corbett, claiming a seat in the Senate from the State of Oregon, respectfully report:

The term of Hon. John H. Mitchell, Senator from Oregon, ended March 3, 1897. The nineteenth biennial session of the legislature of Oregon, under the constitution and laws of that State, was to convene at the capital on the 11th of January, 1897. On that day the senate met and effected a permanent organization. The house met on the same day, effected a temporary organization, and at a later day effected a permanent organization. There was no recognition of the house by the executive branch of the government, or by the coordinate branch of the legislature, the senate.

The members of the senate and house dispersed and returned to their homes without having transacted any business of a legislative character. It thus appears that the legislature of Oregon deliberately refused to perform any of the functions with which they were charged, one of the most important being the election of a Senator to succeed John H. Mitchell.

We are of the opinion that a series of decisions by this body on the point involved in this case forms the rule of stare decisis.

The point of the case of Mr. Corbett is whether the executive of a State can appoint a Senator to fill a vacancy caused by the expiration of the regular term of a senator when the legislature chosen next preceding the expiration of the term fails to elect a Senator to fill such vacancy.

In the Lee Mantle case, decided by this body in 1893, the legislature of Montana adjourned the day before the vacancy occurred by the expiration of the term of Mr. Sanders, after having ineffectually balloted to elect his successor.

In the case of Mr. Corbett the legislature did not even make the attempt to elect. In the case of Mr. Mantle the legislature made the attempt and failed.

Your committee are of the opinion that there is no essential difference between the two cases. In both cases opportunity was afforded to the respective legislatures to perform their constitutional duty. They did not perform that duty. Whether because of failure to organize, as is alleged, but not substantiated, or because after organizing they failed to agree on a choice, does not affect the fact that opportunity was given in both cases to elect, of which they did not avail themselves.

The case of Kensey Johns, of Delaware, decided in 1794; of James Lanman, of Connecticut, decided in 1825; and of Lee Mantle, of Montana, decided in 1893, are on all fours with the case of Mr. Corbett. They were decided after full presentation and exhaustive argument. They decide that an executive appointment can not be made when the legislature had opportunity to elect and failed to elect.

There is no precedent of any weight against the authority of these cases. There have been appointments by governors when the legislature had not the opportunity to elect, and when the apparent hardship of depriving the State of a Senator operated to their admission, but your committee do not think that they have any weight in the solution of the question presented by this case.

Going outside of precedent, and interpreting the Constitution according to the accepted rule that the primary meaning of words is to be followed when there is nothing in the context to show that a secondary meaning is intended, and that general words take on the meaning of the special words, we are of the opinion that the "vacancies" mentioned in article 1, section 3, of the Constitution are those occurring in like manner as "resignation," i. e., by fortuitous event.

We are of the opinion that it would be a dangerous usurpation of power for a governor to appoint to fill a vacancy occurring by the expiration of a regular term in this body; one not sanctioned by the Constitution, and not supported by controlling precedent or convincing reason.

We therefore recommend the adoption of the following resolution:

"*Resolved*, That the Hon. Henry W. Corbett is not entitled to take his seat in this body as a Senator from the State of Oregon."

D. CAFFERY.
WM. V. ALLEN.
J. C. BURROWS.

I concur in the conclusion of the majority of the committee, and submit herewith my opinion.

E. W. PETTUS.

IN THE MATTER OF MR. HENRY W. CORBETT'S CLAIM TO A SEAT AS SENATOR FROM THE STATE OF OREGON.

I prefer to put my concurrence in the conclusion of the majority of the committee squarely and entirely on the ground that the question of law involved in this case was settled in the Mantle case, and ought to remain settled forever.

In the great debate in the Mantle case, which extended at intervals from March to August, 1893, the senior Senator from Massachusetts said:

"I am gratified that this question now arises under circumstances *where it can be settled* without any thought or imputation of partisanship upon any Senator delivering his judgment; because, although it happens there are two Republicans and one Democrat affected by these reports, there is a Senator in this body who took his seat on the 4th of March without question, whose title depends upon virtually the same thing." (25 Cong. Rec., pt. 1, p. 43.)

And in the same debate the then junior Senator from Indiana, in the same line of conservative wisdom, said:

"It would be perhaps as fair a way as any to treat this as a case of first instance, *the same as if no decision had been made upon it*, and to remit the present court, the members of this body sitting in judgment, to the text of the Constitution itself, to the letter of the passage relating to the appointing power, and the spirit of the context in which it is found, and the tenor and purpose of the whole instrument." (Ib., 68.)

The courts of England for centuries and the United States for one century declared it far better that the law should be *settled and known* than that it should be decided with technical accuracy. Those who have studied the judicial legislation enacted during the last forty years, the overthrow of principles long deemed settled, will appreciate the wisdom of the maxim, *Stare decisis.*

I think the question in this case was settled in the Mantle case, and should remain settled.

E. W. PETTUS.

VIEWS OF THE MINORITY.

The undersigned respectfully dissent from the opinion of the majority, and briefly state their reasons.

The term of John H. Mitchell, Senator from the State of Oregon, expired at noon on the 4th day of March, 1897. The members of the legislature who were entitled to elect a successor assembled on the 11th day of January, 1897. The senate completed a lawful permanent organization. That day the house attempted such an organization, but its validity was in dispute and for a time there were two bodies, each claiming to be the lawful house. There was never any election of a Senator by concurrent vote. What was claimed to be a lawful joint assembly was held; but that joint assembly never elected a Senator, and adjourned without day on the 24th of February, 1897. There were certain proceedings under which it was claimed that there was a due organization of the house. During the last week of February, 1897, both senate and house, whichever body be treated as the lawful house, dispersed and were declared by their respective presiding officers adjourned without day. Thereafter, on the 6th day of March, 1897, Mr. Corbett was appointed to the vacancy by the governor. It seems clear that there was a recess of the legislature of Oregon on the 3d of March, 1897, and that there has been one ever since. The only question is of the power of the governor to make a temporary appointment.

It is clear, whatever may have been the nature of the organization of the legislature, that it had dispersed and come to an end before the 3d day of March, 1897, when the vacancy in the office of Senator took place by the limit of the term to which Mr. Mitchell had been chosen, and which he had held for six years. Any choice or appointment made after that time must be a choice or appointment for less than six years. The constitutional provision for the choice of Senators is as follows:

"ART. 1, SEC. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; * * * if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

It is well settled, by a practice which has existed from the foundation of the Government, that vacancies so occurring after the beginning of a constitutional term may be filled by the legislature. If that be true they may be filled by the executive of the State during the recess of the legislature. The legislature is only authorized by the Constitution to fill such vacancies as might be filled by the executive by

temporary appointment until the next meeting of the legislature. So if the executive have no power the legislature has no power. The executive may lawfully make a temporary appointment and the legislature fill that vacancy when it assembles, or the office must remain vacant for the rest of the six years. It has been said that a vacancy does not happen when it occurs by reason of the expiration of a certain term, or when the office has never been filled. But the Constitution uses the same language in *When vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies.* (*Art. 1, sec. 2.*)

When the term of a Representative expires and the people have failed to elect a successor beforehand, which occurred very often when a majority was required for an election, the executive has always issued a writ of election to such vacancy as of course.

The provision as to executive offices is as follows:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session." (Art. 2, sec. 2.)

It is now well settled by long and uniform practice that this power exists when a vacancy happens in the constitutional sense, if the term of office limited by law expires during the recess of the Senate, or if a new office has been created which has never been filled, and the President makes the appointment in such case.

We think, therefore, that the governor of Oregon was entitled to make the appointment, and that Mr. Corbett is entitled to the seat.

GEO. F. HOAR.
WM. E. CHANDLER.
J. C. PRITCHARD.
JOHN C. SPOONER.

(Cong. Rec., vol. 31, pp. 1017, 1018.)

The report of the Committee on Privileges and Elections and the views of the minority of the committee were debated in the Senate January 31, 1898 (Cong. Rec., vol. 31, p. 1243), February 3, 1898 (ibid., pp. 1382–1389), February 8, 1898 (ibid., pp. 1535–1543), February 9, 1898 (ibid., pp. 1585–1588), February 10, 1898 (ibid., p. 1611), February 16, 1898 (ibid., p. 1763), February 17, 1898 (ibid., pp. 1828–1832), February 24, 1898 (ibid., pp. 2119–2133), February 25, 1898 (ibid., pp. 2160–2184), February 26, 1898 (ibid., pp. 2219–2223 and 2225–2230), and February 28, 1898 (ibid., pp. 2262–2274).

[Extracts from remarks of Mr. Caffery in support of the resolution reported by him from the Committee on Privileges and Elections, declaring Mr. Corbett not entitled to a seat in the Senate. Found in the proceedings of February 3, 1898, in the Congressional Record, vol. 31, p. 1389.]

"Mr. President, the proposition broadly laid down in the case of Mantle, which, with the case of Kensey Johns and that of Lanman, I contend, from the rule of *stare decisis*, is that where the legislature has an opportunity to elect and fails to elect, a governor can not appoint; but the reasoning in the cases goes beyond the facts, and points to the conclusion that under no circumstances can the governor appoint to fill an original vacancy commencing at the beginning of a term.

"It may be obiter to travel outside of the facts of a particular case and express an opinion upon matters not strictly necessary to the decision of the case in hand, but certainly, so far as the facts of this case go, they square with the facts of the Lanman case and the Kensey Johns case and the Mantle case.

"The adjudication of the Senate in these cases of Johns, Lanman, and Mantle forms the rule of *stare decisis;* and I ask where, under what circumstances, and under what conditions, could there be a more opportune application of the rule than in the adjudications by this body of the right of a member to fill a seat herein?

"We are called upon to perform a high constitutional duty; we are judges of the qualifications and elections of our members; and in the discharge of that duty in a particular case we must consult the Constitution; we must interpret that instrument according to our best judgment and our best ability; we must bring to bear upon the question not only the light of learning and jurisprudence but the aid of an enlightened conscience.

"Therefore it is, I say, Mr. President, that the rule of *stare decisis* as applied to the right of a seat in this body is of more importance than the application of rule to the judgments of courts deciding upon contracts and titles to property between private individuals. Here are three cases which, in my opinion, are on all fours with each other, that decide the point squarely and fairly, and there can be no evasion of their force as precedents.

"Mr. President, even if the legislature of Oregon was not technically organized, can this body tolerate such wanton disregard of legislative duty in order that the executive of a State may come in and do away with the performance of the duty of

a legislature by discharging it himself? Is there any constitutional duty of this kind that can be transferred, either by direct act or by indirect method, from the legislature to the governor?

"I contend that the legislature of Oregon had ample opportunity, had ample power, to fill the vacancy arising from the expiration of the term of Hon. John H. Mitchell, and whether by intrigue, whether by political combination, whether by a total and flagrant disregard of its duty, it failed to elect a Senator when it was within its power and opportunity to so elect, no other authority or power can constitutionally perform a function and discharge a duty with which it was exclusively charged.

"I think it would be giving a premium for legislatures to disregard their duty; is would be giving a premium for cabals and intrigues and combinations of variout kinds to prevent the action of legislatures in order that governors of States might appoint their personal favorites, if the Senate would admit their appointees under the circumstances of this case.

"Mr. President, the legislatures are the great constituencies of this body. I would be loath to see these constituencies changed; but if anything would convince the American people that there ought to be a change, it would be the premium placed upon the disregard of legislative duty by the Senate of the United States in admitting the appointees of governors to seats in this body who ought only to hold their seats, under such conditions as surround the case of Mr. Corbett, by legislative election."

[Extracts from letter written by Henry W. Corbett to Mr. Chandler in relation to the claim of Mr. Corbett to a seat in the Senate. Found in the proceedings of February 8, 1898, in the Congressional Record, vol. 31, pp. 1535, 1536, 1537.]

"WASHINGTON, *February 7, 1898.*

"DEAR SIR: Since the meeting of your committee in May last, and since my brief was submitted to you at that time, other thoughts have presented themselves to my mind which I desire to lay before you in the following brief statement for your consideration and that of the Senate if, in your judgment, you think it worthy of perusal. I therefore review the case as briefly as I can, without trespassing too much upon your valuable time.

"(I quote from Ex. Doc. No. 62.)

"The members elected to the legislature of Oregon assembled at Salem, the seat of government, on the 11th of January, 1897. The senate effected a permanent organization with its 30 members. The house likewise assembled and appointed a committee on credentials, electing the usual officers for temporary organization until such time as said committee should report.

"The members of the house continued to meet from day to day until January 21, and on each day up to that date the temporary speaker declared that 'there being no quorum present, and there having been no report from the committee on credentials, the house could take no action upon any resolution.' On that day the temporary speaker of the house was removed by a resolution offered by one of its members (Mr. Brown). The temporary speaker having declined to entertain the motion, no quorum being present, Mr. Brown put the question, and Mr. Smith, having received a majority of the votes cast, was duly elected temporary speaker of the house of representatives in place of Mr. Davis, and assumed the chair beside the former temporary speaker, and thereafter, on the same day, 31 members took the oath of office.

"On the 18th of February the pretended organization of the house offered house resolution No. 16, declaring the seats of 29 of the members vacant, by reason of their not having taken the oath of office.

* * * * * * *

"On the 19th of February 28 members assembled, 4 being absent and 28 not having qualified. On the same day, on a call for a vote on this resolution, the yeas and nays were taken, and it was adopted by a vote of 16 yeas to 11 nays. On the 23d of February the house passed a resolution to adjourn on Wednesday, February 24, 1897, on which day they adjourned, or dissolved, and the members went to their homes.

"On the 3d of February the house attempted to organize the joint assembly, at which time there were present 11 members of the senate and 29 members of the house, 40 in all. As part of the proceedings on that occasion there was read the following (see Ex. Doc. No. 62, p. 66):

" 'FEBRUARY 2, 1897.

" 'By unanimous consent Senator Brownell introduced senate resolution No. 19.

" 'Senate resolution No. 19.

" '*Resolved*, That the senate now proceed openly by viva voce vote of each member present to name one person for Senator in Congress from the State of Oregon for the full term commencing March 4, 1897.

" 'The president ruled: "In view of the fact that no organization of the house of representatives has yet been effected, and the act of Congress regulating the time and manner of electing Senators in Congress providing that such vote shall be taken on the second Tuesday after the meeting and organization of the legislature, the resolution is not in order and can not be entertained at this time by the senate."

" 'Senator Brownell appealed from the decision of the chair. After a full discussion, the yeas and nays were called for by Senators Brownell, Johnson, and Driver, the question being:

" ' "Shall the decision of the chair be sustained and stand as the judgment of the senate?"

" 'On this question the roll was called, and the vote was:

" 'Yeas, 16.

" 'Nays, 12.

" 'Absent, 1.

" 'Not voting, 1.

" 'So the decision of the chair was sustained, and the senate declined to consider senate resolution No. 19.'

* * * * * * *

"There were at no time present, as appears from this executive document, to exceed 40 members in attempted joint convention, and there were only present and voting in the pretended organization of the house to exceed 33 members, whereas section 3, article 4, of the constitution of the State of Oregon provides that 'the house of representatives shall consist of 60 members.' Section 12 of the same article provides that 'two-thirds of each house shall constitute a quorum to do business.' The same section says that 'a quorum must be in attendance before an organization thereof can be effected.' Two-thirds of 60 being 40, it is necessary that 40 members should assemble together to constitute a quorum and effect an organization or transact any other business, and must be properly organized before proceeding to vote for a United States Senator or passing any laws.

"The Constitution of the United States provides that 'no State shall be deprived of equal representation in the Senate,' while Article I, section 3, of the said Constitution provides:

" 'If vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancy.'

"The word 'happen' has been commented upon as not embracing such a case as that now before the senate for consideration. My contention is that a resignation is a voluntary act, as stated by Senator Edmunds in his debate on the Bell case on the 10th of April, 1879, as follows:

" 'The word "happen," it has been said, means a casualty, a contingency. So it does. It also means anything that takes place or occurs, that comes to pass. By what authority do constitutional lawyers, when a word of several meanings is used which includes several particulars within those meanings, say that it means half of what it means by the dictionary and by the common understanding of mankind now, as it was then? By what species of law or of logic are we to be told that a word is to be shorn of half its meaning? The Constitution does cover the case of a death, undoubtedly. That happens. It happens much more than a resignation does. A resignation, in the sense of chance, does not happen at all—in that sense "happen," because a resignation does not come by chance. It comes by the free will of the person who is competent to make it. Therefore, in order to give "resignation" any force in that sense as having happened, you must take some other meaning of the word than chance or casualty, because it is neither chance nor casualty. It is just as much the definite and public act of the person who has the right to make it as the passage of an act of Congress is by this Congress, precisely. It is an act of deliberate free will, and if it were not it would be void.'

"I contend that a failure to elect by a legislature, either by resignation of that body before an election occurs, or by the failure of the legislature to organize and elect before the vacancy occurs, is as much a voluntary act of the legislature as is the resignation of a Senator. If we are to be guided strictly by this meaning and eliminate the words of the Constitution 'or otherwise,' it would seem to exclude even

the death of a Senator. Therefore we contend that it must be given a broader meaning than has been attempted to be conveyed by others who have discussed this question. I find no warrant in the Constitution for refusing to seat a Senator who has been appointed by the governor of his State to fill a vacancy occurring during a recess of the legislature.

"The members of the legislature of Oregon met on the 11th of January. The house, failing in obtaining a quorum, dispersed on the 24th of February, and the senate on the 2d of March, the forty days having expired for which they could only receive pay. The vacancy occurred on the 4th of March, at 12 o'clock m., and the governor appointed the applicant on the 6th of March. The governor sets forth in his certificate that there has been no legal legislative session since the biennial session of 1895. Therefore, there being no legislature, as stated, this case comes clearly within the precedents established in the early history of the Government and cited in my brief (see p. 22) in the case of William Cooke, of Tennessee, 1797; Uriah Tracy, of Connecticut, 1801; William Hindman, of Maryland, 1801; Samuel Smith, of Maryland, term expiring 1803; Aaron Ogden, of New Jersey, 1803; Joseph Anderson, of Tennessee, 1809; Charles Cutts, of New Hampshire, 1813; John Williams, of Tennessee, 1817; all of whose terms expired on March 3 of the respective years.

"I see no warrant or provision in the Constitution whereby the Senate is authorized to discipline a State for not electing a Senator, even when there has been a legally organized legislature, and certainly not when there has been no legal organization of the legislature under the constitution of the State of Oregon under which it was admitted as a member of the Union. The Constitution of the United States provides how such a legislature shall be disciplined and what shall be the remedy in case of a failure to elect (the vacancy occurring during its recess), namely, that in such an event the governor may appoint to fill the vacancy, by temporary appointment to fill such vacancy until the meeting of the next legislature.

"Factions will exist, parties will differ, in some cases the choice of Senators will be delayed, and it is impossible to meet all the contingencies that may arise in this connection without an amendment to the Constitution providing for the election of United States Senators by the people. Therefore, until that action is taken I can not see how the Senate can deprive a State of equal representation therein. The legislature is elected by the people. The governor is likewise elected by the people, and the same obligation rests upon him as upon the legislature for keeping the State fully represented in the Senate.

"To me, personally, it is a question of little moment, but the right of a State to equal representation in this body can not be denied, in my judgment, properly, as many cases will arise in the future where a great injustice to such States will be done. It may not be inappropriate for me to state that this appointment was tendered without solicitation or authorization on my part to solicit the same for me through any other person or party, and so far as intimation has been made that a combination was entered into with the governor to defeat the election of a Senator for the purpose of my appointment, it is entirely unwarranted and untrue, and no one would impute such motives to our governor, who has sacrificed some of the best years of his life in the defense of his country, has served with honor and distinction as a judge of the supreme court of our State, and who lives in a modest way in his little cottage, and all that he has—or mainly so—is his good name and reputation, which he has honorably maintained for years past in our community. I trust you will excuse me for alluding to this personal matter, and I should not have done so had it concerned myself alone, but when such motives are insinuated or imputed to the honorable executive of our State it is due to him that I should publicly make this statement.

"In closing I quote from a letter from Hon. George F. Edmunds, one of the best-known constitutional lawyers, who says that the appointee is entitled to his seat, that 'this case comes clearly within the letter and spirit of the Constitution.'

"Very respectfully,

"H. W. CORBETT.

"Hon. WILLIAM E. CHANDLER,
"Chairman of the Committee on Privileges and Elections, United States Senate."

[Extracts from remarks of Mr. Pettus in support of the resolution declaring Mr. Corbett not entitled to a seat as a Senator from the State of Oregon. Found in the proceedings of February 9, 1898, in the Congressional Record, vol. 31, pp. 1586, 1587.]

"Mr. President, I propose to prove that the question now before the Senate has been decided in such a way that it ought to remain settled forever. I do not mean when I say the case has been decided that it has been decided once or twice or three times and therefore ought to remain settled, but it has been decided in such a way as that the Senate ought to be willing to allow the law to be known. It is nothing but a question of law.

"In the first place, in the case of Kensey Johns, the first of the election cases in the Senate, the identical question we are now considering was decided, and not only decided, but in the decision the Senate gave the reason for the decision, and that reason is stated in the resolution.

"'George Read, a Senator from Delaware, resigned his seat in December, 1793, during the recess of the legislature of said State. The legislature met in January and adjourned in February, 1794. On the 19th of March Kensey Johns was appointed by the governor of said State to fill the vacancy. It was determined that Mr. Johns was not entitled to his seat, a session of the legislature having intervened between the resignation of Mr. Read and the appointment of Mr. Johns.'

"Here is the resolution:

"'*Resolved*, That Kensey Johns, appointed by the governor of the State of Delaware as a Senator of the United States for said State, is not entitled to a seat in the Senate of the United States, a session of the legislature of the said State having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.'

"That decision was made prior to the act of 1866, designating the legislature by which Senators should be elected, but it involves exactly the same principle. Not long afterwards there were divers other cases which came up, involving kindred questions. I am only going to call the attention of the Senate to two cases bearing directly on this subject in the early period of our history. There are a great many other cases bearing on this subject, but it would weary the Senate to have them all called to its attention. I desire now merely to call to the attention of the Senate the case of Samuel S. Phelps, appointed Senator from the State of Vermont. I will read the facts:

"'Mr. Phelps was appointed by the governor of Vermont, January 17, 1853, during the recess of the legislature, to fill a vacancy in the Senate happening by the death of William Upham. His credentials were presented and he took his seat January 19. The legislature met in October and adjourned in December without electing a Senator to fill the unexpired term. Mr. Phelps had held the seat during the remainder of the second session of the Thirty-second Congress, ending March 3, and during the special session of the Senate, March 4 to April 11. December 29 he again attended. January 4, 1854, the Senate resolved that the Committee on the Judiciary inquire whether he was entitled to retain his seat. January 16 the committee reported the resolution "that the Hon. Samuel S. Phelps is entitled to his seat in the Senate of the United States." It was accompanied by a minority report adverse to the right of Mr. Phelps to a seat. March 16 the resolution reported by the committee was rejected by a vote of 12 yeas to 26 nays; and it was "*Resolved*, That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States.'"

"The minority report in that case contains some interesting history on that subject, but I shall not consume the time of the Senate in discussing it. I want it understood that I am not debating the question as to what ought to have been decided. I am not debating it on that theory. I am debating it on the theory that it has been decided over and over again one way, and then, as it is said, adversely; and that members have been seated here, without objection, contrary to the ruling of those early cases. It is true members were seated contrary to those early decisions.

"The next phase of the case was brought up by what are called the New Hampshire cases. It is claimed and asserted by the Senator from New Hampshire [Mr. Chandler] in his argument, that the decision in these cases proves the correctness of the minority report in this particular case. I do not consider that the decision goes to that extent, but it goes a long way in that direction.

"There is no use in reading the Blair nor the Bell case. They are familiar to you all. They grew out of a particular situation in the State of New Hampshire in its constitution and the act of 1866. The act of 1866 requires that the legislature elected next before the vacancy shall fill it—the legislature elected, not the legislature sitting, not even the old legislature if it be in session, but the legislature elected next before the vacancy. It so happened that under the constitution of New Hampshire when these vacancies occurred a legislature had been elected, but it did not sit until the next year. Therefore that legislature could not elect under the law of 1866, it not being in session, and by the constitution of the State not to be in session until there was a vacancy. The old legislature could not elect, although it might have been in session, because it was not the legislature designated by the act of Congress.

"Now you will observe that the Senate in the Blair and the Bell cases from New Hampshire, and in another case from New Hampshire, departed to some extent from the old ruling, by holding that as the State was in such a situation that the legislature could not elect, therefore the governor could appoint, and appoint to a full term. I have read these cases here. They are very ably argued on both sides. I do not intend to go into the argument, as I said at first, but you will notice that

there is a wide distinction between cases where the legislature of the State could not possibly elect under the law and cases where the legislature of the State was actually in session and ordered by the law of the United States to elect a Senator and refused to do it.

"That is all that the New Hampshire cases determine. They made it a matter of necessity. True, they went to the full extent of declaring that a governor could fill a whole term. As I said before, there were other cases where the Senate had allowed persons appointed to a whole term, who had been appointed by the governor after the legislature had been in session, to take their seats without any question. A number of cases were cited by the Senator from New Hampshire [Mr. Chandler] in his argument a few days ago. So this case had been variously decided when the great Mantle case came up, and in that case the gentleman who made the report in favor of Mr. Mantle, and another, the distinguished Senator from Indiana [Mr. Turpie], contended most earnestly that now was a chance to settle this question, and 'let us settle it now and forever.' That is the meaning of it. I hope those gentlemen do not belong to that class of men who think a question never is or can be settled until it is settled according to their own peculiar views. I want to show exactly how that question was debated in the Mantle case.

"The distinguished Senator from Massachusetts [Mr. Hoar] was the first to lead off in what I consider this line of conservative wisdom, because there is no doubt in the world that you had better have a case settled and allow the people and the country to know what the law is, than to be forever debating it in this body. The Senator from Massachusetts, who made the report and led the debate, used this language, and, if it means anything, it means the very thing for which I am contending here:

"'I am gratified that this question now arises under circumstances where it can be settled without any thought or imputation of partisanship upon any Senator delivering his judgment, because, although it happens there are two Republicans and one Democrat affected by these reports, there is a Senator in this body, who took his seat on the 4th of March without question, whose title depends upon virtually the same thing.' (Cong. Rec., vol. 25, pt. 1, p. 43.)

"There was a proposition on the part of the Senator from Massachusetts to have this thing settled here in this case, where we could have a fair chance, the Senator from Florida [Mr. Pasco] having been admitted and liable to be turned out, and there being two Democrats on one side and two Republicans on the other, and all depending virtually on the same subject.

"When I speak of the Mantle case I wish Senators to include in it the two other cases decided at the same time. The great Mantle case was debated from March until away into August before it was decided, and it was debated by many of the strongest men in the Senate at that time. The distinguished lawyer now occupying a seat as the senior Senator from Indiana, speaking on the same side of the same question, said he wanted the case decided once forever, just like the Senator from Massachusetts. He said:

"'It would be perhaps as fair a way as any to treat this as a case of first instance, the same as if no decision had been made upon it, and to remit the present court, the members of this body sitting in judgment, to the text of the Constitution itself, to the letter of the passage relating to the appointing power, and the spirit of the context in which it is found, and the tenor and purpose of the whole instrument.' (Cong. Rec., vol. 25, pt. 1, p. 68.)

"Evidently both of those Senators had in their minds that this vexatious question had been before the Senate for a long time and that it ought to be settled, and they proposed a settlement in the words I have read, and it was settled; that is, it was decided. But if we are forever to treat this question in a partisan sense, if we are forever to debate it, then the debate will only work injury to the country at large.

"Mr. President, the importance of having the law decided and known can not be overestimated. Some men treat it as a trifling circumstance that a question has been decided for fifty years one way, and overturned by that sort of logic which some men have which can prove a lie to their own satisfaction. The judicial learning of the United States, especially in the last thirty or forty years, ought to be a lesson to all mankind of the importance of adhering to that which has been the settled law for ages."

[Extracts from remarks of Mr. Spooner in opposition to the resolution declaring Mr. Corbett not entitled to a seat in the Senate. Found in the proceedings of February 24, 1898, in the Congressional Record, vol. 31, pp. 2119, 2120.]

"Mr. President, I am reluctant to take the time of the Senate, but having, as a member of the Committee on Privileges and Elections, joined the minority in a report that Mr. Corbett is entitled to a seat, I feel it to be my duty to state, as rapidly as may be, the grounds upon which I base my action.

"This is a question, Mr. President, of the very highest possible privilege. The term of the Hon. John H. Mitchell, as a Senator from the State of Oregon, expired on the 4th day of March, 1897. The vacancy occurred during a recess of the legislature; and acting, as he thought, and as I think, within the authority of the Constitution of the United States, the governor of Oregon appointed Mr. Corbett Senator and sent him here to submit to the Senate his right to a seat.

"When I was formerly a member of this body the right of Mr. Blair, of New Hampshire, to a seat by the appointment of the governor came before the Senate, and, while I did not participate in the debate, I examined the question with some care and satisfied myself that Mr. Blair was entitled to a seat. I have reexamined the question, and I do not regard my own right to a seat in this body as any higher or better established in law than I do the right of Mr. Corbett to represent here in part, for the time being, the State of Oregon.

* * * * * * *

"Preliminarily, it is said that this question ought to be considered by the Senate as settled because of the decision in the Lanman case, in the Kensey Johns case, in the Phelps case, and in the Mantle case; in other words—the proposition is not distinctly made by a majority of the committee in their report, but in part so, and emphasized by the Senator from Alabama [Mr. Pettus]—that this question ought not even to be debated, but that unanimously, as upon a question which is settled, Senators here, regardless of their individual judgment, should vote that Mr. Corbett is not entitled to a seat.

"Mr. President, the doctrine of *stare decisis* is a well-recognized doctrine. The Senator from Alabama spoke correctly when he said that its importance could not be overestimated. The books speak of it as a rule of public policy. That is accurate, but not as strong as the fact will warrant. With the growth of business, with the necessity for stability in judicial decisions, certainty as to rules of property, and the foundation of business transactions in the world, it has grown to be a rule of public necessity, founded originally, of course, in public policy; but it has always been regarded, I think, as a rule applicable only to the decisions of courts, and that, too, to the decisions of courts of last resort. It is not a rule as arbitrary and unyielding even as applied to courts as the Senator from Alabama seems to think. Chancellor Kent says in his Commentaries:

"'But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application.'

"The volume of overruled, doubted, and discredited cases, which will readily be found in the law library to-day, is almost as large as Webster's Dictionary. All judicial decisions are not subject to the doctrine of stare decisis. The rule of *res adjudicata* is very much broader than the rule of *stare decisis*. Whether a court will adhere to a decision which has been acquiesced in, even though they have doubts, not simply as to its 'technical accuracy' but as to its correctness, depends upon the character of the question, the length of time during which the decision has been acquiesced in, and whether it has entered into and become a rule of property or a rule of business. The Supreme Court of the United States has stated this proposition well in the case of the Minnesota Mining Company *v.* National Mining Company et al. (3 Wallace, 332), where Mr. Justice Grier said:

"'Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.'

"But even as applied to the decisions of courts, I repeat the courts have not been in the habit of holding themselves bound without discrimination by former decisions for whatever length of time they may have been acquiesced in. It depends upon the character of the question and the effect of disturbing the decision.

"I looked into Wells on *res adjudicata* and *stare decisis* to see if I could find noted the distinction in the applicability of this doctrine of *stare decisis* with reference to the class of questions or decisions, and find that he cites two leading cases—one a Wisconsin case. The supreme court of Wisconsin held valid the act of the legislature exacting from railway companies in the State, by way of license in lieu of other taxes, a percentage of the gross earnings, it being attacked as being in violation of the clause of the constitution which requires the rule of taxation to be uniform.

"Mr. GRAY. The State constitution?

"Mr. SPOONER. The State constitution; and the court held that the act was constitutional. Years after, a new court considering the question as a new question, and arguing it with very great ability, came to the conclusion, and so announced, that the original interpretation of the constitution was without good warrant of law; but when it was brought to the attention of the court that the former decision had become a rule of property in the State, and that to overturn it would overturn thousands of titles which had grown up, based upon it, and disturb all the tax proceedings in the intervening years, the court declared that, in view of the harmful result to follow, they felt obliged within the doctrine of *stare decisis* to allow the decision to stand, although were it *nova res* they would hold differently.

"The author, referring in the same connection to a case from Texas, says:

"'But the Texas court, speaking of the same subject of taxation, in reference to the constitutional provision lays down some limitations, which, doubtless, may be properly admitted, to the effect that where the decisions relate not to matters of title, or contract, but abstractly to the structure of the Government, the limits of executive and legislative power, etc., the doctrine of *stare decisis* does not apply. I give, however, the views of the court verbatim on this important topic.'

"The supreme court of Texas has well earned in later years—I do not know so much of it before—by learning, by strong reasoning, and the utmost judicial assiduity, the favor of the profession and of the courts with which their decisions are now received.

"'The proper determination of each of these cases depends upon the validity or invalidity of the 'Act to organize and maintain a system of public schools,' approved April 24, 1872, and the authority conferred thereby to collect the taxes brought in question in them. The constitutionality of this law, and the liability of the taxpayer for these taxes, has been sustained by this court. * * * It may be, therefore, thought that the question should not be regarded by us as now open for discussion'—

"That is the doctrine of the Senator from Alabama—

"'that whatever might be our views in respect to it, upon the principle of *stare decisis* we should hold it as definitely settled and concluded.

"'We can not, however, regard the rule of *stare decisis* as having any just application to questions of the character involved in these cases. This doctrine grows out of the necessity for a uniform and settled rule of property and a definite basis for contracts and business transactions. If a decision is wrong, it is only when it has been so long the rule of action as that time and its continued application as the rule of right between parties demand the sanction of its error; because when a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals and more injury result to society by a reversal of that decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error into which either our predecessors or ourselves may have unadvisedly fallen merely upon the ground of such erroneous decision having been previously rendered.

"'The questions to be considered in these cases'—

"As the question to be considered and determined in this matter, even if this were a court—

"'have no application whatever to the title or transfer of property, or to matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the Government, the limitations upon legislative and executive power as safeguards against tyranny and oppression. Certainly it can not be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis*.'

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"Therefore, a question like that now before the Senate, even if it were pending before a court, would not be so far regarded as settled by a prior adjudication as to properly preclude a court from reviewing its decision and settling it in harmony with its judgment as to constitutional construction.

"But, Mr. President, this doctrine of *stare decisis*, as I said before, applies to courts. Nobody ever heard before, so far as I am aware, of an attempt to apply it strictly and firmly and broadly, as the Senator from Alabama attempts to do, to the decisions of the Senate, of the House of Representatives, and of the different branches of the legislatures in dealing with contested election cases."

[Extracts from remarks of Mr. Foraker in opposition to the resolution that Hon. Henry W. Corbett is not entitled to take his seat in the Senate as a Senator from the State of Oregon. Found in the proceedings of February 26, 1898, in volume 31 of the Congressional Record, pages 2225, 2226, 2227, 2228.]

"Mr. President, the debate with respect to the seating of Mr. Corbett is already long protracted. It is not too much to say, perhaps, that every legitimate argument

that can be presented on both sides has been presented to the Senate. Surely I am justified in saying, after the speech of the Senator from Wisconsin [Mr. Spooner], that I might well be content to discharge my duty with the simple casting of my vote in favor of the seating of Mr. Corbett, as I shall cast it, for that speech was elaborate, masterly, and to my mind conclusive.

"Yet, Mr. President, I feel with respect to this matter as though I want to do something more than cast my vote. I want to at least briefly give the reasons why I do not intend to follow, as Senators have been insisting we should follow, the decision in the Mantle case. I do not intend to follow it, because in my judgment it was an erroneous decision. I think it was so regarded by the legal profession generally throughout the country at the time when that decision was made, for whether the Senators who were then here and made that decision recognized the fact or not, it was, I think, generally thought throughout the country that the silver question had more to do with the making of that decision than legal principles.

"I think the fact that that decision was erroneous is recognized by the Senators who are speaking in opposition here now in this debate to the seating of Mr. Corbett when they make to us the elaborate arguments that they have been making about the doctrine of *stare decisis*.

* * * * * * *

"But now to recur to what I was about to say. Our action in determining whether or not a Senator who comes here with credentials shall be seated is not judicial action. I need not stop to read, for all Senators are familiar with the fact that the Constitution of the United States, in the third article, provides that the judicial power of this Government shall be conferred upon certain courts which are named in the Constitution, or which according to that provision are authorized to be created by statute. There is no conferring of judicial power upon any body but the courts. The legislative branch has no judicial power.

"I have not been able to find any decision of the Supreme Court directly in point upon that question in the limited time I have had to make an examination, but being familiar with a decision of the supreme court of Ohio that is directly applicable, I want to call attention to it. The constitution of the State of Ohio provides, just as the Constitution of the United States does, that the judicial power shall be conferred upon the courts enumerated in the constitution and authorized by statute. The constitution further provides that in all contested cases of election the trial shall be had before such tribunal as the legislature may appoint.

"The legislature of Ohio provided by statute that in every case of contested election of a judge the trial should be before the State senate. We had a judicial contest. It was brought before the State senate, and the State senate found against the contestee. I believe that is the way the case arose. At any rate the decision of the State senate came before our supreme court, and one of the questions involved was whether it was competent under our constitution to confer upon the State senate the power to hear and determine a case of contest. It was claimed that senators could not sit as judges in that contested-election case without exercising judicial power; but our supreme court said, in answering that proposition, that the judicial power was conferred upon the courts, and that while this involved a necessity to sit and hear testimony and pass judgment, yet it was not in an appropriate sense an exercise of judicial power, although approaching the exercise of judicial power in its nature, remarking in that connection that there were many powers which would be held to be legislative or judicial accordingly as the exercise of those powers might be conferred upon a court or upon a legislative body.

"I will not stop to read the case, but it is the case of The State *v.* Harmon (31 Ohio State Reports, p. 250). The case there is precisely what the case is here. The senate of Ohio was empowered to hear and determine. They had to hear and weigh testimony; they had to examine witnesses; they had to pass judgment; they had to determine rights. That is all we have to do in this case. We hear the testimony, we hear what the facts are, and we then apply the law to the case.

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"Therefore it is that I do not believe we ought now to follow the decision in the Mantle case, because in my opinion that decision was erroneous, and because, Mr. President, this country has never accepted it and followed it in such a way as to make it appropriate to apply here, if otherwise it might be appropriately applied, the doctrine of *stare decisis*. No rights have been vested on account of it; no rule of property has been created on account of it; no rule of public policy will be violated that has been adopted on account of the Mantle case if we now depart from it. Therefore, if the Mantle decision was erroneous, as invoking the doctrine of *stare decisis* implies that it was and concedes that it was, we are under no obligation whatever to follow it and now make a second erroneous decision.

"In the next place I object to following it, Mr. President, because, not being a judicial decision, if it were otherwise on all fours with this case, the disposition of the Mantle case would not bind us now upon the doctrine of *stare decisis* or *res adjudicata*, because that doctrine can be applied only to a judicial decision, and that decision was not judicial. Judicial power in this country is conferred upon the courts. It is only when courts pass judgment upon those things with respect to which they have been given jurisdiction that judicial power is exercised and the predicate is laid for invoking the doctrine of *stare decisis*, other things being appropriate for its application.

"But, Mr. President, there is a stronger reason to my mind—if it be possible to have any stronger—than the one I have suggested why the decision in the Mantle case should not bind anybody in this case; why we should feel ourselves at liberty to take up this case and consider it *res nova*. It has been said here, and repeated over and over again, that this case is identical with the Mantle case upon the facts. I do not so understand it. Not only do I not understand the facts to be the same, but I can not comprehend how any Senator can make that statement about the facts, admitted and conceded to be what all agree that they are—but when I speak of facts I contradistinguish simple facts from the mixed case of law and fact.

"There is not any question but that in the Mantle case the legislature had met, had organized, and as an organized body was in session, with full power and opportunity to elect a Senator if it had seen fit to do so, and failed. In this case it is an admitted fact that while the members-elect to that general assembly had a meeting, they never did have an organization as a legislature under and in accordance with the provisions of the constitution of the State of Oregon.

"I listened to the Senator from Tennessee [Mr. Turley] yesterday as he stated the undisputed facts. If I do not state them exactly as they are, I trust that he will correct me. The senate met—the members-elect. They had a temporary organization. They met subsequently and had a permanent organization, and there is not any question but that the senate of Oregon was duly constituted, duly met, duly organized, and duly in session, with power to do its part in the election of a Senator.

"As to the house the case was different. They met; they had a temporary organization; appointed a committee on credentials, and adjourned without anybody taking the oath of office. They never met again, except only a portion of them. The constitution of Oregon provides that two-thirds of the whole number of members elected, or 40—having reference to the figures that will represent the number of members of that house—shall constitute a quorum. There were never but 31 assembled after the first meeting; never but 31 members met who had taken the oath of office; there was not, therefore, ever a quorum of the house of Oregon in meeting or in session of any kind whatsoever, and yet it is said they were in session and full opportunity to elect a Senator.

"How is that said? It is said they were in session, because the constitution of Oregon provides that less than a quorum may adjourn from day to day, and shall have power to send for and compel the attendance of absent members; and because, while they were so sitting and adjourning from day to day and undertaking to compel the attendance of absent members, they were not subject to arrest; they were in the enjoyment of all the privileges conferred upon those who were in attendance upon the general assembly in the performance of their duties, and because, further, it is provided by the statute of Congress that on the second day of the Senatorial election, when the two houses of the legislature meet in joint session, they shall proceed with the election, provided there be a majority of both houses present.

"Well, now, Mr. President, let us examine that just for a moment. It does not seem to me that upon these facts there was a house of representatives in session when less than a quorum had taken the oath of office and were meeting from day to day and adjourning from day to day, with power to compel the attendance of absent members, and when it is admitted that they never did compel such attendance.

"Certainly it can not be contended that there was ever an organization of that house which met the requirements of the constitution of Oregon, and surely, for the purposes of organization, that constitution would be the organic and supreme law to govern the house of representatives. It does not cut any figure, Mr. President, that there was a majority present, or more than a majority, who had taken the oath of office, so long as the majority failed to be a quorum. If there had been only 10 members of the general assembly present who had taken the oath of office, who were meeting from day to day and adjourning from day to day, with power to send for the other members and compel their attendance, those 10 would have been just as much a legally organized and acting house of representatives of the State of Oregon as the 31 members were or ever could be. It does not make any difference, when you come to consider the question of organization, whether they had 31 members, or 21 members, or 10 members, or 5 members. So long as less than 40 members

assembled and took the oath of office and undertook to act together, there was less than a quorum and never any organization. Nothing, it seems to me, can be more definitely established than that.

"How did the Senator from Tennessee yesterday, in his very able argument, with which I was pleased, although he differed from me in the opinion he was trying to uphold, undertake to say that that legislature, which he was compelled to admit never had any valid organization under the constitution of Oregon, had an opportunity to elect a Senator? He got around that by pointing out to us the language of the statute of the United States governing in such case and commenting upon that feature of it to which I have already adverted, that on the second day, if there be a majority of each house present, they may proceed to the election of a Senator. Ah, but, Mr. President, the Senator from Tennessee skipped over lightly the preceding section of the statute. This statute can have no application or operation except only the condition precedent, for the second day's session, the joint session, shall have been complied with. What is the language of the statute? I will read section 14, title 2, chapter 1:

"'SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.'

"When came the time—will some Senator please answer—when it was competent under this statute for the legislature of Oregon to proceed with the election of a United States Senator? This statute can have no application, can confer no power or authority, until after the legislature shall have met and shall have organized. When did it organize? The senate organized, we all agree; but the organization of the senate is not an organization of the legislature. When did the house organize? Never. That, Mr. President, is the crucial point in the whole case. There never was any organized legislature in the State of Oregon."

MONDAY, *February 28, 1898.*

Mr. Hoar moved to amend the resolution reported from the Committee on Privileges and Elections by striking out the word "not," so as to make the resolution read:

"*Resolved*, That the Hon. Henry W. Corbett is entitled to take his seat in this body as a Senator from the State of Oregon."

A vote being taken thereon, the amendment was rejected by the following vote:

Ayes—Messrs. Aldrich, Allison, Baker, Fairbanks, Foraker, Frye, Hanna, Hansbrough, Hawley, Hoar, Lodge, Mantle, Mason, Morrill, Perkins, Sewell, Turner, Wetmore, and Wilson—19.

Nays—Messrs. Allen, Bacon, Bate, Berry, Burrows, Butler, Caffery, Carter, Chilton, Clark, Clay, Cockrell, Cullom, Davis, Deboe, Faulkner, Gallinger, Gorman, Gray, Hale, Heitfeld, Jones (Ark.), Jones (Nev.), Kenney, Lindsay, McBride, McMillan, Mallory, Martin, Mills, Mitchell, Money, Nelson, Pasco, Penrose, Pettigrew, Pettus, Platt (Conn.), Rawlins, Roach, Shoup, Stewart, Teller, Thurston, Tillman, Turley, Turpie, Vest, Warren, and Wellington—50.

Thereupon a vote was taken on agreeing to the resolution as reported from the Committee on Privileges and Elections and the same was agreed to by the following vote:

Ayes—Messrs. Allen, Bacon, Bate, Berry, Burrows, Butler, Caffery, Carter, Chilton, Clark, Clay, Cockrell, Cullom, Davis, Deboe, Faulkner, Gallinger, Gorman, Gray, Hale, Heitfeld, Jones (Ark.), Jones (Nev.), Kenney, Lindsay, McBride, McMillan, Mallory, Martin, Mills, Mitchell, Money, Nelson, Pasco, Penrose, Pettigrew, Pettus, Platt (Conn.), Rawlins, Roach, Shoup, Stewart, Teller, Thurston, Tillman, Turley, Turpie, Vest, Warren, and Wellington—50.

Nays—Messrs. Aldrich, Allison, Baker, Fairbanks, Foraker, Frye, Hanna, Hansbrough, Hawley, Hoar, Lodge, Mantle, Mason, Morrill, Perkins, Sewell, Turner, Wetmore, and Wilson—19.

(Cong. Rec., vol. 31, p. 2275.)

At the first session of the Fifty-sixth Congress, and during the debate in the case of Matthew S. Quay, the case of Henry W. Corbett was discussed by Mr. Carter and Mr. Simon and certain papers relating to the case were inserted in the Record and are referred to here.

(Cong. Rec., vol. 33, pp. 2573–2579.)

[Fifty-fifth Congress—Special session of the Senate.]

ANDREW T. WOOD, *of Kentucky.*

The term of Joseph C. S. Blackburn, a Senator from the State of Kentucky, expired March 3, 1897. The legislature of said State not being then in session, the governor of said State, on the 5th day of March, 1897, appointed Andrew T. Wood to fill the vacancy in the Senate caused by the expiration of the term of Mr. Blackburn. The credentials of Mr. Wood were presented in the Senate March 10, 1897, and were referred to the Committee on Privileges and Elections. No report was submitted by the committee concerning the claim of Mr. Wood to a seat in the Senate. Afterwards William J. Deboe was duly elected by the legislature of the State of Kentucky to succeed Joseph C. S. Blackburn as a Senator from said State. Mr. Deboe appeared and took his seat in the Senate during the first session of the Fifty-fifth Congress, and no further action was taken in respect to the claim of Mr. Wood.

The history of the case here given consists of a statement of the proceedings in the Senate in reference to the claim of Mr. Wood, as published in the Congressional Record.

PROCEEDINGS IN THE SENATE.

WEDNESDAY, *March 10, 1897.*

The Vice-President presented a communication from the governor of Kentucky, which was read, as follows:

"COMMONWEALTH OF KENTUCKY, EXECUTIVE OFFICE,
"*Frankfort, Ky., March 5, 1897.*

"SIR: I have the honor to notify you that I have this day appointed Andrew T. Wood, of Montgomery County, this State, Senator from Kentucky in the United States Senate (to supply the vacancy occasioned by the expiration of the term of J. C. S. Blackburn as such Senator, which happened during the recess of the legislature of Kentucky, said body not being now in session) temporarily until the next meeting of said legislature and election thereby of his successor.

"In testimony of which, as governor of said Commonwealth, my name, with seal of State, is hereto attached, day and date above written, and in the one hundred and fifth year of the Commonwealth.

"WILLIAM O. BRADLEY.

"Attest:
"CHARLES FINLAY, *Secretary of State.*
"By E. D. GUFFEY, *Assistant Secretary of State.*

"Hon. GARRET A. HOBART,
"*Vice-President of the United States and President of the Senate.*"

Mr. Hoar moved that the Senator appointed from the State of Kentucky be admitted to take the oath.

On motion of Mr. Gorman the credentials presented, with the motion of the Senator from Massachusetts, were referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, p. 7.)

[Fifty-fifth Congress, first session.]

JOHN A. HENDERSON, *of Florida.*

The term of Wilkinson Call as Senator from the State of Florida expired March 3, 1897. By the constitution of the State of Florida the legislature of that State was chosen in the month of October 1896, but did not meet until in the month of April, 1897. A special session of Congress having been called to begin on the 15th day of March, 1897, the governor of the State of Florida on the 6th day of March, 1897, appointed James A. Henderson to fill the vacancy caused by the expiration of the term of Mr. Call. The credentials of Mr. Henderson were presented in the Senate March 16, 1897, and his right to a seat in the Senate was discussed. The credentials were referred to the Committee on Privileges and Elections, and attention having been called to a defect in the credentials, amended credentials were presented March 25, 1897, and referred to the same committee. No report was submitted by the committee, nor was any further action taken by the Senate in the matter. On the 14th day of May, 1897, Stephen R. Mallory was elected a Senator from the State of Florida for the term beginning March 4, 1897, and duly appeared and took his seat as such Senator.

The history of the case here given consists of a statement of the proceedings in the Senate in said case as published in the Congressional Record and extracts from the remarks of Mr. Hoar and Mr. Pasco in regard to referring the credentials of Mr. Henderson to the Committee on Privileges and Elections.

PROCEEDINGS IN THE SENATE.

WEDNESDAY, *March 16, 1897.*

Mr. PASCO. I present the credentials of Mr. Henderson, who comes here by appointment of the governor of the State of Florida.

The credentials were read, as follows:

"STATE OF FLORIDA, EXECUTIVE DEPARTMENT.

"I, W. D. Bloxham, governor of the State of Florida, by virtue of the authority in me vested by subdivision 2 of section 3 of Article I of the Constitution of the United States, have, by reason of a vacancy happening from the expiration of the term of Hon. Wilkinson Call as United States Senator from the State of Florida on the 4th day of March, 1897, and during the recess of the legislature of said State, made temporary appointment of Hon. John A. Henderson, of Tallahassee, Leon County, Fla., who is duly qualified therefor under the Constitution of the United States, to be Senator in the Congress of the United States from the State of Florida from said 4th day of March, 1897, until the legislature of said State shall fill such vacancy.

"In testimony whereof I have hereunto set my hand and caused the great seal of the State of Florida to be affixed.

"Done at Tallahassee, the capital, this 6th day of March, A. D. 1897.

"[SEAL.] W. D. BLOXHAM, *Governor.*

"By the governor. Attest:

"JNO. L. CRAWFORD, *Secretary of State.*"

Mr. Pasco stated that Mr. Henderson was in waiting and asked that he be allowed to take the oath of office.

Mr. Allen moved that the credentials be referred to the Committee on Privileges and Elections.

Mr. Pasco. I am not willing to consent to that course. The case of Mr. Henderson is different in many respects from the two cases which have already been referred to the Committee on Privileges and Elections, and I see no reason why there should be any delay whatever in admitting him to a seat. When I presented similar credentials myself four years ago, without any objection, without any motion, I was admitted to my seat; and Mr. Henderson's case is precisely the same as that which was then presented to the Senate.

* * * * * * *

Mr. HOAR. I desire to call the attention of the Senate and of the Senator from Florida to the fact that there is a clear illegality in this proceeding, as disclosed by the credentials themselves. The governor has undertaken to appoint this gentleman to hold office until the legislature shall elect. He has no such power. He can only appoint, under the constitution, until the next meeting of the legislature. That has been extended by an ancient, well-settled construction to the time when the legislature either elects after meeting or adjourns without an election, but it never has been contended by anybody from the foundation of the Government that a governor could appoint until the legislature elected. They may meet and adjourn, and meet again and adjourn half a dozen times without an election. Strictly construed, this is an appointment not merely for six years, but forever, if the legislature of Florida do not elect. But, at any rate, the governor made this appointment supposing that he could appoint a man who would hold office certainly for the rest of the term of six years if the legislature of Florida did not agree. Non constat, if he were to appoint a man for a few days or weeks, he would not have appointed a very different person. So these credentials differ from all the other cases in the fact that they are materially defective themselves. Certainly the proposition which I make is grave enough to be referred to the Committee on Privileges and Elections.

But I also desire, now I am up, to say to the Senator from Florida that, having studied this matter as thoroughly as I can, it seems to me that all these cases—the three which have now been presented and some others which have been settled by the Senate—are governed and ought to be governed by one simple principle, which would require all three of these applicants to be admitted, as it required Mr. Blair and Mr. Bell to be admitted, but which also would require the overruling of some recent and, it appears to me, quite erroneous action of the Senate. There ought to be a well-considered, careful dealing with this whole subject, first by the report of the committee, and afterwards by the action of the Senate. It is very much more important that we should extricate ourselves from the mud in which we have got on this matter of executive appointment than that any one gentleman should have the right of sitting a week or two earlier or later in this body.

When the Senator from Florida himself came in, everybody knew that the matter was merely formal. His election by his legislature in the course of two or three weeks was as sure as any such thing in the future ever would be, and to have kept him out while the committee scrutinized his credentials would have cost him his place on committees which he had earned by long service and would have left also the seat vacant. Therefore, his colleagues on both sides of the Chamber thought it was not worth while to raise the question.

* * * * * * *

Mr. President, I for one, as at present advised, after very careful study of the matter, agree with the Senator from Florida in one particular. I think—and I go further than I understood him to go—I think that the Constitution intended that this body should be always full, and that its framers did not mean to have any difficulties in the way. They were not quite so sure that the State legislatures would always elect or that Senators elected would always accept in those days. The seats here were not the objects of ambition when the Constitution was framed that they have become since. The powers of the United States Government were few—at any rate, those exercised were few—the subjects of our jurisdiction were limited. It was a painful and disagreeable thing in those days for a man to leave his home for the seat of government and travel here, and in many of the States there were fines established by law for the punishment of persons who refused to accept legislative and other public offices. I might add further that down even to Mr. Webster's time one of the serious dangers which Mr. Webster spoke of as menacing our Government was that it might fall to pieces by the failure of the State legislatures to elect Senators and of the people to elect Representatives. He contemplated that as one of the serious dangers to our Government down to 1825 or 1830.

It seems to me that the Constitution meant to say that when the legislature is in session it shall choose a Senator, and that if the office be vacant when the legislature is not in session a Senator shall be appointed ad interim by the great authority representing the State in all other of its great functions, the governor or executive, who in those days appointed the judges and the great officers of the State. There was a simple, ample, sufficient method of providing for the keeping of seats in this body always occupied by the representatives of the different States, and all the subtleties and refinements which have been born of political desires where the votes of Senators have been affected by the question whether the man was a silver man or a gold man, a Democrat or a Republican, have produced infinite mischiefs and have gone far to get us into difficulty, and I hope we shall go back to what was the simple and plain

constitutional doctrine which was involved in the action by the Senate in the cases of Blair and Bell, and which was laid down in the report of the majority of the Committee on Privileges and Elections in the cases of Lee Mantle and others.

(Cong. Rec., vol. 30, pp. 26, 27, and 29.)

The motion to refer the credentials to the Committee on Privileges and Elections was agreed to.

(Cong. Rec., vol. 30, p. 34.)

THURSDAY, *March 25, 1897.*

Mr. Pasco presented the amended credentials of Mr. John A. Henderson, appointed a Senator from the State of Florida.

The credentials were read and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, p. 261.)

[Fifty-sixth Congress, first session.]

MATTHEW S. QUAY, *of Pennsylvania.*

The term of Matthew S. Quay, a Senator from the State of Pennsylvania, expired March 3, 1899. The legislature charged with the duty of choosing his successor failed to elect. On the 21st day of April, 1899, the governor of the Commonwealth of Pennsylvania appointed Matthew S. Quay a Senator from said State to supply the vacancy in the Senate of the United States occasioned by the expiration of the term of said Matthew S. Quay.

On the 4th day of December, 1899, the credentials of Mr. Quay were presented in the Senate and referred to the Committee on Privileges and Elections; also a resolution that Mr. Quay be admitted as a Senator from the State of Pennsylvania in accordance with the appointment by the governor of said State. On the 23d day of January, 1900, the committee reported a resolution in the case of Mr. Quay, that he was not entitled to a seat in the Senate as a Senator from the State of Pennsylvania. This resolution was accompanied by the report of the committee and also the report of the minority of the committee, which alleged the right of Mr. Quay to a seat in the Senate.

After a full debate the resolution reported by the committee was adopted by a vote of 33 to 32.

The history of the case here given consists of a statement of the proceedings of the Senate in the case as published in the Congressional Record, the report of the Committee on Privileges and Elections, the report of the minority of the committee, a statement of the days on which the debates occurred, with a reference to the record of the same, a portion of the remarks of Senators in such debate, a statement of the vote on the amendment to the resolution reported by the committee, and a statement of the vote on the adoption of the resolution.

PROCEEDINGS IN THE SENATE.

MONDAY, *December 4, 1899.*

Mr. Penrose presented the credentials of Matthew S. Quay, appointed by the governor of Pennsylvania a Senator from that State, which were read, as follows:

"In the name and by the authority of the Commonwealth of Pennsylvania, executive department.

"*To all to whom these presents shall come, greeting:*

"Whereas a vacancy exists in the representation of the Commonwealth of Pennsylvania in the Senate of the United States by reason of the expiration of the constitutional term of the Hon. Matthew Stanley Quay and the failure of the general assembly of the Commonwealth to elect his successor: Therefore, know ye, that reposing especial trust and confidence in the prudence, integrity, and ability of the Hon. Matthew Stanley Quay, I, William A. Stone, governor of the Commonwealth of Pennsylvania, in conformity to the provisions of clause 2 of section 3 of Article I of the Constitution of the United States, have appointed, and do by these presents commission, him a Senator to represent this State in the Senate of the United States, to supply the vacancy in the Senate of the United States occasioned by the expiration of the term of office of the Hon. Matthew Stanley Quay, which occurred on the 4th day of March last. He is, therefore, to have and to hold the said office, together with all the rights, powers, and privileges thereunto belonging, or by law in any wise appertaining, until the next meeting of the legislature of the Commonwealth of Pennsylvania, or until his successor shall be duly elected and qualified, if he shall so long behave himself well.

"This appointment to compute from the day of the date hereof.

"Given under my hand and the great seal of the State, at the city of Harrisburg, this 21st day of April, in the year of our Lord 1899 and of the Commonwealth the one hundred and twenty-third.

WILLIAM A. STONE.

"[SEAL.]

"By the governor:

"W. W. GRIEST, *Secretary of the Commonwealth.*"

The credentials were referred to the Committee on Privileges and Elections.

Mr. Chandler submitted the following resolution, which was referred to the Committee on Privileges and Elections:

"*Resolved*, That Matthew S. Quay be admitted as a Senator from the State of Penn-

sylvania in accordance with his appointment made on April 21, 1899, by the governor of the State."

Mr. Burrows presented a memorial in the nature of a remonstrance against the seating of the appointee by the governor of the State of Pennsylvania, which was received and referred to the Committee on Privileges and Elections.

Mr. Jones, of Arkansas, presented a remonstrance by 78 members of the legislature of Pennsylvania against the seating of M. S. Quay as a Senator from said State, which was also referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 33, p. 1.)

THURSDAY, *January 4, 1900.*

Mr. Hoar asked and obtained leave of the Senate to make a statement in the nature of a personal explanation, as follows:

"Mr. President. I receive in my mail daily a good many letters—and I dare say the same is true of all members of the Senate—appealing to me with great earnestness to vote to deny a seat in the Senate to a gentleman from Pennsylvania who claims a seat by reason of an appointment made in the recess of the legislature by the governor of that State. Some of the writers of these letters are Quakers—members of the Society of Friends; others are evidently very philanthropic persons; and I am to assume that they are very good judges of character, because their letters are full of personal compliments to myself [laughter], and I dare say the same is true of the letters received by other Senators. The proposition is, however, that I must vote—and they are surprised at my having any doubt about it—to deny a seat in this body to the gentleman who claims it under an appointment on the ground of certain charges that they make against him in regard to his personal character and fitness for the office.

"A good many years ago I investigated the question of the right of the governor of a State to appoint, and I suppose I have made eight or ten elaborate speeches during the last fifteen years in favor of the proposition that whenever, during the recess of the legislature of a State there was a vacant seat in the representation of that State in the Senate, the governor had the right to fill it, and I have made three or four reports in favor of that proposition.

"The Senate is the body, the court, the judge of the election of Senators. I am one of the sworn judges, and what these worthy gentlemen are asking me to do is, in substance, to stuff the ballot box and make a false return in my capacity as a sworn judge of elections because they think the governor of a State ought to have appointed somebody else.

"That is the attitude which these worthy gentlemen are taking, and I see that some newspapers of wide circulation in my own State affected to take the same view of the case. Of course the same principle would require Senators, if the legislature should elect this gentleman or some other against whom such charges can be maintained, to deny him a seat when the legislature has elected him. If the governor has no right to appoint or the legislature has no right to elect, then of course we do not admit the claimant. But if the governor have the right to appoint or the legislature have the right to elect, and we declare that they have not appointed him or have not elected him when they have, we are doing exactly what is done by ballot-box stuffers and election judges who make false returns.

"I hope this little statement of mine regarding such communications—in which I am sure every member of this body, without exception, will concur—will answer as a reply to the great batch of letters I am getting on this subject."

(Cong. Rec., vol. 33, p. 646.)

TUESDAY, *January 23, 1900.*

Mr. Turley, from the Committee on Privileges and Elections, reported a resolution in the case of Matthew S. Quay, who claims the right to a seat in the Senate as a Senator from the State of Pennsylvania. He also submitted the report of the Committee on Privileges and Elections in the said case; also the views of the minority of said committee.

The secretary read the resolution, as follows:

"*Resolved*, That the Hon. Matthew S. Quay is not entitled to take his seat in this body as a Senator from the State of Pennsylvania."

It was ordered that the resolution be placed on the Calendar and that the report of the Committee and the views of the minority be printed.

(Cong. Rec., vol. 33, p. 1051.)

REPORT OF THE COMMITTEE.

[The committee consisted of the same Senators named in the statement preceding the report in the case of Nathan B. Scott, supra.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 23, 1900.—Ordered to be printed.

Mr. Turley, from the Committee on Privileges and Elections, submitted the following report (to accompany Senate resolution relative to admitting Matthew Stanley Quay, of Pennsylvania, to a seat as a Senator):

The Committee on Privileges and Elections, to whom were referred the credentials of Matthew Stanley Quay, claiming a seat in the Senate from the State of Pennsylvania, respectfully report:

Prior to March 3, 1899, Mr. Quay was a Senator in Congress from the State of Pennsylvania. His term of office, to which he had been elected by the legislature of Pennsylvania, expired by effiux of time on the 3d day of March, 1899. The legislature of Pennsylvania convened in regular session on the first Tuesday in January, 1899. On Tuesday, January 17, 1899, it began balloting for the purpose of selecting some one to succeed Mr. Quay and fill the vacancy which would occur on the 3d day of March, 1899. Daily ballots were taken in obedience to the provisions of the act of Congress of July 25, 1866, and of the Pennsylvania statute of January 11, 1867, from that date until April 19, 1899. The legislature adjourned April 20 without effecting an election. Thereafter, on April 21, 1899, the governor of Pennsylvania appointed Mr. Quay to represent the State of Pennsylvania in this body until the next meeting of the legislature.

It will thus be seen that the vacancy, which the governor of Pennsylvania has here attempted to provide for by a temporary appointment, was one which was foreseen, one which was caused by the expiration of a prior term, one which occurred while the legislature of Pennsylvania was in session, and one which that legislature had an opportunity of filling before it occurred, and also after it occurred, in the interim between the date of the occurrence and the appointment by the governor.

Under these facts we think that the appointment is invalid.

On behalf of Mr. Quay it is insisted that whenever a vacancy exists during the recess of a legislature, no matter when or how it happened or occurred, and no matter how often the legislature may have had an opportunity to fill it, the governor may appoint.

In the opinion of your committee whenever the legislature has had the right and an opportunity to fill a vacancy, either before or after it begins, the executive can not lawfully appoint.

The question involved is a constitutional one, a judicial one, and the Senate of the United States is the only court, the sole tribunal, which has jurisdiction over it and power to settle it. The Senate has had frequent occasion in the past to consider the power of the executives of States to make temporary appointments to seats in this body. But before going into the precedents thus established we will, as briefly as is consistent with the importance of the question, consider the provisions of the Constitution bearing upon it. The Constitution of the United States pertaining to this subject, Article I, section 3, provides:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years, and each Senator shall have one vote.

"Immediately after they shall have assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

When this language is analyzed, giving to the words used therein their usual and ordinary meaning, it clearly appears that the paramount and controlling intent of the framers of the Constitution was: First, to give the States equal representation in the Senate, which carries with it the intent to always keep the Senate full; second, to have the Senators chosen by the legislatures of the various States; and third, to have all vacancies in the office of Senator filled by the legislatures. But it was seen that under our complex system of national and State governments vacancies might

happen or occur at times when they could not be filled by the State legislatures, and that if provision was not made for such contingencies the equality of representation in the Senate might, for the time being, be destroyed; and to prevent this evil the power to make temporary appointments until the next meeting of the legislatures was given to the executives of the States.

Let us now consider the paragraph conferring the power of appointment on the State executive, again giving to the words used their ordinary meaning. It is "and if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." What is a vacancy in the office of Senator? The original or full term is for six years. If the first incumbent dies or resigns, a vacancy occurs, happens, or begins. When the legislature has filled this vacancy it ceases to exist, and the term of office of the Senator thus chosen is measured by the unexpired time of the original term. A vacancy may again occur in the term of office of the second Senator which will exist until it is filled by the legislature, and the term of office of the Senator thus chosen will again be measured by the unexpired time of the original term. It is thus manifest that there can be but one vacancy in any one term. "A vacancy in an office is a unit. It can not happen or occur but once."

After a vacancy in the office of United States Senator occurs or comes to pass, if the next legislature does not fill it, it continues to exist. It is the same vacancy, not a new one. Now the State executive is given power to make temporary appointments in case of a vacancy, not as long as it continues or exists, but *only until the next meeting of the legislature*, which is then required to fill the vacancy. This clearly means that the paramount intent to have the legislature choose the Senators is to prevail, and that, whenever the legislature has had the opportunity to fill the vacancy, either before or after it occurs, the executive has no power to appoint. And when we take the phrase "if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State," if we concede that the general word "otherwise" is not qualified nor limited by the specific word "resignation," and that it includes vacancies which are caused by efflux of time and which can be foreseen, as well as vacancies which are caused by a casualty or the happening of an unexpected event and which can not be foreseen, still it must be construed and defined with reference to the balance of the phrase so as to give effect to all its parts; and it thus results that the vacancy, no matter how it is produced, must happen, take place, or begin *during a recess of the legislature;* and this of itself would be decisive against Mr. Quay's claim.

As to the proper definition to be here given to the word "happen," your committee is of opinion that the primary or ordinary meaning of the word carries with it the idea or element of uncertainty, as is clearly shown by the report of the minority of this committee in the Lee Mantle case (Senate Report No. 1, Fifty-third Congress, special session), pages 14, 15, and 17, which report was sustained by the Senate. But suppose that we give it the meaning attributed to it in the report of the majority of the committee in the Mantle case, page 4, and admit that it means "to take place," "to occur," "to come to pass," the result will be the same. Applying these equivalents of "happen" to a vacancy—a vacancy, all will admit, "takes place," "occurs," "comes to pass" at a fixed moment; that is, at its very beginning. Having "taken place," "occurred," "come to pass," it may continue indefinitely, but it does not continually and momentarily "take place," "occur," nor "come to pass" again and again. Hence a vacancy must begin or commence during a *recess of the legislature* before the executive can appoint.

Thus construed, this clause of the Constitution affords every facility for always keeping the Senate filled with Senators who are the real representatives of their respective States. A Senator who is chosen by the legislature of his State is likely to be the choice of the majority of the citizens of his State. A Senator who is appointed by an executive is frequently only the personal or political favorite of the executive.

The legislature, as we construe the clause, chooses the Senator in the first instance. If he declines to serve or dies before he is inducted into office; or if, after qualifying, he dies, resigns, or is expelled the executive may make a temporary appointment until the legislature meets again; or if, owing to changes in State constitutions, as in the New Hampshire cases to be mentioned hereafter, the legislature, which is authorized to fill the term at its commencement, can not meet until after the term has commenced, the executive can also make a temporary appointment.

Every contingency is thus provided for except the sole contingency that the legislature will fail to perform its sworn duty. Against a contingency of this kind the framers of the Constitution did not intend to provide. As was said by the minority of the committee in the Mantle case:

"That the Constitution expresses a strong or controlling purpose to keep the representation of each State full in the Senate is manifested by its specific provisions for filling regular terms both at the beginning and as they legally expire, and by providing for any accidental or unforeseen casualties by which seats thus filled might become vacant otherwise than by legal expiration of terms. Further than this no man can say that the Constitution makers intended to go. It can not for a moment be supposed that they contemplated or intended to provide for a case where either the legislature or the governor of a State should wantonly or with any other motive or for any reason either refuse or fail to perform their duty in the creation of Senators. This would have been to express a doubt and want of faith in the perpetuity of the structure which they were building. On the contrary, it is just and reasonable to suppose that, having invested each State with certain specific rights as to representation in this body, and imposed upon them the duty of exercising these rights in a certain specified way, patriotism and self-interest would combine to secure the enjoyment of these rights more effectually than any provision which they could possibly insert in the Constitution."

Again, consider the words, "the executive thereof may make temporary appointments until the next meeting of the legislature." The plural "appointments" is used to conform to "vacancies." The entire section deals with "Senators," "two Senators from each State," and the plural forms "vacancies" and "appointments" were more convenient and in better style. And, besides, a case might happen where two vacancies would occur in the same State during the same recess of the legislature. But the material point is that the power granted is not general, but temporary and limited. It is not a general power to fill vacancies by appointments whenever they occur and as long as they exist; on the contrary, it is a special power to supply certain kinds of vacancies for a limited or fixed period.

If we examine this clause of the Constitution in the light of the proceedings of the convention of 1787, the conclusion which we have reached will be strengthened and fortified. Several plans for the selection of Senators were submitted. Two, differing in detail, contemplated their selection by the House of Representatives; one contemplated their election by the people; one by electors chosen by the people; two provided that they should be chosen by the legislatures; and one that they should be appointed by the President out of a proper number of persons nominated by the legislatures. There was no suggestion that State executives should appoint them. It was finally agreed that the States should have equal representation in the Senate and that Senators ought to be chosen by the individual legislatures. The matter was then referred to the committee on detail. The clause, as reported by the committee on detail, was as follows:

"The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote."

It will be noticed that under the clause, as thus reported, the power of appointment was vested in the executive in any condition of vacancy. In other words, the clause contained apt language to express the very idea upon which Mr. Quay now bases his claim to a seat in this body. If that clause had been adopted, undoubtedly the executive would have had the right to appoint as long as the vacancy existed, no matter how often the legislature, after the vacancy occurred, might have met and failed to fill it. The clause, as thus reported by the committee on detail, came up for discussion on the 9th of August. Objection was made to giving the executives of States the power of temporary appointment in any case. It was suggested, however, that it was necessary to repose the power of temporary appointment somewhere inasmuch as Senators might resign or refuse to accept election. Quoting from the debates of the convention, "Mr. Madison, in order to prevent doubts whether resignations could be made by Senators, or whether they could refuse to accept, moved to strike out the words after 'vacancies' and insert the words 'happening by refusal to accept, resignation, or otherwise, may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature.'"

This amendment was, for the time, adopted The clause then read as follows:

"The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies happening by refusal to accept, resignation, or otherwise may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature."

It will again be seen that under Mr. Madison's amendment the vacancy could be filled by the executive no matter when it happened nor how often the legislature had failed to fill it. Under this amendment, if a vacancy happened during a session

of the legislature and the legislature failed to fill it, or if it happened during a recess of the legislature, the executive could appoint until the next meeting of the legislature, and then if the legislature failed to fill the vacancy, the executive could again appoint. Thus the clause as originally reported by the committee on detail, and as amended by Mr. Madison, placed the power of appointment in the hands of the executive without regard to the time at which the vacancy began.

The matter then went to the committee on style, revision, and arrangement. That committee reported on September 12, and the third section of Article I read in its report just as it now does in the Constitution, excepting that it did not contain the final words "which shall then fill the vacancy." On September 14 these last-mentioned words were added by amendment, and this clause of the Constitution was thus completed as it now stands.

It is to be remembered that many of the members of this convention were trained lawyers and all were men of great intellect and fine education. Undoubtedly they well understood the meaning of words and how to use apt terms to express their views and intentions. It can scarcely be conceived that they, without fully understanding what they were doing, rejected words and phrases which gave the power of appointment to the executive in any and every condition of vacancy and substituted therefor words which naturally and appropriately limit his power of appointment to vacancies occurring, happening, or taking place during a recess of the legislature.

Much stress has been laid upon the fact that when Mr. Madison offered his amendment to the clause as reported by the committee on detail he stated that it was done in order to prevent doubts whether resignations could be made by Senators or whether they could refuse to accept. We might well say that, if this was the idea which induced Mr. Madison to offer the amendment, he also intended, for he well knew the rules of construction which applied in all such cases, to limit the power of appointment to vacancies happening by causes of like kind and character as a refusal to accept or a resignation.

But certainly the convention itself was not devoting its attention to the question as to whether a Senator could resign or refuse to accept; on the contrary, the great object of its consideration was how to create the Senate. If it had been intended to simply give Senators the right to resign or refuse to accept, how easy it would have been to have done so in apt and simple words, and why was not some similar provision enacted in reference to members of the House of Representatives?

The history of the proceedings of the convention in reference to this clause of the Constitution demonstrates that the controlling purpose was to have the Senators elected by the legislatures, to have all vacancies filled by the legislatures, and to deny to the executive the power to appoint whenever the legislature had had the opportunity to fill the vacancy. We quote again from the report of the minority of the committee in the Mantle case, pages 15 and 16:

"It is illogical in the extreme to contend that the method of supplying a casual vacancy in the Senate contains the controlling purpose of the Constitution. If the frequency and emphasis of the words are considered, much stronger would be the argument that the election of Senators by the legislatures of the States is the controlling purpose. Look at the language: 'The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof'—not appointed by governors or anyone else—'immediately after they shall be assembled in consequence of the first election'—not first appointment—'after dividing them into three classes'—the language is—'so that one-third may be chosen'—not appointed—'every two years. And if vacancies happen by resignation, etc., the executive may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"The power of the executive is, 'may make temporary appointments,' while the injunction to the legislature is 'shall be chosen'—the one is mandatory and the other permissive; and yet they say the permissive power controls and is paramount to the mandatory power of the legislature to elect. This language clearly is only intended to give State executives a right to keep the Senate full by appointments, and nothing more.

"Again, the next clause says, 'that the Senator shall be an inhabitant of that State for which he shall be chosen'—not appointed. In section 4 it is provided again:

"'The times and places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.'

"In every mention in the Constitution of the creation of Senators but one an election is contemplated."

It is claimed that the right of a State executive to fill a Senatorial vacancy which occurs during a legislative session or during a recess of a legislature, where the legis-

lature has foreseen the vacancy and has failed to fill it, should be assimilated to the right now claimed and exercised by the President under section 2, Article II, of the Constitution. This section provides as follows:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Various Attorneys-General have held under this provision that, where an office became vacant during a session of the Senate and the Senate adjourned before it had been filled, the power of the President to appoint still continued. We submit, however, that this construction has never been placed on the clause of the Constitution now under consideration, and, further, that there is a marked distinction between the cases of Presidential appointments and the appointment of Senators by State executives. In the appointment of administrative officers of the United States the power under the Constitution is primarily with the President. The Senate is simply an advisory and consenting body. In the case of the selection of Senators the responsibility is cast primarily on the legislatures of the States. The composition of the Senate is based upon the theory that the people of the States act through their legislatures. We confidently assert, therefore, that there is no analogy between the subordinate right of State executives in the case of Senators and the primary right of the President in the matter of the appointment of administrative officers of the Government.

In discussing the clause of the Constitution now under consideration we have recognized the New Hampshire cases, which are hereinafter explained, as establishing the proposition that where, under changes in a State constitution, the legislature which is charged with the duty of filling a regular term can not meet until after its commencement, the executive can make a temporary appointment. But we think that the framers of the Constitution never contemplated nor intended to provide for a case where a State, by its own deliberate act should deprive its legislature of the power to fill an entire term at its beginning. In our opinion they never intended to give the executive of a State the power to fill an entire term by original appointment, unless, possibly, in a case where the legislature had chosen and the person elected had refused to accept or died before qualification. In other words, we conclude that the power of appointment was not to be exercised unless the vacancy occurred in the recess of the legislature and was occasioned by some casualty like death or resignation. This view has been maintained by many of the ablest constitutional lawyers who have occupied seats in this body, notably by the present junior Senator from Missouri, Mr. Vest. In his remarks in one of the New Hampshire cases (the Blair case, Senate Election Cases, p. 37) he said among other things:

"I voted on the Bell case that Mr. Bell was not entitled to a seat in this body; that the governor of a State had no right to fill an entire term by original appointment; that the meaning of the Constitution, which declares 'if vacancies happen by resignation or otherwise during the recess of the legislature of any State' the executive authority of a State may make a temporary appointment, is that when a vacancy shall occur, not by operation of law, but by some event which applies to the individual asking for the office or applying for admission into this body, by the resignation of a person, by death operating upon him, and that the word 'otherwise' in that connection means by similar casualty—when a vacancy shall happen, when it shall occur, not by operation of statute or of any constitution, but when it occurs by resignation, death, or otherwise.

"The terms of the Constitution as originally made—and I shall be very brief in the discussion of the subject, for I only propose to give my own reasons for casting my vote—the terms of the Constitution are:

"'If vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancy.'

"There are three clauses in the Federal Constitution in which the word 'happen' is used. First, in Article II, section 2, the Constitution says:

"'The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.'

"Article I, section 2, provides:

"'When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.'

"Article I, section 3, which is the clause now under discussion, provides:

"'And if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"In all three of these clauses the word 'happen' is used, but I call the attention

of the Senate to the fact that in the first two clauses in regard to vacancies in the House of Representatives and vacancies during a recess of the Senate as to executive officers, the word 'happen' is without limitation 'where vacancies shall happen,' and there is the termination of the power of the President in regard to Executive appointments; but in regard to Senators the Federal convention put a limitation upon the word 'happen.' They did not stop with declaring where vacancies may happen during a recess of a legislature that then the governor may appoint, but where a vacancy shall happen by resignation or otherwise.

"If the Senators now present are correct who claim the power of a governor to exist to appoint in these cases, we are forced to the conclusion that the words 'by resignation or otherwise' are void and meaningless as used by the framers of the Constitution, or else that the terms are a limitation upon the word 'happen.' They are not found in the other two clauses of the Constitution. What makes this argument more significant and conclusive to my mind is that the original draft of the Constitution, which I have before me, and the debates show that the clause as originally reported to the convention of 1787 was absolute and unlimited when a vacancy should occur, and Mr. Madison moved to put in these terms of limitation, that where the vacancy should occur by resignation or otherwise, or equivalent terms, then the governor of the State might appoint."

We come now to the consideration of the reported cases where the Senate has passed on questions involving the power of State executives to supply vacancies by temporary appointment.

The first case is that of Kensey Johns, of Delaware, which was decided on March 28, 1794. As reported in Taft's Election Cases, pages 1 and 2, the cases was as follows:

"George Read, a Senator from Delaware, resigned his seat in December, 1793, during the recess of the legislature of said State. The legislature met in January and adjourned in February, 1794. On the 19th of March Kensey Johns was appointed by the governor of said State to fill the vacancy. It was determined that Mr. Johns was not entitled to his seat, a session of the legislature having intervened between the resignation of Mr. Read and the appointment of Mr. Johns."

There were five members of the Federal Convention who were members of the Senate when this case was acted on. Four of them voted against the right of claimant to said seat and one voted in his favor. This fact should be persuasive of how the framers of the Constitution understood and construed the clause of the Constitution now under consideration.

The next case is that of Uriah Tracy, of Connecticut, which was disposed of on March 4, 1801. (Senate Election Cases, p. 3.) Mr. Tracy's first term expired March 3, 1801. On March 4, at a special session of the Senate, he produced credentials of appointment by the governor of Connecticut to fill the vacancy. It appeared from the credentials, which were dated February 20, 1801, that the legislature was not then in session and that he was appointed to serve from March 3, 1801, until the next meeting of the legislature. Exceptions were taken to his credentials, but he was admitted to his seat by a vote of 13 to 10. It will be seen that in this case the vacancy occurred during a recess of the legislature and that the legislature had had no opportunity to fill it after it occurred.

Then comes the case of Samuel Smith, of Maryland, which was decided on June 6, 1809. Senate Election Cases, p. 4.) The facts of this case were as follows: On the expiration of Mr. Smith's first term, March 3, 1809, the legislature of Maryland not having elected his successor and not then being in session, he was appointed by the governor on March 4, 1809, to fill the vacancy until the next meeting of the legislature, which would take place on June 5 next thereafter. It will thus be seen that the facts in the Smith case were the same as those in the Tracy case. That is to say, the vacancy occurred during a recess of the legislature at the beginning of a term, because the legislature which should have filled the vacancy failed to do so. The right of Mr. Smith to take his seat under the appointment seems not to have been contested. The only question determined was whether the appointment would or would not cease on the first day of the meeting of the next legislature. The Senate held that Mr. Smith was entitled to hold his seat during the next session of the legislature unless said legislature should fill such vacancy and the Senate be officially informed thereof.

The cases of Mr. Tracy and Mr. Smith, taken together, decided that where a legislature, whose duty it was to elect a successor to a Senator whose term of office was about to expire, adjourned before the expiration of said term without electing the successor, the executive might then appoint and the appointee would not simply hold his seat until the next meeting of the legislature, but during the next session of the legislature or until that session of the legislature filled the vacancy. If it adjourned without doing so, then the appointee's right to his seat would cease. It will thus be

seen that these cases do not help Mr. Quay, for in each of them the vacancy occurred during a recess of the legislature, and the legislature had had no opportunity of filling the vacancy between the date of its occurrence and the time of the appointment.

The next case is that of James Lanman, of Connecticut. This case was disposed of in March, 1825. (Senate Election Cases, pp. 5 and 6.) Mr. Lanman's term expired on March 3, 1825. On March 4, 1825, he produced credentials of appointment by the governor to fill the vacancy. The credentials were dated February 8, 1825, and set forth that the President had desired the Senate to convene on March 4, 1825, and had caused official notice of that fact to be communicated to the governor. The credentials were to take effect immediately after March 3, 1825, and to continue until the next meeting of the legislature. According to the report of the committee on this case, as contained in Niles Weekly Register, volume 28, page 32, the credentials further showed that at the time of their execution "the legislature of the State was not in session and would not be until the month of May."

Exceptions being taken, the credentials were referred to a committee, who reported the facts as above stated. On motion, Mr. Lanman was denied his seat. It will thus be seen that the facts in the Lanman case were identical with the facts in the Tracy case and identical with the facts in the Smith case, with the exception that in the Smith case the appointment was not made until the vacancy had occurred. In the Tracy and Lanman cases the appointments were made before the vacancies occurred. Otherwise the three cases are similar. It is said that the Lanman case may have been decided upon the ground that the executive could not properly make the appointment in anticipation before the vacancy occurred. We do not coincide in this view. First, because under this view Mr. Tracy should have been denied his seat; and second, because we can find nowhere in the earlier reported cases any doubts suggested as to the validity of an appointment by an executive on the ground that it was made before the vacancy actually occurred if the appointment was otherwise valid. In our opinion the decision in the Lanman case rested upon the fact that the legislature of the State had had full opportunity to fill the vacancy before it actually occurred and had failed to do so. This will more clearly appear from the report of the committee in the next case to be considered, that of Ambrose H. Sevier, of Arkansas.

The Sevier case was considered and decided in February and March, 1837. (Senate Election Cases, pp. 7 and 8.) The facts were as follows:

"The State of Arkansas was admitted into the Union in June, 1836. In October, 1836, the legislature of that State elected Ambrose H. Sevier and William S. Fulton Senators. On the allotment of the Arkansas Senators to their respective classes, as required by the third section of the first article of the Constitution, Mr. Sevier was placed in the class of Senators whose term of service expired on the 3d of March, 1837. The legislature of Arkansas had no opportunity to fill the vacancy, not having been in session after the result of the allotment was known in that State. January 17, 1837, the governor of Arkansas appointed Mr. Sevier to fill the vacancy which would take place on the 3d of March. At the special session of the Senate in March the credentials were referred to the Committee on the Judiciary. The committee reported that as the time when Mr. Sevier was to go out of office was decided by lot, and as the legislature, not being in session after this decision, could not supply the vacancy, it came 'fairly within the provision of the Constitution contained in the third section of the first article, which declares, "and if vacancies happen by resignation or otherwise," etc.,' and reported a resolution that the oath required by the Constitution be administered to him. March 8 this resolution passed and Mr. Sevier took his seat."

Mr. Grundy, of Tennessee, made the report in this case. In the course of the report he referred to the Lanman case and the distinction between it and the Sevier case in the following language:

"In looking into the practice of the Senate upon the subject of executive appointments, no case like the present has been found. Several cases have occurred in which the executives of different States in anticipation of the expiration of the regular term of service have appointed Senators (the legislature not being in session), and in all of these cases the Senators thus appointed were admitted to their seats until the called session of the Senate in March, 1825, when Mr. Lanman, of Connecticut, whose term of office expired on the 3d of March, 1825, produced his credentials from the governor of Connecticut, and the Senate decided he was not entitled to his seat by a vote of 23 to 18.

"This decision seems to have been generally acquiesced in since that time; nor is it intended by this committee to call its correctness in question. The principle asserted in that case is that the legislature of a State by making elections themselves shall provide for all vacancies which must occur at stated and known periods; and that

the expiration of a regular term of service is not such a contingency as is embraced in the second section of the first article of the Constitution.'

"The case now under consideration is wholly different in principle. The time when Mr. Sevier was to go out of office under his election made by the legislature of Arkansas was decided by lot, agreeably to the provisions of the Constitution on that subject. After the decision thus made, the legislature of Arkansas, not being in session, could not supply the vacancy; and the case, in the opinion of the committee, comes fairly within the provisions of the Constitution contained in the third section of the first article, which declares, "and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

It will thus be seen that Mr. Grundy understood the Lanman case to have been decided upon the principle announced above.

The next case was that of Robert C. Winthrop, of Massachusetts, which was before the Senate on February 4, 5, and 7, 1851. (Senate Election Cases, pp. 10–12.)

"Mr. Winthrop was appointed July 27, 1850, to fill a vacancy in the Senate happening by the resignation of Daniel Webster. February 1, 1851, Robert Rantoul was elected by the legislature to fill the unexpired term. February 4, Mr. Rantoul not having appeared to take the seat, Mr. Winthrop offered a resolution, which was agreed to, "That the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a Senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires." The committee reported that a person so appointed had a right to the seat until the legislature, at its next meeting, should elect a person to fill the unexpired term, and the person elected should accept, and his acceptance appear to the Senate; that presentation of credentials implied acceptance; that these views were sustained by the precedents. The report was debated, but no action taken, the whole subject was laid on the table," because, on February 7, 1851, Mr. Rantoul's credentials were presented, and Mr. Winthrop thereupon vacated the seat.

The next case is that of Archibald Dixon, of Kentucky, which was before the Senate in December, 1852. (Senate Election Cases, pp. 13–15.) The facts of this case were as follows: On December 17, 1851, Henry Clay was a Senator from Kentucky, chosen by the legislature for a term of six years, which expired on March 3, 1855. Being so a Senator, he resigned by a communication to the legislature, declaring that it was to take effect on the first Monday in September, 1852. The legislature then being in session, received the resignation, and chose Mr. Dixon to fill the vacancy thus to occur from the first Monday in September, 1852, to March 3, 1855. The legislature then adjourned. On June 29, 1852, during a recess of the legislature, Mr. Clay died, and the governor of Kentucky made a temporary appointment of Mr. Meriwether as a Senator from Kentucky to hold the seat until the first Monday in September, 1852, the date on which Mr. Clay's resignation was to take effect. Mr. Meriwether immediately took the vacant seat and held it until Congress adjourned on the last day of August, 1852. On the reassembling of Congress, December 6, 1852, Mr. Meriwether did not appear, and Mr. Dixon appeared and presented his credentials.

Objection was made to Mr. Dixon's taking the oath of office on the ground that the seat still belonged to Mr. Meriwether, the point being that Mr. Meriwether had been appointed to fill a vacancy happening by the death of a Senator and he had a right to the seat until the next meeting of the legislature, and that it was not in the power of the governor to limit the term of office until the first Monday in September, 1852, the day on which Mr. Clay had declared his resignation was to become operative. The Senate held that Mr. Meriwether's right to the seat expired on the first Monday in September, 1852, and that thereafter Mr. Dixon was entitled to it.

This case establishes several principles. The first and most important is that if, while the legislature is in session, a Senator tenders his resignation to take effect at a date which will be subsequent to the adjournment of the legislature, the legislature can fill the vacancy which is to thus begin after its adjournment. This carries out the paramount idea and intention of the convention, already mentioned, to have the Senate kept filled with Senators chosen by the legislatures. The second principle established is that a Senator's resignation can take effect in futuro; and the third is that if the Senator, after having so resigned, dies before the date fixed for the consummation of the resignation, the legislature not then being in session, the governor can appoint. This case, in all its aspects, is adverse to the claims of Mr. Quay.

The next case is that of Samuel S. Phelps, of Vermont, which was debated in the Senate from January to March, 1854, and was finally disposed of on March 16, 1854. (Senate Election Cases, pp. 16–18.)

"Mr. Phelps was appointed by the governor of Vermont January 17, 1853, during

the recess of the legislature to fill a vacancy in the Senate happening by the death of William Upham. His credentials were presented, and he took his seat January 19. The legislature met in October and adjourned in December without electing a Senator to fill the unexpired term. Mr. Phelps had held the seat during the remainder of the second session of the Thirty-second Congress, ending March 3, and during the special session of the Senate March 4 to April 11. December 29 he again attended. January 4, 1854, the Senate resolved that the Committee on the Judiciary inquire whether he was entitled to retain his seat. January 16 the committee reported the resolution 'that the Hon. Samuel S. Phelps is entitled to his seat in the United States Senate.' It was accompanied by a minority report adverse to the right of Mr. Phelps to a seat. March 16 the resolution reported by the committee was rejected by a vote of 12 yeas to 26 nays, and it was '*Resolved*, That the Hon. Samuel S. Phelps is not entitled to retain his seat in the Senate of the United States.' "

The resolution of inquiry, referred to above, was submitted by Mr. Seward, and was in the following language:

"Whereas the Hon. Samuel S. Phelps was appointed by his excellency the governor of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States which had happened by the death of the Hon. William Upham, a Senator whose term of six years would have continued until the 4th day of March, 1855; and

"Whereas it is understood that since that temporary appointment was made the legislature of Vermont has been convened at their annual session and has adjourned without filling such vacancy: Therefore,

"*Resolved*, That the Committee on the Judiciary inquire whether the Hon. Samuel S. Phelps is entitled to retain his seat in the Senate of the United States."

This case was very fully considered by the committee and by the Senate. As will be seen, Mr. Phelps was denied his seat because, between the date of his temporary appointment and the action of the Senate, the legislature of Vermont had convened and adjourned without filling the vacancy.

The case of Jared W. Williams, of New Hampshire, was before the Senate in July and August, 1854, was, in substance, the same as the case of Mr. Phelps explained above, and was decided in the same way.

The cases of Charles H. Bell and Henry W. Blair, of New Hampshire, which were before the Senate in 1879 and 1885, respectively, may be considered together. (Senate Election Cases, pp. 26–47.) Each of these appointments was made to fill a vacancy at the commencement of a full term. The act of Congress of July 25, 1866, as will be remembered, provides that "the legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress," etc. In 1878 the constitution of New Hampshire was changed so that its biennial legislatures were chosen in November, but were not allowed to meet in session until the following June. Thus in each of these cases the legislatures which, under the act of 1866, were bound to fill these vacancies had no opportunity to do so until some three months after they occurred. Under these circumstances it was decided that the governor had the right to make temporary appointments for this period of time. We thus see that in these cases the legislature had never had an opportunity to fill the vacancies which were supplied by temporary appointment by the governor.

In the case of Horace Chilton, of Texas, disposed of in January, 1892, and reported in Senate Election Cases (pp. 48–51), Mr. Reagan, an elected Senator from the State of Texas for a term of six years, resigned his office and the resignation was to take effect June 10, 1891. The executive of Texas, after the receipt of the resignation of Mr. Reagan and on April 25, 1891, appointed Mr. Chilton to supply the vacancy. The certificate recited that the appointment was to take effect June 10, 1891. The only point decided was whether the governor had the right to appoint in advance. The decision was in the affirmative. The legislature had never had an opportunity to fill this vacancy.

Again, and finally, we can consider the cases of Lee Mantle, of Montana; John B. Allen, of Washington; A. C. Beckwith, of Wyoming, and Henry W. Corbett, of Oregon, together, the first three being before the Senate in 1893 and the last in 1898. All of these were appointments to supply vacancies of regular or full terms. In the cases of Mantle, Beckwith, and Corbett the legislatures which should have filled the vacancies had met and adjourned without doing so. In the Allen case the legislature was in session on the 4th of March, the date the new term commenced, and remained in session until the 9th of that month, and Mr. Allen was appointed on the 10th. In each of the cases the claimants were refused seats, or, to state it more correctly, the claimants in the Mantle, Corbett, and Allen cases were refused seats, and the Beckwith case was not pressed to a vote, Mr. Beckwith having abandoned his claim.

It will be noticed that the facts in the Allen case are identical with those in the Quay case.

The statement of these cases and precedents shows that from the beginning of the Government down to the present time the Senate has never recognized the right of a State executive to make a temporary appointment where the vacancy happened or occurred during a session of the legislature. It shows, further, that for seventy-five years the Senate has refused to recognize the right of a State executive to make a temporary appointment, even where the vacancy happened or occurred during a recess of the legislature, if the legislature, either before or after it occurred and prior to the date of the appointment, had had an opportunity to fill it.

The fundamental principle thus established is that if the legislature, either before or after the happening of a vacancy, has had an opportunity to fill it, then there is no power in the State executive to appoint. The result is fatal to the claims of Mr. Quay. No danger or evil has resulted to the Government from the enforcement of this principle.

We therefore submit that the Senate, for its own honor and dignity, should stand by its previous solemn and deliberate decisions, and recommend the adoption of the following resolution:

"*Resolved*, That the Hon. Matthew S. Quay is not entitled to take his seat in this body as a Senator from the State of Pennsylvania."

DONELSON CAFFERY.
E. W. PETTUS.
THOS. B. TURLEY.
W. A. HARRIS.

I concur in the recommendation of the foregoing report.

J. C. BURROWS.

VIEWS OF THE MINORITY.

Matthew S. Quay claims to be admitted to a seat as a Senator from Pennsylvania by virtue of an appointment by the governor of that Commonwealth, dated April 21, 1899. Mr. Quay had held the seat for the term ending March 4, 1899, by election of the legislature.

The legislature who were authorized to elect his successor met on the 3d day of January, 1899, and adjourned without such election on the 20th day of April, 1899. The Constitution of the United States provides (sec. 3, Art. I):

"If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The constitution of the Commonwealth of Pennsylvania provides (sec. 4, Art. II):

"In case of a vacancy in the office of United States Senator from this Commonwealth, in a recess between sessions, the governor shall convene the two houses, by proclamation on notice not exceeding sixty days, to fill the same."

It is claimed that the governor under this provision of the constitution was bound to call the legislature together forthwith. It is admitted that this was not done. It is claimed, therefore, that the effect of this failure was to deprive the governor of the power of appointment, if any, conferred upon him by the Constitution of the United States. We are unable to accept this view.

First. It seems to us that it was a fair question whether the governor was bound to call the legislature together at once in all cases, without discretion. For instance, if the vacancy had occurred so near the time for a regular session that it would be inconvenient and not worth while to anticipate it, or if the legislature had just adjourned without effecting a choice and the governor felt reasonably certain that it would be impossible to effect an election if they were assembled, it might be fairly claimed that he was not bound to issue a call from which no practical result of any value would be likely to come. It might well be that no session of the Senate of the United States was likely to take place in which a person chosen could take a seat before the regular time of assembling the legislature. Now, the question whether the governor had a discretion in any case or whether the injunction of the State constitution is absolute and peremptory is one which the governor must decide, and we can not, it seems to us, hold that an erroneous decision on his part would deprive the State of Pennsylvania of its right to be represented in the Senate in a constitutional way. It seems to us that this clause of the constitution of Pennsylvania must of necessity be interpreted by the authority in Pennsylvania charged with its execution, and that the Senate of the United States can not go behind the judgment of that officer in regard to its meaning and application.

Second. It seems to us that, whatever may have been the duty of the executive of Pennsylvania, the constitution of Pennsylvania itself can have no effect upon the

lawful appointment of a Senator of the United States. That is provided for by the Constitution of the United States. The Constitution of the United States declares that the governor may appoint under certain circumstances. It declares also that "this Constitution shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding." So if there be such a vacancy as is described in the Constitution, the Constitution providing that in such case the governor may appoint, a provision of the constitution of Pennsylvania that he shall not appoint or that he shall do something else, can not have the effect to deprive him of his power under any circumstances.

We are left, therefore, to the consideration of the meaning of the provision of the Constitution of the United States above cited. This question, in our judgment, is a very simple one. Does the language of the Constitution of the United States mean just what the constitution of the Commonwealth of Pennsylvania says: "In case of a vacancy in the office of United States Senator in a recess between sessions," or does it mean that the vacancy must be one which comes by chance, so that it does not apply at all to the case of a vacancy at the beginning of a term, which does not come by chance but is foreseen and inevitable? If the words have the former meaning, then all distinctions between cases where a legislature has been in session and those where a legislature has not been in session, between vacancies at the beginning of a term and vacancies beginning after the term itself has begun and the office for that term once filled, are without importance. We think that the former is the true meaning of the Constitution. We think that it was the intent of the Constitution to provide, as far as possible, that every State should have two Senators.

First. The constitutional convention hesitated between conferring the power of appointing Senators upon the executive and the legislature of the State in the beginning. Like the legislature, the executive of the State was supposed to represent the will of the people. Under the constitutional arrangements then existing, he appointed all State officers and appointed judges, who held their office for life. So there is no reason to suppose that they considered the executive an unfit instrument for such appointment. And they settled the question by giving the power of permanent appointment to the legislature, and of temporary appointment to the executive.

Second. We can conceive no reason likely to have influenced the framers of the Constitution for making a distinction between cases of vacancy occurring in one way or at one time and vacancies occurring in any other way or at any other time. The office of Senator may be at any time of infinite importance to the interests of a State. Upon a single vote may often depend and sometimes has depended the fate of measures which would bring prosperity or misery into every workshop and almost every family in Pennsylvania. We do not believe that when the Constitution was enacted it would have occurred to anybody that if a Senator died within a week of the adjournment of the legislature, or at a time when there were three parties in the legislature who could not agree, or at a time when the two houses who formerly made an election by concurrent vote were of ways of thinking in politics so different that they could not be reconciled, that the State must remain unrepresented until a new legislature should be chosen.

They meant, as we believe, that for the interest of the State and the interest of the whole country the Senate should always be full, so far as they could devise a constitutional mechanism to accomplish that purpose. The debates in the convention show, it seems to us, that such was the understanding of all the members. There is not the slightest suggestion of any distinction in the kind of vacancies which may be filled by the executive of the State. It is spoken of only as a scheme for filling vacancies without exception or qualification. Mr. Ellsworth says:

"It is only said that the executive may supply vacancies. When the legislative meeting happens to be near, the power will not be exerted. As there will be but two members from a State, vacancies may be of great moment."

It will be noted that Mr. Ellsworth uses the word "happen" in reference to a fixed and foreseen event, viz, the time of the meeting of a State legislature. Mr. Williamson says: "Senators may resign or not accept. This provision, is, therefore, absolutely necessary," showing that it was in his mind that a vancancy occurring at the beginning of a term, when a Senator refused to accept, was within the contemplation of the Constitution.

Mr. Madison then (and it will be observed he is in this instance reporting his own remarks and his own purpose) says:

"Mr. Madison, in order to prevent doubts whether resignations could be made by Senators or whether they could refuse to accept, moved to strike out the words after "vacancies" and insert the words "happening by refusal to accept, resignation, or otherwise."'

From this, in our judgment, it clearly appears that the words which it is now

claimed qualify the universal words "vacancies shall be supplied by the executive" were inserted for the distinct purpose and the only purpose of rendering it clear that a person elected could lawfully refuse to accept, and that a Senator could resign. Mr. Gouverneur Morris declares the same reason. He says:

"This is absolutely necessary. Otherwise, as members chosen into the Senate are disqualified from being appointed to any office by section 9 of this article, it would be in the power of the legislature, by appointing a man Senator against his consent, to deprive the United States of his services."

Now, can it be believed that language which, as its author states, was used for this purpose was intended to accomplish a much more important and totally different purpose, by providing that the executive might appoint in some cases but not in others, and a motion supported by Mr. Ellsworth with the argument that as there will be but two members from a State vacancies may be of great consequence, was intended to provide, in substance, that a large number of vacancies should not be filled at all?

Mr. Rutledge's report of the committee of detail, made in the convention August 6, 1787, was under discussion when Madison's amendment was adopted. The provision there was: "Vacancies may be supplied by the executive until the next meeting of the legislature." So the committee of detail, consisting of Messrs. Rutledge, Randolph, Gorham, Ellsworth, and Wilson, were, as it appears, unanimously of opinion that the clause should read, "Vacancies may be supplied by the executive until the next meeting of the legislature," and that view was supported by the argument that it was exceedingly important that every State should always have its full representation; and then the language was changed to read as it is now for the sole purpose, so far as was avowed, of affirming the right of a Senator to resign or decline.

So it seems to us clear that the convention meant to use language which should give the executive this power whenever a vacancy exists.

The next question is, Did they use apt language to convey that meaning? If it be true that the phrase used is a phrase which is commonly used as synonymous with "occur," "happen to exist," "exist," if it happen that there be a vacancy, then the case is made out. Now, we affirm with great confidence that the phrase used in the Constitution is employed in ordinary usage to describe events that do not depend upon chance, and to describe a continuing condition without reference to the time or method of its origin. If the Fourth of July happen on Sunday, the coming of Sunday and the coming of the Fourth of July, the coincidence of those two things, is the result of fixed and unchangeable natural laws; and that word expresses not merely the beginning of the Fourth of July, or the beginning of Sunday, but the continued identity of the two periods of time described throughout their entire length. Indeed, the word "coincidence" is equivalent to the words "happening at the same time," and is used to describe events that are not fortuitous. "Incido" means "to happen" and it also means "to exist." Our lexicographers, Webster and Worcester, and the Century Dictionary, all give as one of the meanings of the word "happen," "occur." The English translation of the Scriptures, which is our standard of good usage, in the twenty-second verse of the forty-first chapter of Isaiah, "Shew us what shall happen," is intended to include everything that is to take place hereafter. It applies to everything that is to exist in the future. And the text goes on to explain what is meant, for it adds, "Shew the things that are to come hereafter, that we may know," etc. The Century Dictionary states that the word "happen" is equivalent to "it may be."

In the debate on the Sevier case in the Senate in 1836, John Quincy Adams said he believed, in relation to offices, that every one happens to be vacant which is not full, and that he believed was the meaning and sense of the Constitution, whether the vacancy occurred from casualty, the regular course of events, expiration of term, or other cause.

This construction is fortified by the consideration that the same phrase is used in two other places in the Constitution, where it is now well settled that the words "if a vacancy happen" mean what we think they mean here, viz, "if a vacancy happen to exist." The Constitution provides that "the time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may, at any time, by law make or alter such regulations." The further provision is: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." Now, that phrase has been uniformly held, as we suppose, without question to include all vacancies, whenever they begin and from whatever conditions they are produced. It is the only authority given to the executive of the State on the subject; and yet, in the old days, where a majority of votes was required to elect, the executive always, and in some cases repeatedly, in relation to the same vacancy, issued his writ under this constitutional power. It made

no difference whether it occurred by chance or in the beginning of a term or by death or expulsion.

The phrase "when vacancies happen" means "whenever there are vacancies." Now, it is true this phrase is not limited by the words "during the recess of the legislature." But if, when the word "happen" is used without limitation, it applies to every occasion and to the whole time when there is a vacancy, surely the words "if vacancies happen during the recess of the legislature" apply to every recess, to the whole recess, and to all the time when, under whatever conditions or from whatever causes, there is a vacancy during any recess. It will be noticed also that the Constitution speaks in terms of a single State—"if vacancies happen during the recess of the legislature of any State," and it provides, "the executive may make temporary appointments"—not may make a single appointment. It would seem from this language that the Constitution had in mind the possibility of repeated appointments by the executive.

Again, the provision for appointing executive officers has been held, in accordance with the opinion of Attorneys-General Taney, Wirt, and Devens, and the opinion and practice, we suppose, of every President of the United States from the beginning, to mean the same thing.

The provision is:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

Now, it is well settled that if an official die during the session of the Senate, and the office is not filled before adjournment, the President, under this clause, may appoint in vacation. If a new office be created by act of Congress during a session, the President may appoint persons to fill it, after the Senate has adjourned, during the recess. In other words, the words "all vacancies that may happen during the recess of the Senate" mean "whenever there is a vacancy during the recess of the Senate." It is inconceivable that the convention intended in the use of the same language a simple general provision in one case and a provision to be applied fettered by refinements and distinctions and with large exceptions in another case. It was said in argument at the hearing that this view had never been accepted by the Senate, but that claim is in conflict with the uniform history of the country for more than a generation.

The Senate and the House of Representatives not only have for many years let such appointments pass without question or remonstrance, but they provide salaries for officers so appointed, and, what is more emphatic still, as an expression of their assent and approval they create at almost every session of Congress new offices which they expect when they are created will be filled for the first time by the President in vacation. The uniform course of our legislation establishes the construction that when a new office is created by law on the 1st of February and no action is taken by the President until after the 4th of March, when Congress adjourns, the words in the Constitution "all vacancies that may happen during the recess of the Senate" are uniformly held to describe exactly that case.

Further, the language of the very clause in question can not be construed as the opponents of Mr. Quay would construe it, or in any other way than the undersigned construe it, without destroying its own purpose. If there be no power in the executive of Pennsylvania to appoint a successor to Mr. Quay under this clause of the Constitution, there is no power in the legislature to choose such successor until the end of the term; and in every case where a Senator dies or resigns, where the legislature is not in session, or where, after such death or resignation, the legislature has met and adjourned without a choice, or wherever, at the beginning of a term, the vacancy remains unfilled, it must remain unfilled until the end of the six years, according to the logic of the majority of the committee. The Constitution confers upon the legislature—

First. The power to elect Senators for six years—not for five years or for four years or for two years. Having made that provision, which relates solely to the full term, as its express language clearly indicates, then comes the provision with which we are now dealing:

"If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The vacancy which an executive might fill in vacation is the only vacancy which the legislature can fill when it meets. So that those persons who maintain the theory we are dealing with must either hold that the legislature of Pennsylvania can not, when it meets, elect a Senator, or must admit that the governor lawfully appointed Mr. Quay.

We find, then, a clear purpose on the part of our Constitutional Convention to pro-

vide that all vacancies shall be filled by the executive when no legislature is in session, apt language and language clearly adapted to that purpose introduced without objection in the Constitutional Convention, accompanied by the statement of Oliver Ellsworth of the great importance that no vacancy should be left unfilled, a change in that language on Mr. Madison's motion for the purpose avowed by him of removing a doubt as to the right of a Senator to resign or a Senator-elect to decline, and no suggestion anywhere of a purpose of limiting the power of the executive or making any exception to it.

We find next that the language newly inserted by Mr. Madison is language employed in ordinary usage to express the same meaning, and that it is employed to express the same meaning in the same Constitution in two other important instances, both being instances where vacancies in public offices are to be filled.

We find next that the purpose of the Constitution that there should be a Senate consisting of two members from each State will be interfered with and interrupted by the construction which denies the power to the executive to fill all vacancies whatever when there is no legislature. If that construction prevail, there must be frequently an interruption in the Senatorial office, and States must frequently be left without representation or with only partial representation in the Senate. It is unnecessary to dwell on the importance of a single vote in a body consisting, in the beginning, of but twenty-two Senators, and now consisting of but ninety. In many important instances great measures have been determined by the casting vote of the Vice-President, which would have failed if there had been a single vacant seat. Instances have been very numerous indeed of important amendments which changed, or if they had passed would have changed, the character of great measures of legislation whose fate has been determined by a single vote. In Massachusetts a governor has twice been elected by a majority of one—in one year in the popular vote, in another year in the legislature.

It is said that if the legislature has been in session after a vacancy and has failed to fill it the State is in fault; that the legislature has neglected its duty, and so it is not unjust that the State should suffer. There are two answers to this argument: First, that it is for the interest of the whole people that every State should be fully represented; and, second, that there is no fault to be imputed to the legislature of a State or to the people, where a majority vote is required, if there be a failure to elect. Will anybody claim that the case of a failure to elect a President for want of a constitutional majority, a case provided for by conferring a power upon the House of Representatives voting by States, is the case of fault or negligence on the part of the people? If there be three parties holding different opinions in regard to great policies which affect the interest, the honor, or the destiny of the Republic, and neither party can conscientiously surrender its honest convictions and aid in the establishment of a policy which it believes iniquitous or destructive, that is no fault and no neglect. It is inevitable from the constitution of human nature.

In the beginning, the universal practice was to elect members of the House of Representatives only by a majority of the entire vote cast, and to elect Senators by a concurrent vote of two bodies who must agree to produce a result. It seems to us no valid reason can be given for supposing that if the two houses of a State legislature, before the statute of 1866, failed to agree, the framers of the Constitution thought that it would be a just punishment that the State should be deprived of its equal voice in the Senate, or in case of an election on joint ballot, in later years, that there were three parties instead of two, so that there could be no majority, the State should be so punished. The cases where there are great political differences about public measures are few in comparison with the nonpartisan questions which come before the Senate, and the special interests of a State are much more likely to be affected by the latter than by the former.

It is said that if there be a vacancy and the legislature meet and adjourn without filling it, if the power of appointment exist in the governor, there will be likely to be intrigue on the part of the executive or his political friends, so as to prevent a choice, and to enable him to appoint his favorite. But there is not the slightest historical evidence that any such idea occurred to the framers of the Constitution. It seems to us to be a refinement which they never would have considered, and which never should be considered by anybody in framing a constitution. Such intrigues can only be successful if they have the aid of some considerable political party. They would be quite as likely to desire to put over an election by which the office is to be permanently filled, whether the governor were to have power to fill the vacancy temporarily or no. Such intrigues, in the few cases where they are possible, will be as likely to happen under one arrangement as under the other. But our constitutional arrangements are based, and must be based, on the theory that the executives chosen by the people will be, in general, upright, honorable, and conscientious men, to whom such motives would be foreign and abhorrent.

These words, then, do not mean that the vacancy must come by accident when the legislature is not in session. Do they mean that the vacancy must begin when the legislature is not in session? There is a meaning, unquestionably, that may be given to the language which lends plausibility to the claim that it must be a fortuitous vacancy, although that claim is abundantly overthrown by the fact that the words are used frequently in our language in the other sense, that they are used twice in the Constitution in the other sense, and that the purpose of the Constitution would be defeated if they were not used in the other sense. But there is no such argument in favor of the construction that the words "if a vacancy happen" mean "if a vacancy begin." If the legislature adjourn on the 4th of March and do not meet again until the 1st of December, certainly a vacancy happens all through that interval, and there can be no reasoning that is not strained and far-fetched which can lead anybody to suppose that if a Senator died on the 3d of March and the legislature adjourn on the 4th that it was the intention of the Constitution that the State should be left unrepresented.

The Senator from Tennessee, Mr. Turley, in an able speech on the Corbett case, made in the Senate February 25, 1898, quoted with great effect the following language of Mr. Webster:

"The Constitution utters its behests in the name and by authority of the people, and does not exact from States any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty and individual obligation. Sir, the States can not omit to appoint Senators and electors. It is not a matter resting in State discretion or State pleasure.

"The Constitution has taken better care of its own preservation. It lays its hand on individual conscience and individual duty. It incapacitates any man to sit in the legislature of a State who shall not have first taken his solemn oath to support the Constitution of the United States as they are to support their own State constitution. Nay, sir, they are as solemnly sworn to support it as we ourselves are, who are members of Congress.

"No member of a State legislature can refuse to proceed, at the proper time, to elect Senators to Congress or to provide for the choice of electors of President and Vice-President any more than the members of this Senate can refuse, when the appointed day arrives, to meet the members of the other House to count the votes for those officers and ascertain who are chosen. In both cases the duty binds, and with equal strength, the conscience of the individual member, and it is imposed on all by an oath in the same words.

"Let it, then, never be said, sir, that it is a matter of discretion with the States whether they will continue the Government or break it up by refusing to appoint Senators and to elect electors. They have no discretion in the matter. The members of their legislatures can not avoid during either, so often as the time arrives, without a direct violation of their duty and their oaths—such a violation as would break up any other government."

That language seems to the undersigned a great reenforcement of their position. If it be true, and it is true, as Mr. Webster says, that the States can not omit to appoint Senators; that it is not a matter resting in State discretion or State pleasure; that the Constitution has taken better care of its own preservation and lays its hand on individual conscience and individual duty, then it seems to us impossible to believe that the Constitution has not provided a method of filling vacancies when the legislative power fails. It is individual conscience and individual duty on which the great expounder of the Constitution declares the Constitution lays its hand. But it is clear that individual conscience and individual duty must be totally inadequate to keep the seats in the Senate full, except as they are the conscience and the duty of the executive. The legislative power is never exercised by an individual. It could formerly only be exercised by the concurrent action of two bodies, each containing many individuals, each with a separate conscience, each with its own view of duty, which in many cases it will be found impossible to reconcile. Many instances have occurred in our history when a State legislature could not elect a Senator unless many of its members should cast their vote in gross violation of conscience and duty. And it was for that case, as well as other cases of vacancy, that it was the purpose of the Constitution to provide.

It is not the ending of the term; it is not the failure of the legislature to elect; it is not the fact that the legislature has been in session after the vacancy began and has failed to elect, but the absence from the office of any person authorized to fill it to which the word "happen," which expresses contingency, is applied. It is certain that terms will end. It is quite probable that there will be many cases when legislatures can not elect. It is quite likely that Senators will die or resign, or that Senators-elect will decline. In all these contingencies, described by the comprehensive word "happen," the constitutional mandate that each State shall have two Senators

is in force and there is a simple provision for its execution by authorizing the executive to fill the vacancy.

It remains only to consider the precedents set by the Senate in dealing with like cases.

In our judgment the decisions of the Senate made heretofore do not present any obstacle to the decision of this case on its merits and by the simple rule of the Constitution, as we understand it. We think the weight of those decisions tends to establish the construction for which we contend. They are somewhat in conflict with each other, and in some cases it is difficult to know on what grounds they proceed. While great weight is to be given to a judgment of the Senate reached on careful consideration and debate, yet it is obvious that in determining how far they are to control later cases, very different considerations exist from those which apply to ordinary courts. They do not affect property which may have been acquired in consequence of a belief that the former decisions contain a rule of law which will stand. They do not involve penal consequences as do decisions which expound criminal laws. If the clear meaning of the Constitution be what we believe it to be, no harm can happen to anybody if it be so declared. The only result will be that States which otherwise would be left unrepresented will have their full constitutional representation without an interval.

It is also true that frequently political or personal considerations enter into the votes of a political body, even into the votes of the Senate, which very seldom find admission into courts of justice, and unhappily such considerations have been in the past sometimes frankly avowed by Senators who have yielded to them, and the political opinions of contestants for seats in this body have had an influence on the judges of elections which has sometimes determined the vote in election cases. But, beyond all cavil or question, no such consideration entered into the fully discussed and carefully considered cases of Mr. Bell and Mr. Blair and Mr. Marston, where it was held that the executive can appoint in case of a vacancy at the beginning of the term, and that the word "happen" used in the Constitution does not mean "occur accidentally," but means "exist," and that the words "if vacancies happen" and the words "if there happen to be a vacancy" are equivalent.

When these three gentlemen were admitted to their seats the Senate had a considerable majority for one political party whose members had no conceivable advantage to gain by the admission, for a short time, of another person of the same political faith. The members of the two parties in the Senate were divided upon the question, and took different sides in the debate. There probably has never been an occasion, from the beginning of the Government, of a vote in the Senate in which it was more absolutely certain that the votes were wholly upon the constitutional merits of the question. In all these cases the vacancies occurred by the ending of the constitutional term. No legislature could lawfully elect a Senator under the statute of 1866 until June, although the Senatorial term began on the 4th of March. And it was held that the governor might appoint in those cases. We suppose that to be the accepted law, which would be enforced in a like case to-day. Now, if that be the accepted law, then the word "happen" does not mean "take place unexpectedly." It means "occur," and the rule of those cases is as applicable to the case where a legislature has met and failed to elect as where no legislature has met.

There can be plausible reasons given, we agree, for claiming that the word "happen" means "occur unexpectedly." But, as we conceive it, no plausible reason can be given for claiming that the words "if vacancies happen" mean "if vacancies begin." We find no authority anywhere for giving such a meaning to the term. It is true that, in the three cases of Montana, Washington, and Wyoming, which were argued and decided practically as one, and in the case of Mr. Corbett, of Oregon, there was a different result. In the Corbett case it was a disputed question whether the legislature had existed after the vacancy began or no. In the case of Lee Mantle, of Montana, the vacancy began during the vacation of the legislature. The legislature, which was entitled to elect a successor in anticipation of the vacancy, had adjourned before the ending of the previous term without an election.

The case of Allen, of Washington, was decided with the Lee Mantle case and without argument, a decision to which Mr. Beckwith, of Wyoming, submitted without further contest. At that time there was an earnest division in the Senate on an important question relating to the currency, which created for the time being more earnest differences of opinion than those existing between the two great political parties on other questions. It was a time not favorable to a dispassionate, nonpartisan judgment. We prefer the authority of the New Hampshire cases, which was acted on also in the case of Mr. Pasco, of Florida, and we think that a decision which must inevitably deprive States in the Union for long periods of time of their rightful representation under the Constitution will not be permitted long to stand, and that no settlement of the question in derogation of the rights of the States and, as we

conceive, in violation of the intent of the framers of the Constitution should be acquiesced in.

We therefore recommend the following resolution:

"*Resolved*, That Matthew S. Quay is entitled to a seat in the Senate as a Senator from the Commonwealth of Pennsylvania until the next meeting of the legislature."

GEO. F. HOAR.
WM. E. CHANDLER.
J. C. PRITCHARD.
L. E. McCOMAS.

The resolution reported by the committee, as hereinbefore set forth, was debated in the Senate February 22, 1900 (Congressional Record, vol. 33, pp. 2062, 2063); February 23, 1900 (ibid., pp. 2115–2122); February 26, 1900 (ibid., pp. 2233–2240); February 27, 1900 (ibid., pp. 2310–2316); March 2, 1900 (ibid., pp. 2462–2469); March 3, 1900 (ibid., pp. 2503–2508); March 5, 1900 (ibid., pp. 2529–2533); March 6, 1900 (ibid., pp. 2573–2579); March 15, 1900 (ibid., pp. 2929–2930, and 2931–2939); March 16, 1900 (ibid., pp. 2963, 2964); April 4, 1900 (ibid., pp. 3732–3736); April 5, 1900 (ibid., pp. 3795–3798); April 6, 1900 (ibid., pp. 3829, 3830); April 7, 1900 (ibid., pp. 3873, 3874); April 9, 1900 (ibid., pp. 3913–3916); April 10, 1900 (ibid., pp. 3965, 3966); April 11, 1900 (ibid., p. 4001); April 12, 1900 (ibid., pp. 4079–4094); April 14, 1900 (ibid., p. 4159); April 21, 1900 (ibid., pp. 4520–4525); April 23, 1900 (ibid., pp. 4539–4557); April 24, 1900 (ibid., pp. 4586–4612).

[Extracts from remarks of Mr. Hoar in opposition to the resolution that Mr. Quay was not entitled to a seat in the Senate as a Senator from the State of Pennsylvania. Found in the proceedings of March 2, 1900, in the Congressional Record, vol. 33, pp. 2462–2464.]

"Mr. President, I have stated my opinion in debate and in printed reports on this question a good many times during the last twenty years. I do not wish to go over those arguments now. I wish merely to state very briefly and compactly, if I can, one or two propositions which may not in the first instance seem directly applicable to the main argument, and yet it will be found by anybody who reads the debates or reports or who talks with Senators in private that these propositions or their opposite seem to be constantly in the heads of Senators who are reflecting upon this question.

"In the beginning, I desire to ask the Senate to consider for a moment the condition of mind in the convention that framed the Constitution and the people who accepted it in regard to this question, with a view of ascertaining what they desired to do and would have done, if they could, by a proper expression.

"They were constructing a Government in a convention in which 11 States only were taking part. They were providing for a Senate to consist of only 22 men, in which they were to deposit half the legislative power of that Government, a share in the executive power, and a great judicial power affecting the interests and rights of the whole country. They expected that body, in the main, as everybody who is familiar with the history of that time well knows, to be a nonpartisan body. It was contrary to etiquette for many years after the Senate was organized to allude to party considerations in debate in this Chamber. The Senate was expected to be a sort of political supreme court, composed of men in whose judgment, by reason of their age, their character, their experience in public affairs, the whole country would have confidence, and, as I have said, they expected in the beginning that there would be but 22 of them. Rhode Island and North Carolina came in afterwards.

"I allude to this consideration to show how completely the idea that the whole country was interested in having the Senate full and how little the idea that it was a concern of a particular State alone whether there was a vacancy was in the mind of that convention and of the people.

"They proceeded to make a rule, a mechanism, by which this great assembly should be made up and should be kept full, and they did it by enacting that the State legislatures should appoint Senators, and they went on to say, 'vacancies may be filled by the executive.' That is the phrase they used.

"When they had said that, which, beyond all question was an enactment that whenever under any circumstances there was no Senator appointed by a legislature here, the chair should be filled by the governor, they had previously doubted whether the governor should not have the entire power. He represented the whole people of the State.

"He represented the dignity and the authority of the State in those days; he appointed every judicial officer and almost all of the high officers of the State—the sheriffs, district attorneys, judges. That was the arrangement they made, and that was passed by the Convention and reported in that form from the committee on detail. Then Mr. Ellsworth, than whom there was no greater constitutional lawyer and

statesman on the face of the earth anywhere, made a brief remark reported by Mr. Madison. Mr. Randolph first said:

"'It is necessary in order to prevent inconvenient chasms in the Senate.'

"He was speaking of the provision that vacancies may be filled by the executive. Then Mr. Ellsworth says:

"'As there will be but two members from a State, vacancies may be of great moment.'

"Everything said on that subject, so far as reported, being to call the attention of the assembly to the importance of keeping the Senate without a vacancy. That being the condition of affairs, Mr. Madison, who was also the reporter of the debate as well as a participant in it, rose in his place and said, 'But there is a question in England whether a man holding a legislative office may resign or decline, and for that reason I suggest a change in the phraseology.' He then moved to strike out the words after 'vacancies' and insert the words, 'happening by refusal to accept, resignation, or otherwise, may be filled by the governor.'

"Mr. President, I hold it very unlikely that any body of men would make that great change which made it possible that there might be long vacancies continued—and vacancies are now continuing in this body week after week, month after month, and year after year—when nobody said anything about it, when the mover of the amendment did not disclose any such important purpose, and only mentioned a much less important and more insignificant purpose.

"The honorable Senator from Tennessee says that this language is not to be taken in any artificial, or constrained, or technical sense, but is to be taken in a popular sense. To that I agree; but I would prefer to say that it should be taken in the sense in which the Convention used it, and in which the people who voted, or the assemblies who represented the people in accepting it, took it when they accepted it.

"Let us see if we can not settle that. They used precisely the same words in regard to vacancies in two other cases; first, in regard to possible vacancies in the House of Representatives, and, second, in regard to possible vacancies in the executive offices where the President appoints, and precisely those same words, 'if vacancies happen,' have been from that day to this, held to include not only vacancies coming by chance, or in any particular way, but any possible vacancy arising under any circumstances at any time or under any conditions.

"So, in order to limit this language as it is attempted to limit it here, you have got to say, first, that a convention that meant to do exactly what is claimed here by those in favor of the seating of Mr. Quay, five minutes before, without any question, all of them having so voted and whose committee had so reported, adopted language having a totally different meaning without any suggestion of a change of mind in this very important particular; and, next, that having adopted this language to express in this particular clause a totally different meaning, they used the same language in two other clauses in the same Constitution to express the purpose they at first entertained.

'Mr. President, I stated just now that I thought there was one consideration which, in the first instance did not seem to be so very important, but which seemed to be in the minds of Senators who debated this question on the floor, or who discussed this question in their private consultations, or who may do so, and that is, that if a State legislature meet and fail to make an election of a Senator, the State has neglected to perform a duty; that the State is in fault. You find that phrase all through the speeches on the other side of this question, that the governor can not appoint if the State legislature has neglected its duty. The honorable Senator from Tennessee, in his very interesting and able address the other day, said that if the State legislature neglected to elect, did not elect a Senator, its members had violated their oaths. Let us see if this proposition will bear the light. I maintain the contrary. I submit to the considerate judgment of Senators that not only it is no negligence, that it is no violation of an oath, but under many circumstances which are conceivable—and not only conceivable, but many conditions which frequently exist—the members of a State legislature would violate their oaths and depart from their duty if they made an election.

"In the beginning it was expected that two houses, two separate political persons, two corporate bodies, must separately choose the same man, and now there must be a majority of all the members of the joint body to choose a Senator voting for the same man. There are many cases familiar to all of us where these two bodies can not agree, or where there are three parties in the joint convention who can not agree, when the difference between them goes down not merely to the deepest interest of the Republic, but to the very root of the moral law itself. Take the case of one of our recent conditions; take the case in a Southern State of two legislatures, one believing and its members believing with all their might and main that the late election law was tyrannic, was unrepublican, was a violation not only of the Consti-

tution, but of every sound principle of legislation and of the principles of public liberty, and the other body believing with equal sincerity that the failure by national authority to secure the purity of elections in regard to Representatives in the other House was a great public crime. Could they conscientiously agree on a Senator?

"Suppose Aaron Burr were the candidate of one party and Thomas Jefferson of the other, or suppose Aaron Burr and Thomas Jefferson and some Federalist had been the three candidates, and a joint convention was to choose upon joint ballot. Is it neglect, is it a breach of the oath, is it a violation of constitutional duty, when any one of those representing those three opinions finds it impossible for him to agree with the men representing either of the others?

"Why, Mr. President, the framers of the Constitution meant to provide for just that case in other respects, did they not? Twice in our history has there been a failure of the electoral majority, of the persons chosen to the electoral colleges to agree, and will my honorable friend from Tennessee, or any other honorable friend, claim that the men who voted for Aaron Burr during those long ballotings, or the men who voted for Thomas Jefferson, or in a later year, the men who voted for John Quincy Adams and for Andrew Jackson, or for Henry Clay, or for William H. Crawford, were violating their oaths and that, to be consistent in our logic, the American people ought to be punished by not having a President for four years? Do the electors violate their oaths when they fail to choose a President? Does the House violate an oath when it fails to make a choice? The framers of the Constitution provided for the very case of a failure in bodies, which must act by majorities only, to get majorities for any particular candidate, and in case of President they went further and provided also in the case of a failure of the House of Representatives to elect. Two successive cases of failure to elect a President were provided for in the Constitution.

"Can anybody believe, who reflects on it impartially, that the framers of the Constitution did not intend to make a similar provision that should cover every case and should cover the whole time in regard to the great office of Senator? Why, Mr. President, they knew as well as you know how important a single vote may be. A single vote within the last twelve or thirteen months would have changed the whole policy of our Government with reference to imperialism. A single vote saved Andrew Johnson from impeachment. A single vote passed the bill taking newspapers out of the mail, a vote which tended so much to bring on the political destruction of Martin Van Buren and the overthrow of a dynasty. Twice in my own Commonwealth a single vote has elected the chief magistrate. Now, is it to be supposed they would have for a moment contemplated the idea that the great State of Pennsylvania, which now has a people of more than double the entire population who accepted this Constitution, should be shorn of half its strength, and that the people of the United States should be without the presence here of a gentleman to utter the voice and represent the will of 3,5000,000 people?

"Mr. President, the question before us is just that question. Did the men who framed this Constitution intend, would they have thought for a moment, that these great political corporations for great spaces of time on great questions should be without their lawful representation and their lawful voice here?

"It may be said that the executive, after all, if the legislature fails to agree, may appoint somebody whom the people as represented by a majority of the legislature would not approve. But that is our universal policy. If you can not get a majority you do not leave the people interested unrepresented; you take a plurality, do you not? And in every instance now throughout the entire country, I believe, a plurality of voices elects the Representatives in the other House, and nowhere is a majority required.

"Mr. President, when you couple with these considerations the fact that the language the framers of the Constitution used means in the same instrument in two other places that there shall be no vacancy and the office shall be kept full, that they did not utter, they did not make any suggestion of changing their mind in this particular, that they had unanimously adopted language which said "vacancies shall be filled"—when you couple with that the constitutional declaration of the importance of this matter, as shown in the enactment that no State shall be deprived of its equal voice in the Senate without its own consent, the justice of my contention will be manifest.

"The American people may, by constitutional processes and in a lawful way, make any changes in their Constitution whatever but one. They may establish a limited monarchy; they may do away with every safeguard of life, liberty, and property; they may amalgamate this country with races or States; but one thing they can not do, unless 45 States shall agree, and that is, leave a State with but half a voice in the Senate.

"These things, Mr. President, seem to me to be the large considerations that belong to this topic. They are such considerations as, it seems to me, would be in the minds

of the statesmen in that convention and of that generation. If you had come in in the light of these things and somebody had got up and said, 'There will be a State by and by whose legislature meets but once in four years; there will be a great many States by and by whose legislatures meet but once in two years; now, if it happens that a week or ten days or a fortnight before one of those legislatures adjourns a Senator dies, or if it happens that one of those legislatures tries to elect a Senator and can not do it because there are three opinions, each conscientiously held,' do you mean, gentlemen, that for two years, or for four years, or for one year, or for half a year, that that State shall be unrepresented?

"It may happen in regard to two Senators from the same State. Frequently in our history there has been such a condition of things that two Senators were to be voted for at once, or were to be appointed at once. It happened once in my own State, and it happened in the case of Mississippi not long ago. Do you mean in such a case the governor can not appoint? 'Why, no,' the answer would have been, 'We no more mean that that thing should happen, and that the whole country should be without the voice of that Senator, than we mean that the executive offices should be vacant under like circumstances, or that seats in the House of Representatives should be vacant under like circumstances; and you will observe that we have said in regard to the Senate just what we have said in regard to them.'

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"Mr. President, I wish to call the attention of the Senate to one judicial construction which I think has not been lately cited in the debate, and that is in the State of Pennsylvania. The constitution of Pennsylvania provides that the governor may fill any vacancy 'which may happen' in any judicial or elective office. It was held in Walsh *v.* Commonwealth (89 Pa. St. Rep., 419), just as it has been held in our dealing with executive officers, that where the legislature created a new county the governor was authorized to appoint all the officers of that new county without their being elective officers ordinarily until an election could be held, on the ground that there was a vacancy happening within the meaning of the constitution of the State.

"Mr. President, my friend the Senator from Tennessee [Mr. Turley] says—and it struck me that the argument he made was more against than in favor of his proposition—that if the framers of the Constitution meant what it is claimed they meant how easy it would have been to have said 'appoint a Senator till the legislature fill the office.' The fact that they did not say so, where they could have said it so easily, seems to him a strong argument that they did not mean it. But what they did say has been construed to mean exactly that thing. They said 'appoint until the next session of the legislature,' and the Senate says, as they also said so emphatically, that the Senate should be always full; that it means till the next adjournment of the legislature, which they did not say.

"I should like to ask this question, which I have never heard answered: What difference in principle is there between the case of a vacancy that begins at one time and the case of a vacancy that begins at another; between the case of a vacancy happening according to your construction of the word 'happen' and the case of a vacancy happening according to my construction of the word 'happen?' Is there any reason that can be conceived of on earth or in heaven which would induce any intelligent body framing a constitution to say that if the legislature has not met the governor may appoint, and if it has met the governor shall not appoint, unless what I have just spoken of now can be accounted a crime, perjury, negligence on the part of the legislature who can not agree?

"Now, one of these things which our ancestors feared was a failure on the part of the State to take interest enough in this General Government to keep the seats in the Senate and in the House full. You will find that fear constantly in the early discussions on the Constitution, even down to Mr. Webster's time. Mr. Webster, as late as 1825 or 1830, spoke of the danger that the States might not perform their constitutional duty of keeping the Senate full, and he said, in a passage cited in both the majority and minority reports on this question, that such a negligence would be fatal or destructive to any other country but ours. And then he adds, the Constitution, to secure us against this evil, lays hold of the individual conscience. But the individual conscience of the legislature is not sufficient for that purpose, and you are not safe any the more for the individual conscience of the legislature if they can not agree in regard to the character or the principles or the policy of the man upon whom they must unite. No oath can make a jury agree. No oath of office can create a majority among men conscientiously differing in opinion. But behind the legislature and behind the individual consciences of senators or representatives of the State, whose individual consciences may not let them agree, you have one place where the individual conscience is to be laid hold of, where it is sure to create individual action, and that is the conscience and the action of the executive.

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"He has to agree with nobody; he has to reconcile no difference of opinion, and he has the power and the right and the sworn duty to fill the office if the legislature can not fill it; and in that way, and in that way alone, is the security of the whole Republic assured."

[Extracts from remarks of Mr. Burrows in support of the resolution that Mr. Quay was not entitled to a seat in the Senate as a Senator from the State of Pennsylvania. Found in the proceedings of April 12, 1900, in the Congressional Record, vol. 33, pp. 4078, 4080, 4081, 4082, 4083, 4085, 4086, 4087, 4088, 4089, 4091, 4092, and 4094.]

"Mr. President:

* * * * * * *

"A recital of the facts in this case, in connection with the foregoing provisions of the Constitution, will disclose the exact question involved. In 1893 the legislature of the State of Pennsylvania elected Matthew S. Quay a Senator for the full term of six years from the 4th of March, 1893. He accepted and held such office until the expiration of the term, March 3, 1899. The legislature failed to elect his successor, and as a consequence such office became vacant on the 4th of March, 1899. The legislature was in session, however, at the time such vacancy occurred, and had been since the 2d of January previous, and continued in session until the 20th of April, 1899, when it adjourned sine die without electing a successor to Senator Quay for the succeeding term of six years. Thereafter, and on the 21st of April, 1899, the governor of the State appointed and commissioned Matthew S. Quay to hold the office of Senator 'until the next meeting of the legislature,' invoking as his authority for such action the provision of the Constitution already quoted, namely:

"'If vacancies happen during the recess of the legislature, by resignation, or otherwise, the executive of the State may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

* * * * * * *

"Proceeding, then, to the consideration of the exact issue involved, let me again direct the attention of the Senate to the wording of the constitutional provision in controversy:

"'If vacancies happen by resignation, or otherwise, during the recess of the legislature, the executive of the State may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

"The language employed is so clear, simple, and direct, the wonder to my mind is that there should ever have been any contention as to its import. If the rule laid down by Judge Story applicable to the construction of constitutions be applied to this provision, what room can there be for doubt or question as to its true meaning? Judge Story says:

"'Every word employed in the Constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense, and can not be presumed to admit in them any recondite meaning or any extraordinary gloss.' (1 Story, p. 322.)

"In the light of this rule of construction I confess it is difficult for me to comprehend how any serious difference of opinion could possibly have arisen as to the significance of the words employed; and yet it is a fact that a sharp contention is now made as to the true intent and meaning of the provision in question.

"These antagonistic opinions are set forth at length in the report of the committee and the views of the minority submitted in this case, from which the exact points of difference are made to appear. They may be summarized as follows:

"On the one hand, it is contended (and this is the view of the majority of the committee) that the vacancy to which the governor can make temporary appointment must be a vacancy, in the language of the Constitution, that 'happens during the recess of the legislature,' meaning thereby that it must be a vacancy having its beginning, its inception, during the time and when the legislature *is not in session;* and that a vacancy occurring when the legislature *is in session*, as was the fact in this case, is not such a vacancy as the governor of the State can supply by temporary appointment; and, further, that the vacancy which the governor can supply must not only 'happen during the recess of the legislature,' but it must occur, in the language of the Constitution, by 'resignation or otherwise'—meaning by 'otherwise' some like unforeseen event against which human foresight can not provide.

"On the other hand, it is insisted (and this is the contention of the minority) that the expression 'happen during the recess' does not mean that the vacancy must actually 'happen,' or come into existence, have its inception 'during the recess,' but the true intent and meaning is that if a vacancy 'happen' to *exist* in recess, though it had its inception and beginning when the legislature was in session, yet, upon the adjournment of the legislature, such a vacancy becomes a vacancy 'happening during the recess,' within the meaning of the Constitution, which the executive of the State can supply by temporary appointment; and that the expression by 'resignation or otherwise' embraces all conceivable vacancies from whatever cause, and that therefore it follows whenever the executive finds a vacancy existing for any cause, and the legislature is not in session at the time, he may make temporary appointment to such vacancy until the next meeting of the legislature. I think I have stated accurately the exact issue.

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"It will be observed that the exercise of this power of temporary appointment by the State executive is not mandatory, as in the case of vacancies in the House, but he '*may* make temporary appointments until the next meeting of the legislature.' It lies wholly within his discretion. He may convene the legislature, or make temporary appointment until the legislature shall meet in regular or extraordinary session. The reason for leaving the exercise of this power within the discretion of the executive was given by Mr. Ellsworth in the debate in the Constitutional Convention in explanation of this provision, when he said:

"'It is only said the executive *may* supply vacancies. When the legislative meeting happens to be near the power will not be exerted.'

"For this reason the exercise of the appointive power was purposely made discretionary.

"And thus by these various provisions the necessary machinery was provided, not only for the primary selection of the membership of both Houses, but the supplying of vacancies which might happen in such membership—a machinery so perfect and complete that it need only to be employed by those in whose hands it is intrusted to insure, at all times, a full membership of both Houses of Congress.

"In the examination of these various provisions it will be observed that the legislature of the State is, under the Constitution, the sole depository of the power to *elect* United States Senators either for a full term or to fill a vacancy. The executive of a State can not choose Senators nor fill vacancies—this power is lodged exclusively with the State legislature. The executive 'may make temporary appointments' under certain circumstances and conditions, but in no case is he authorized to *fill* either the original term or any vacancy which may happen therein. That power is lodged exclusively with the legislature. This will be conceded.

"When, therefore, Senator Quay's term expired on the 4th of March, 1899, it was the right and the duty of the legislature of the State of Pennsylvania, then in session, to choose his successor for the full term of six years. This was the express mandate of the Constitution, and, as Webster said in the constitutional convention of Massachusetts in 1820.

"'Whatsoever is enjoined on the legislature of the State by the Constitution of the United States the legislature is bound to perform.'

"Not only this, but by the act of Congress passed in 1866 it is provided that—

"'The legislature of each State which is chosen next preceding the expiration of the term for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.'

"The legislature of Pennsylvania, therefore, in session on the 4th of March, 1899, at the time the vacancy occurred in this case, was, in the language of the act of 1866, *the* legislature 'chosen next preceding the expiration of the term for which' Senator Quay was elected. This particular legislature, therefore, in session on the 4th of March, 1899, and remaining in continuous session until the 20th of April, 1899, was resting under the double mandate of the Constitution and the law to elect a Senator for the full term of six years, and, as I said before, no other power was authorized to perform this duty. It failed to discharge that constitutional and legal obligation, and on the 20th day of April, 1899, adjourned without day, leaving the office of United States Senator vacant. It is the vacancy thus created which the governor of the State of Pennsylvania attempts to supply by a temporary appointment, invoking as his authority the constitutional provision already cited.

"This is the storm center around which the entire controversy rages. To this point, therefore, I direct the attention of the Senate.

"That the executive of a State has the power, under certain circumstances and conditions, to make temporary appointments of United States Senators is not denied,

but the extent of such power is the only matter in controversy. The executive is empowered to make temporary appointments *under certain restrictions and limitations*, clearly set forth and defined. He has no authority, however, to supply all vacancies unless the construction contended for by the minority shall prevail. That power was expressly withheld by the Convention that framed the Constitution.

"It may be well at this point to glance at the proceedings of the Convention to determine, if possible, the true intent and meaning of this provision, and what the framers of the Constitution designed to do and did do in relation to supplying vacancies. Nothing further was necessary to perfect the machinery for the *election* of Senators—it only remained to provide for the contingency of *vacancies*.

"It will be well, therefore, to trace—and I will do it briefly—the plan for creating the Senate and for supplying vacancies therein. There were twenty-four resolutions agreed to in the Convention expressive of the general plan of government. Three of these resolutions—the fourth, the eleventh, and the twenty-second—relate to the organization of the Senate. These general resolutions were referred to the committee on detail.

"When the committee on detail made its report to the Convention, the Convention modified the report in many particulars, and after such modification of the report of the committee on detail it was referred to the committee on style. After the committee on style reported, the Convention itself modified the report of that committee, and as thus modified it was embodied in the Constitution.

"And at this point, for the convenience of the argument, I present in order the steps taken in perfecting the provision in relation to the Senate and vacancies therein:

"First. The resolutions of the convention, as agreed to and referred to committee on detail.

"Second. Report of committee on detail.

"Third. Modification by the convention of the report of the committee on detail and as referred to committee on style.

"Fourth. Report of committee on style.

"Fifth. Modification of report of committee on style as finally embodied in Constitution.

"'4. *Resolved*, That the members of the second branch of the Legislature of the United States ought to be chosen by the individual legislatures, to be of the age of thirty years at least, to hold their offices for six years, one-third to go out biennially. * * *' (1) Resolutions agreed to by convention and referred to committee on detail.

"'11. *Resolved*, That in the second branch of the Legislature of the United States each State shall have an equal vote.'

"'22. *Resolved*, That the representation in the second branch of the Legislature of the United States shall consist of two members from each State, who shall vote per capita.'

"Vacancies may be supplied by the executive until the next meeting of the legislature. (2) Report of the committee on detail.

Vacancies happening by refusals to accept, resignations, or otherwise may be supplied by the legislature of the State in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature. (3) Modifications by convention of report of the committee on detail, and as thus modified referred to committee on style.

"And if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature. (4) Report of the committee on style.

"And if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. (5) Report of committee on style as modified by convention and inserted in the Constitution.

"It would be well, therefore, as I say, to trace the plan for creating the Senate and supplying vacancies therein, from its inception to its completed form, as it was finally agreed to and embodied in the Constitution as it stands to-day.

"The subject came up in convention in committee of the whole, and all the various plans and suggestions were considered as to the manner of electing Senators, their term of service, qualifications, etc. The committee of the whole finally reported to the convention, as the result of its deliberations, a series of resolutions, the following of which related to the constitution of the Senate:

"'*Resolved*, That the members of the second branch of the national legislature ought to be chosen by the individual legislatures, to be of the age of 30 years, at least, to hold their office for a term sufficient to insure their independence, namely, seven years.'

"When this resolution came up in the convention for consideration a great contention arose, among other things, over the basis of representation, the smaller States refusing to agree to any plan which did not give them equal voice in the Senate. This brought the convention, as Sherman said, to a 'full stop,' requiring the efforts of a subcommittee of one from each State to adjust differences and harmonize conflicting views, and the final upshot of the matter was that the convention agreed to twenty-three propositions as embodying its views on the fundamental principles of the government to be established, three of which related to the Senate, as follows:

"'Fourth. That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures, to be of the age of 30 years, at least, to hold their offices for six years, one-third to go out biennially.

"'Eleventh. That in the second branch of the legislature of the United States each State shall have an equal vote.

"'Twenty-second. That the representation in the second branch of the legislature of the United States shall consist of two members from each State who shall vote per capita.'

"These twenty-three resolves of the convention above mentioned were then referred to the 'committee of detail' to work out and formulate and express in proper phrase the ideas embodied therein. It will be remembered that there was also referred to this committee, in connection with these resolutions, Mr. Pinckney's draft of a federal government, presumably for such helpful suggestion as it might contain and in which for the first time, so far as I have been able to discover, the idea of supplying vacancies appears.

"The Congress, by Pinckney's plan, was to consist of a house of delegates and a senate, and it was provided by this plan that—

"'vacancies in the house of delegates were to be supplied by the executive authority of the State in which they shall happen.'

"The senate was to be chosen by the house of delegates and—

"'The house of delegates shall fill all vacancies that arise from death or resignation for the time of service remaining of the member so dying or resigning.'

"By referring the Pinckney plan, which contained a method for supplying vacancies, to the committee of detail, this question was also before the committee, although up to that time the convention had expressed no opinion upon that subject.

"There went to the committee of detail, therefore, three settled principles in the organization of the Senate which the convention had determined:

"First. That the Senators should be chosen by the legislatures.

"Second. That there should be equal representation, and to that end there should be two Senators from each State, voting per capita.

"Third. A suggestion in the Pinckney plan as to the method of filling vacancies.

"The committee of detail, to which was referred the three resolves above mentioned and the Pinckney plan, reported back the following provision:

"'The Senate of the United States shall be chosen by the legislatures of the several States. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.'

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"When the report of the committee of detail came up for consideration in the convention, objection was at once made to the supplying of vacancies by the executive as conferring upon that officer a too liberal grant of power, as shown by the following debate:

"'Mr. Wilson objected to vacancies in the Senate being supplied by the executives of the States. It was unnecessary, as the legislature will meet so frequently.

"'Mr. Randolph thought it necessary, in order to prevent inconvenient chasms in the Senate.

"'Mr. WILLIAMSON. Senators may resign or not accept. This provision, therefore, is absolutely necessary.'

"Mr. Madison, in order to prevent doubts whether resignation could be made by Senators or whether they could refuse to accept, moved to strike out the words after 'vacancies' and insert the words—

"'happening by refusals to accept, resignations, or otherwise may be supplied by the legislature of the State in the representation of which such vacancies shall happen or by the executive thereof until the next meeting of the legislature.'

"Now note what they did. Instead of 'vacancies may be supplied by the executive until the next meeting of the legislature,' the convention changed that and said 'vacancies may be supplied by the legislature or by the executive until the next meeting of the legislature.'

"So that that clause of the Constitution read:

"'Vacancies happening by refusals to accept, resignations, or otherwise may be

supplied by the legislature of the State in the representation of which such vacancies shall happen or by the executive thereof until the next meeting of the legislature.'

"What does that mean but that if the legislature is present it shall fill the vacancy, and the governor can not act in such a case?

"Gouverneur Morris, in support of Madison, said:

"'This is absolutely necessary; otherwise, as members chosen into the Senate are disqualified from being appointed to any office by section 9 of this article, it will be in the power of a legislature, by appointing a man against his consent, to deprive the United States of his services.'

"In lieu, therefore, of the provision, as reported by the committee of detail, that 'vacancies may be supplied by the executive until the next meeting of the legislature,' the report was modified by the convention to conform to the suggestions made, so that it read: 'Vacancies happening by refusals to accept, resignations, or otherwise may be supplied by the legislature of the State in the representation of which such vacancies shall happen or by the executive thereof until the next meeting of the legislature.' Instead, therefore, of unbridled power being conferred upon the executive to fill vacancies arising from whatever cause, his power was thus still further curbed and restricted.

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"A vacancy happening by the expiration of a term, as in this case, confessedly is not a vacancy caused by 'refusal to accept' or 'by resignation,' but solely by the failure of the legislature to act, and therefore not within the competency of the executive to supply, unless such a vacancy is embraced within the meaning of the word 'otherwise.' Of this I will have something to say later on. I will observe in passing, however, that independent of the known rule of construction, that a word of general import is controlled and limited by the specific word with which it is associated, it is a little remarkable that at no time and nowhere in the proceedings of the convention was there the remotest suggestion by any member of that convention that the legislature might fail to do its duty, and that it was intended to confer upon the executive the power of appointment in such a contingency.

"Neither Madison nor anyone else ever suggested filling such a vacancy. They suggested death, removal, expulsion, resignation, but never the failure of the legislature to do its duty. If that had been the purpose, how easy it would have been to have said 'if vacancies happen by failure of the legislature to elect, by resignation, or otherwise.' They surely would not have left so vast and far-reaching power to be inferred from the word 'otherwise' as used in that connection.

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"It would seem much more reasonable to suppose that, when Madison suggested a doubt as to whether Senators could resign or refuse to accept, these words were inserted for the purpose of removing that doubt, and then instead of inserting, as in the Pinckney plan, the word 'death,' etc., and enumerating all the other casualties which might happen to an incumbent of the office, they were all embraced in the word 'otherwise.' And it will be observed that every suggestion of vacancy by the convention, by speech or amendment, had reference to something happening to the incumbent of the office and not to dereliction of duty on the part of the legislature. It is hardly to be presumed that the framers of the Constitution intended to embrace within the meaning of that word a failure of the legislature to perform its duty, for that would have been to admit in the beginning a fatal defect in their plan of government.

"More than this, as Senator Vance well said in the Mantle case:

"'Can the Senator point out any case in the Constitution where, a duty being primarily imposed upon an officer therein named, the performance of that duty is conferred upon another officer contingent upon the failure of the first officer to perform his duty?'

"And Senator Garland, the ex-Attorney-General of the United States, said in the debate in 1879:

"'It is a well-established principle of jurisprudence that when one tribunal has jurisdiction and fails to exercise it, no other tribunal can assume it.'

"It will be observed that the convention still further modified the report of the committee of detail, which, it will be remembered, provided that—

"'vacancies may be supplied by the executive until the next meeting of the legislature.'

"by adding—

"'or by the legislature of the State.'

"et cetera, so that the provision as a whole was made to read as follows:

"'Vacancies happening by refusals to accept, resignation, or otherwise may be supplied by the legislature of the State in the representation of which such vacancies shall happen or by the executive thereof until the next meeting of the legislature.'

"By this it will be seen that the convention, instead of conferring the power of supplying vacancies exclusively upon the executive, vested it primarily in the legislature, so jealous were they of executive control over the matter of choosing Senators. The authority of the executive was secondary. They were evidently determined that the executive should not be permitted to take the selection of Senators either for a full term or to fill a vacancy away from the legislature, where the primary power had been deposited. The manifest purpose in this modification was to make it incumbent upon the legislature, in the first instance, to fill the vacancy, but if the legislature was not in session or for any cause could not act, then the vacancy was to be supplied 'by the executive until the next meeting of the legislature'—until the legislature, the primary power, could act. In this form, as thus modified by the convention, it was referred to the committee on style, which reported it back to the convention in the following form:

"And if vacancies happen, by resignation or otherwise, 'during the recess of the legislature of any State'"—

"This is the first time that clause appears—

"'during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature.'

"It is conceded that the committee on style was only authorized to put in proper form and phrase that to which the convention had already agreed. Now note what the committee did. First, they dropped the words 'refusals to accept' as evidently being surplusage, being included within the meaning of the word 'otherwise.' They had evidently abandoned the suggestion of Madison, that it was necessary to include these words in order to confer upon a Senator the right of 'refusal to accept.' Secondly, they dropped the words—

"'by the legislature of the States in the representation of which such vacancies shall happen'--

"evidently for the reason that the legislature, if in session or if convened, had the power to *fill vacancies* under its original grant of power to elect Senators, and this provision was, therefore, unnecessary, and inserted in lieu thereof the words—

"'during the recess of the legislature of any State'—

"thus still further limiting the power of the governor over vacancies to those which should happen when the legislature was not in session—when the primary power was absent and could not act; so that the provision as formulated by the committee on style read:

"'And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature.'

"It is worthy of note, too, in this connection that the committee on style dropped the words 'may be supplied' and inserted, *for the first time*, the words 'may make temporary appointment.' Why was this done? 'Supply' is defined to mean 'to fill up,' but it is clear the convention never intended to allow the governor to *fill* the vacancy; and so these words were stricken out and 'may make temporary appointment' inserted, 'temporary' meaning, as defined by lexicographers, 'lasting for a time only; existing or continuing for a limited time; not permanent.' From this it will be seen how guarded the convention was in conferring this power of appointment upon the executive of the State, and how determined they were to restrict it within the narrowest possible limits. Not content with this, when the convention took up the report of the committee on style, to compare it with the articles agreed to and referred to that committee, they modified the provision as reported from the committee on style by adding after 'legislature' the words 'which shall then fill such vacancies,' as if to set definite bounds to the exercise of this limited power, beyond which the executive could not go, and, as thus modified, it was embodied in the final draft of the Constitution.

"Now, it has been said that the clause, 'which shall then fill such vacancies,' refers to those vacancies to which the governor might make temporary appointments; and if the governor can not make a temporary appointment in this case, then the legislature can not fill. The expression 'shall fill such vacancy' does not refer to such vacancies as the governor may supply, but to the original vacancy. Our friends on the other side insist upon reading into the Constitution power to supply vacancies, which the executive does not possess, and then draw the conclusion if the governor has not the power to supply then the legislature can not fill.

"This is a correct history, step by step, of the development of this provision from its inception to its final completion and embodiment in the Constitution, where it stands to-day in clear and unmistakable phrase:

"'If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'

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"The whole contention of the minority resolves itself into this—the executive may fill any vacancy he finds existing when the legislature is in recess. A vacancy and the absence of the legislature are the only prerequisites for executive action. The framers of the Constitution when they said, 'If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancy,' intended only to say the executive of the State may fill all vacancies when the legislature is not in session.

"If at the expiration of a term, though the legislature may be in session at that time, and remain in session many weeks thereafter, yet if it finally adjourn without making a choice of Senator, immediately upon such adjournment the governor may appoint until the *next meeting* of the legislature, which is construed to mean not only to the meeting of the legislature, but to its final adjournment if no choice is made. If at the *next* meeting of the legislature thereafter there should again be no choice, immediately upon its adjournment the governor may again appoint until the *next* meeting of the legislature, and so continue the process indefinitely until some legislature shall make a choice of a Senator, so that seats in this Chamber are to be filled by governors so long and as often as the legislature shall refuse or fail to elect.

"In this very case, as an illustration, in the approaching election in Pennsylvania, only about six months distant, if ex-Senator Quay should be a candidate for reelection it will not be necessary for him to carry a majority of the legislature, but only to secure a sufficient number of adherents to prevent an election and force an adjournment, when Governor Stone can again disregard the mandates of his own constitution, refuse to call a session of the legislature, and again issue his commission to Senator Quay to hold a seat in this body until the next meeting of the legislature, and then, upon the theory of the minority, he would be seated, and thus repeat the process for the full term of six years, and thus continue to hold a seat in this body by the favoritism of the governor, and independent of the will of the legislature of the State of Pennsylvania. Is the Senate of the United States prepared to indorse a construction which would lead to such results?

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"And in this connection I can not refrain from again quoting the words of Hamilton in the Federalist (p. 393), where he says in explanation of this provision of the Constitution:

"'It may be alleged that, by declining the appointment of Senators, they'

"Meaning the legislatures—

"'might at any time give a fatal blow to the Union. It is certainly true that the State legislatures, by forbearing the appointment of Senators, may destroy the National Government. So far as that construction may expose the Union to the possibility of injury from the State legislatures, it is an evil, but it is an evil which could not have been avoided without excluding the States in their political capacities wholly from a place in the organization of the National Government.'

"But how could the State legislatures, if the contention of the minority be sound, by forbearing the appointment of Senators, destroy the National Government? The executive can appoint whenever and as often as the legislature fails to elect. How it would have quieted the apprehension of Alexander Hamilton for the safety of the National Government if he could have but known that the governors of the States had the power to keep the Senate always full, though the legislatures should fail to do so. He was evidently laboring under the delusion that if the legislatures failed to elect there was no remedy, and the whole fabric of government would be placed in jeopardy. How natural it would have been for Hamilton, in his defense of this provision of the Constitution, if such a defense were permissible, in answer to the criticism that the States, by withholding Senators, might break up the National Government, to have said in reply what is contended for now by the minority, that if the legislature fails to elect at any time the Constitution empowers the executive of the State to appoint Senators, and so keep the Senate always full. It seems inexplicable that Hamilton, a member of the convention that framed the Constitution, should have lost sight of this power of the governor to supplement the failure of the legislature.

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"And so we have this plain provision of the Constitution distorted and made to read, 'whenever vacancies exist for any cause, and the legislature is not in session, the executive may make temporary appointment until some legislature fills the vacancy.' When I consider how this provision is warped and twisted, that it may temporarily serve personal or party ends, I am again reminded of the words of Senator Hill:

"'When I hear gentlemen on either side of this Chamber, in either party of this country, take that plain language of the Constitution and construe it to apply to any

vacancies that may occur by any means, by the failure of the legislature, willfully or otherwise, to elect a Senator, that the governor can come in and supply the vacancy, I must say it excites my profound astonishment, more than that, my sorrow. It absolutely shakes my confidence in the efficacy of written constitutions.

"'The primary object of the Constitution is to put in the State legislature the power to fill this office, and nobody else; but casualties may occur, death may come, resignation may come, Senators may be expelled, there may be divers casualties by which the term thus filled by the legislature may become vacant, and vacant during the recess of the legislature when Congress may be in session. It is important, therefore, as was said by Mr. Randolph, to allow the governor power to fill chasms, but not to fill an original term.'

"What did the great Seward, of New York, say?

"'This alarm'—

"Speaking of the effect of the contention of the minority—

"'This alarm will be increased by the fact that the proceeding will operate to strengthen and increase the provisional prerogative of the governors of the States at the expense of the power conferred by the Constitution on the legislatures of the States; for nothing is clearer than that the power conferred on the governors to fill vacancies was designed to be but occasional and exceptional, and subordinate to that devolved on the legislature, which was designed to be general, complete, and supreme.'

"William H. Seward, it will be admitted, was a great constitutional lawyer.

"I commend to the Senators from Illinois the language of Justice Davis, who, when in the Senate, commenting upon this very provision, said:

"'The whole question is in a narrow compass, and the view of the Constitution which has been presented by different gentlemen who have discussed the subject, especially by the Senator from Georgia [Mr. Hill], and last by the Senator from Wisconsin [Mr. Carpenter], in my judgment presents the proper construction of that instrument.

"'I do not believe'—

"Says Judge Davis—

"'that the vacancy mentioned in that clause of the Constitution is anything else than a portion of the six years' term where there is no person qualified to discharge the functions of the office. The principle asserted in the Lanman decision is that the legislature of a State shall provide for all vacancies which must occur at stated and known periods, and that the expiration of a regular term of service is not such a contingency as is embraced in the governor's power under the Constitution; that where opportunity is given to the legislature to choose a Senator the governor can not appoint. A vacancy within the meaning of the constitutional provision does not arise by the failure of a legislature to elect.

"'I think that the decision in Lanman's case, as I understand it, gives the true interpretation of the Constitution, that when the legislature had the opportunity of providing a Senator but failed, the governor can not appoint.'

"Attorney-General Garland, a great lawyer, said, in the debate on the Bell case in 1879:

"'Mr. President, the position that I take in reference to this matter from my reading of the Constitution is that legislatures of the States, being the original constituency of the United States, must themselves by election place a Senator in this body at the beginning of a new term; or, to state the proposition somewhat differently, it is not within the meaning of the Constitution that the governor of a State can put upon the floor of the Senate a Senator at the commencement of a new term of six years, or a new term that might be by the meeting of the legislature afterwards for a shorter period. Before the governor of a State can appoint a Senator to fill what he may consider a vacancy in the Senate, there must not only be an unfilled seat but a broken term previously held by someone else.

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"'According to the interpretation of the Senator from Delaware, if the legislature of any State of the eleven that first ratified the Constitution had failed to send two Senators here to compose the Senate, the governor of the State could have sent two to compose the body. There is no halfway ground, because we have heard it enunciated here by the Senator from Delaware and by the minority report that if the vacancy exists, by a robust and athletic construction of the Constitution, somebody must fill it—it must not go unfilled.

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"'Now, we have the vacation of these seats by law. When that is done, according to the fair interpretation of this instrument, the legislature alone can step in. Then:

"'"And if vacancies happen by resignation or otherwise."

"'That is, "if vacancies happen" after the seats have been filled, after the legislature has chosen, "by resignation or otherwise," meaning by expulsion or by death. The word "happen," whether you enlarge it or whether you narrow it in its construction, affects at last the incumbent in the seat by some accident or by some casualty. Hence the word "happen" is used, referring to something which takes him out of the seat, leaving both an unfilled seat and a broken term.'

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"Mr. Carpenter, of Wisconsin, said:

"'When the legislature last in session previous to the expiration of a Senatorial term, having power to make an election, refuses or neglects to do so, then until an election can be made, in conformity with the Constitution of the Union, the State, by its legislature, has consented to waive its right to equal representation in this Chamber.'

"Did Stephen A. Douglas, of Illinois, know anything about the Constitution? He said:

"'Where a Senatorial term has expired by its own limitation under the Constitution, and an absence of representation results from that cause, it is not a vacancy within the meaning of the Constitution. Vacancies happening in the representation of the Senate during a recess of the legislature may be filled by the governor of a State.

"'But I presume no man ever contended—certainly not since the Lanman case—that a governor, under the power to fill vacancies, could make an appointment to an original term of office.

"'Therefore, when we speak of vacancies happening in the constitutional sense, we must be understood as meaning cases where the term has once been filled and subsequently becomes vacant by registration or otherwise.

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"'Why, sir, the Constitution provides that in the election of Senators generally it shall be done by the legislature of each State; it provides by implication that in case of vacancies which occur during the session of the legislature the legislature shall elect; but it also provides that if the vacancy occurs during the recess of the legislature the legislature shall not elect in the first instance, but that the governor shall appoint, and that the appointment shall continue until the next meeting of the legislature, and that the legislature shall then elect.'

"Senator Cass, of my own State, a great lawyer and a man of recognized ability, said:

"'How, then, stands this case, sir? The third clause of the first article of the Constitution provides for the composition of the Senate by fixing the term of service and the mode of selecting the Senators, permanent and temporary. It declares that "if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." The regular terms of Senators are for six years, and the "vacancies" herein provided for are the unexpired portions of such terms, which are to be "filled" by the legislature when it can act, and when it can not act to be occupied by temporary executive appointments. If, therefore, a Senator resign, or his seat is otherwise vacated, *except by the expiration of his term*, the "vacancy" is for his original period of service, to be temporarily appointed to by the governor or "filled" by the legislature.'

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"Senator James A. Bayard held to the same doctrine:

"'You find that in reference to the full term of a Senator the provision is that he shall hold his office for six years and be chosen by the legislature. The executive has no authority there. And you find, further, that if the legislature is not in session at the time a vacancy occurs by resignation or otherwise, though it may not even be known to them, yet no authority in such a case is confided to the executive to appoint.

"'You find, in other words, that within the intent of the Constitution no authority over the subject is meant to be intrusted to the executive whenever the primary power—the legislature—is in existence as an organized body. I am aware that at one time it was decided that even in reference to the full term the executive of a State might make an appointment until the legislature met; but that construction was subsequently overruled by the Senate in the case of Mr. Lanman in the year 1825, and ever since the practice has been uniformly in accordance with the decision in that case.

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"'In reference to the full term, it can not be doubted that no authority whatever is confided to the executive. The negation of power in any other event than when the vacancy occurs in recess shows that it was the intent of the Constitution that the

executive was merely to provide for casualties happening when the legislative power, which is the primary power, was not in existence, and, of course, could not act.'

"Senator Mason, of Virginia, said:

"'The Constitution has created Senatorial terms and has declared that those terms shall last for six years; they are so arranged by another provision of the Constitution that one-third of the Senate go out biennially. What is the language of the Constitution as affecting the duration of the term? The Constitution declares that the seats of the Senators of the first class shall be vacated at the end of two years, of the second class at the end of four, and of the third at the end of six years, thus creating the terms. The language of the Constitution is that the seat "shall be vacated" by the lapse of time, and then new terms commence.

"'A few words now as to the precedents. Until Lanman's case, according to my recollection, it was considered by the Senate, or rather it was decided by the Senate, manifestly without consideration, that it was competent for the State executive when a term expired in the recess of the legislature to treat that as a vacancy and to fill it accordingly. Such a practice was common until the decision in Lanman's case. I confess that on looking at the Constitution my first impression was that the practice was correct, but on examining the Constitution and weighing it carefully and deliberately I can not entertain a doubt that the decision of Lanman's case was correct, and that when a term expires by constitutional limitation it is not a "vacancy" which the executive can fill.'

"Senator Butler, in the Phelps case in 1854, said:

"'It must be conceded that the authority to choose a Senator to commence a new term of six years, after the efflux of a regular term, is exclusively vested in the State legislature.'

"And referring to the Lanman case, he said:

"'In 1825 Lanman's case came up for consideration involving both questions. In that case, after a very full debate, it was solemnly decided that it was not competent for the governor of a State to put a member on this floor at the commencement of a term. In other words, it was decided that his power of appointment could not be substituted for the election of the State legislature. Even if such had not been the decision in the case of Lanman, I take it for granted that such would be, and must necessarily be, the decision now.'

"In the great debate of 1852, Jefferson Davis, then a Senator from the State of Mississippi, said:

"'Sir, there are two modes of electing Senators—the one by the legislature of a State, the other by executive appointment. And how comes it, Mr. President, that there are two modes? It is well to understand the reason. It was foreseen by the framers of the Constitution that vacancies would occur—would "happen," as the Constitution expresses it—during the "recess" of the legislature of a State, and consequently that a State would be deprived of its representation, for a time at least, unless that vacancy could be supplied. Hence, it gives to the executive of a State the power of a temporary appointment, as the Constitution expresses it, a temporary appointment to hold until the legislature, as I shall show you, has had an opportunity to appoint; and when the legislature has once had that opportunity and declined or omitted to exercise its power, the executive no longer has any power over the subject. It has been justly enough observed here that the word "until," in the clause of the Constitution, qualifies the word "power;" that is, he shall appoint to hold until the legislature discharges that duty, or has an opportunity to discharge it.'

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"The other day the Senator from Maryland read a letter from Senator Edmunds—and I am apprehensive that all the Senators did not hear it, and I am therefore going to repeat it—written September 1, 1885.

"Mr. BACON. Written by whom?

"Mr. BURROWS. By Senator Edmunds, in relation to the Oregon matter.

"'BURLINGTON, VT., *September 1, 1885.*

"'DEAR SIR: I have yours of the 21st ultimo. The Constitution, as you know, provides respecting Senators that "if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancy."

"'It has been held by the Senate, and may now be considered as the settled law of that body, that if a State legislature has once acted or had an opportunity to act while a vacancy exists, the governor has no power to supply the failure of the legislature to fill it up.

"'Applying this rule to the case of Oregon, a vacancy existed on and after the 4th

day of March, 1885, and your legislature, as I understand it, continued to sit a long time after that date and had the opportunity to fill the vacancy, so that the vacancy did not happen during a recess of the legislature, and it now only exists because the legislature failed in its duty of keeping its Senatorial representation full.

"'If we construe this clause of the Constitution as some Democratic Presidents have the corresponding clause respecting the President filling vacancies in offices, so as to make it mean that if vacancies happen to exist during any recess the governor may fill them, it would be an indefinite power to be exerted just so long as the legislature failed, which is not according either to the language or spirit of the Constitution. But, however we may reason about it, the Senate will be obliged to reverse its repeated decisions on the subject in order to admit a Senator appointed by the governor under such circumstances. Trusting that in some way a Republican Senator from Oregon may be preserved to us at a time when the only security for safe and conservative government lies within the Senate.

"'I am, very truly, yours, GEORGE F. EDMUNDS.'

"Will the Senate read the opinion of this great constitutional lawyer out of the record and trample his words under foot?

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"In this connection I desire to call special attention of the Senate to the case of Kensey Johns, which arose in 1794, only five years after the organization of the first Senate, in which body there were a considerable number of members who had previously been members of the Constitutional Convention, and, of course, participated in the framing of this provision of the Constitution, and whose opinions, therefore, should command great weight. It is said—

"'That contemporary construction put upon the language or meaning of a constitution at the time of its adoption, or shortly after, by members of the convention which framed it, is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause.'

"The opinion of members of the Senate at that time, who were members of the Constitutional Convention, ought, therefore, to come to us with very great force.

"The Senator from Wisconsin [Mr. Spooner] very well said recently, in his remarks on this case, in reply to the Senator from Maryland [Mr. Wellington]:

"'He has invoked the lessons and the actions of the past. I agree with him that profound respect is to be accorded to the action of prior Senates. I agree with him that the men who acted in this body near the time of the adoption of the Constitution knew quite as much about it as we who come here many, many years after its adoption.'

"The Senator then called the attention of the Senator from Maryland to a case which occurred in 1809, the Smith case, and said:

"'No man in that body—it was only twenty years after the adoption of the Constitution, and, I suppose, or have supposed, they knew as much about the Constitution in 1809 as we do in 1900, and cared as much for their obligation to support it as we do.'

"If the opinion of members of the Senate twenty years after the organization of the Government come to the Senator from Wisconsin with so much force, how convincing must be the opinion of the Senate only five years after its organization, when nearly one-fourth of its membership consisted of gentlemen who had been members of the Constitutional Convention? Let me invoke, therefore, the attention of the Senate particularly to this case.

"George Read, a Senator from the State of Delaware, resigned his seat in the United States Senate on the 18th day of December, 1793. The legislature of the State met in January, 1794, and adjourned in February thereafter without filling the vacancy.

"On the 19th of March, 1794, the governor appointed Kensey Johns. There had been a meeting of the legislature between the resignation and the appointment. His credentials were referred to the Committee on Elections of the Senate, consisting of seven members, which committee reported, with only one dissenting vote, that the governor had no power to make the appointment, and Mr. Johns was rejected. True, that was not an appointment by the governor at the beginning of a term, but the same principle was involved, namely, that where the legislature has the opportunity to fill a vacancy happening in the representation of the State in the Senate of the United States, and fails to perform its duty in this regard for any reason, the governor has no power to appoint.

"The determination of the Senate in that case ought to appeal to us with very great force. It came up and was decided within five years after the inauguration of the Government, when Washington was in the executive chair and the men who

had participated in the Constitutional Convention were still alive and whose opinions were undoubtedly sought and must have been potential in shaping the judgment of the Senate. More than that, in that very Senate sat several Senators who were members of the Constitutional Convention which considered and framed these provisions of the Constitution now in controversy, and certainly they ought to have known, and unquestionably did know, just what these provisions meant.

"There was Pierce Butler, of South Carolina, a Delegate in the old Congress and the first Senator from that State; Oliver Ellsworth, of Connecticut, who had served in the old Congress, been a judge of the superior court, elected a Senator from that State, afterwards appointed Chief Justice of the Supreme Court of the United States by President Washington, and subsequently became minister to France; Rufus King, of Massachusetts, a Delegate in the old Congress, member of the State legislature, who subsequently became a Senator from the Empire State and minister to England; John Langdon, of New Hampshire, of legislative experience in the old Congress, elected to the Senate in 1789, and became President pro tempore of that body; and Alexander Martin, of North Carolina, speaker of the State senate and governor of his State.

"All these Senators who participated in the work of framing the Constitution of the United States voted that Mr. Johns was not entitled to a seat, and admission was refused him by a vote of 20 to 7. It is no violent presumption to assume that these Senators, who were members of the Constitutional Convention and participated in its formation, knew what they were doing when they voted that the governor had no power to appoint Kensey Johns.

"I desire to read from the Official Record, the Annals of Congress, Third Congress, the proceedings of the Senate in this case in detail.

"'*Monday, March 24, 1794.*

"'Kensey Johns appeared and produced his credentials of an appointment by the governor of the State of Delaware as a Senator for the United States, which were read. Whereupon, it was moved that they be referred to the consideration of the Committee of Elections before the said Kensey Johns should be permitted to qualify, who are directed to report thereon; and it passed in the affirmative.

"'*Thursday, March 27.*

"'The Senate proceeded to the consideration of the report of the Committee of Elections, to whom was referred the credentials of Kensey Johns, appointed by the executive of the State of Delaware to be a Senator of the United States. On motion that the report be recommitted, it passed in the negative; and, after progress, it was ordered that the further consideration of this report be postponed until to-morrow.

"'*Friday, March 28.*

"'The Senate resumed the consideration of the report of the Committee of Elections, to whom was referred the credentials of Kensey Johns, appointed by the executive of the State of Delaware to be a Senator of the United States; which report is as follows:

"'"The Committee of Elections, to whom was referred the credentials of an appointment by the governor of the State of Delaware of Kensey Johns as a Senator of the United States, having had the same under consideration, report:

"'"That George Read, a Senator for the State of Delaware, resigned his seat upon the 18th day of December, 1793, and during the recess of the legislature of said State.

"'"That the legislature of the said State met in January and adjourned in February, 1794.

"'"That upon the 19th day of March, and subsequent to the adjournment of the said legislature, Kensey Johns was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid.

"'"Whereupon the committee submit the following resolution:

"'"*Resolved*, That Kensey Johns, appointed by the governor of the State of Delaware as a Senator of the United States for said State, is not entitled to a seat in the Senate of the United States, a session of the legislature of said State having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.'"

"'On the question to agree to this report it passed in the affirmative—yeas, 20; nays 7.'

"From this report of the Committee on Elections, which consisted of Bradley, Elsworth, Mitchell, Rutherford, Brown, Livermore, and Taylor, it will be observed

that the committee reported against the right of Kensey Johns to a seat, upon the express ground that—

"'A session of the legislature of the said State having intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.'

"That being the case, it was the duty of the legislature to elect. The report was adopted by the Senate by a vote of 20 yeas to 7 nays. It is worthy of note in this connection that the Committee on Elections, which gave this case special preliminary consideration, consisted of seven Senators, among whom was Elsworth, who was one of the most conspicuous members of the Constitutional Convention and of whom the distinguished Senator from Massachusetts [Mr. Hoar] very properly said the other day in debate:

"'Than whom there was no greater statesman and constitutional lawyer on the face of the earth anywhere.'

"And he, as a member of this committee, not only reported against the right of the governor to appoint in that case, but on the final vote in the Senate voted to keep the seat empty and that the State should go unrepresented of one Senator until a Senator had been properly elected. He did not regard it so important to keep the Senate full, even when it consisted of but thirty members, as to admit to membership anyone not lawfully commissioned. Elsworth, it must be remembered, was not only the 'greatest lawyer on earth,' and a member of the Constitutional Convention, but he was also a member of the committee of detail to amplify and give expression to the principles of government which the convention had adopted, and was, therefore, specially qualified to speak, and his opinion in this case comes to us with peculiar force. It is not saying too much of Mr. Elsworth that he was not only one of the most active members of the Constitutional Convention, but one of the most influential, and when he gave his interpretation of this provision of the Constitution, it ought to come home to the members of the Senate to-day, as it did to the Senate then, with convincing power.

* * * * * * *

"Mr. President, we have reached a crisis in the history of the Senate fraught with the utmost peril, not only to the Senate but to the country. The eyes of the nation are upon us. What we do to-day will not be overlooked or forgotten. We can not change front unnoticed. We are not sitting behind closed doors. The Senate can not afford to reverse its record of one hundred and eleven years. It can not afford to reject a claimant for a seat to-day and, on the same state of facts, admit another claimant to-morrow. It can not afford to give credence to the charge that the Senate of the United States is, after all, but a social club, where good-fellowship is a better credential than a certificate of election in conformity to law. In a word—we can not afford to do that which defies all precedent, strikes a fatal blow to the perpetuity of the Senate as constituted under existing forms of law, and shakes public confidence in the integrity of this body.

"But 'to this issue it has come at last.' The long and unbroken line of precedents, stretching over a century of national history, builded by the considerate judgment and patriotic solicitude of the great men who have gone before us, strengthened by the approving judgment of the Senate but two years ago, which has stood through all these years as a bulwark against the assaults of partisan zeal and the more insidious assaults of favoritism, is at last to be broken down and demolished, and this great council of States exposed to political intrigue and the machinations of ambitious men.

"Mr. President, when this work of demolition has been consummated, if it must be, and the people realize that the Senate, trampling under foot the precedents of a century, has solemnly adjudged that it will receive into its membership the appointees of governors whenever the legislature fails to elect or can be prevented from choosing a Senator; that governors may fill the seats in this Chamber whenever vacant for any cause, though themselves conspirators to produce vacancies; that the Senate itself, with the cooperation of State executives, will hereafter make up the membership of this body out of their personal or political friends, independent of the legislatures and regardless of the will of the people—when that time comes, I repeat, there will come with it the remedy, swift and complete. The people will not submit to it. They ought not to submit to it. They are wedded to representative government and they will not permit it to be subverted. There is yet a power mightier than Senates, more potent than Senators—a power that can make and unmake both.

"And let me say to Senators that no sooner shall you establish the doctrine contended for by the minority than there will be a popular uprising in this country which no power can resist or suppress to take from State legislatures and governors all control over the election of Senators and lodge it with the sovereign people. Already 34 States, through their legislatures, have demanded it. The House of Representatives has repeatedly proposed it.

"I implore Senators therefore to follow the beaten path of the century, in the footsteps of Elsworth, Benton, Vance, Cass, Bayard, Hill, Davis, Garland, Cameron, Douglas, Mason, Blaine, Edmunds, Conkling, Carpenter, and the long line of illustrious men whose genius and learning illumines the way, and so save the Senate from public scandal and reproach, restore and preserve its ancient dignity, and insure the perpetuity of representative government."

WEDNESDAY, *April 4, 1900.*

The Secretary read the resolution reported from the Committee on Privileges and Elections January 23, 1900, as follows:

"*Resolved*, That the Hon. Matthew S. Quay is not entitled to take his seat in this body as a Senator from the State of Pennsylvania."

Mr. Chandler moved to amend the resolution by striking out the word "not."

(Cong. Rec., vol. 33, p. 3732.)

TUESDAY, *April 24, 1900.*

The President pro tempore announced that the motion before the Senate was that offered by Mr. Chandler to strike out the word "not" from the pending resolution.

The amendment was rejected by the following vote:

Ayes—Messrs. Allison, Baker, Carter, Chandler, Clark (Wyo.), Cullom, Daniel, Davis, Deboe, Foraker, Frye, Gear, Hansbrough, Jones (Nev.), McComas, McLaurin, Mason, Morgan, Nelson, Penrose, Perkins, Platt (N. Y.), Scott, Sewell, Shoup, Spooner, Stewart, Sullivan, Taliaferro, Warren, Wetmore, and Wolcott—32.

Nays—Messrs. Allen, Bacon, Bard, Bate, Berry, Burrows, Butler, Clay, Cockrell, Culberson, Hale, Harris, Hawley, Heitfeld, Jones (Ark.), Lindsay, McBride, McCumber, McEnery, McMillan, Martin, Money, Platt (Conn.), Proctor, Quarles, Ross, Simon, Teller, Tillman, Turley, Turner, Vest, and Wellington—33.

A vote was then taken on the adoption of the resolution reported by the Committee on Privileges and Elections, and the same was agreed to by the following vote:

Ayes—Messrs. Allen, Bacon, Bard, Bate, Berry, Burrows, Butler, Clay, Cockrell, Culberson, Hale, Harris, Hawley, Heitfeld, Jones (Ark.), Lindsay, McBride, McCumber, McEnery, McMillan, Martin, Money, Platt (Conn.), Proctor, Quarles, Ross, Simon, Teller, Tillman, Turley, Turner, Vest, and Wellington—33.

Nays—Messrs. Allison, Baker, Carter, Chandler, Clark (Wyo.), Cullom, Daniel, Davis, Deboe, Foraker, Frye, Gear, Hansbrough, Jones (Nev.), McComas, McLaurin, Mason, Morgan, Nelson, Penrose, Perkins, Platt (N. Y.), Scott, Sewell, Shoup, Spooner, Stewart, Sullivan, Taliaferro, Warren, Wetmore, and Wolcott—32.

(Cong. Rec., vol. 33, pp. 4612, 4613.)

[Fifty-sixth Congress, First and second sessions.]

MARTIN MAGINNIS v. WILLIAM A. CLARK, *of Montana.*

After the resignation by William A. Clark of his seat in the Senate as a Senator from the State of Montana (see case of William A. Clark, of Montana, *supra*), the lieutenant-governor and acting governor of the State of Montana, on the 15th day of May, 1900, appointed William A. Clark to fill the vacancy caused by the resignation of Mr. Clark. The governor of the State of Montana, claiming that this appointment was brought about by fraud and collusion, revoked the appointment, and on the 19th day of May, 1900, appointed Martin Maginnis to fill the vacancy aforesaid.

The conflicting claims of Mr. Clark and Mr. Maginnis were laid before the Senate, and a resolution was introduced in the Senate May 25, 1900, to refer the credentials of the claimants to the Committee on Privileges and Elections, but no action was taken on this resolution. Mr. Clark did not appear or attempt to claim a seat in the Senate otherwise than by the presentation of his credentials, and the Senate took no action in regard to determining the title of either of the claimants to the seat made vacant by the resignation of Mr. Clark.

The question involved in the case was which appointment was legal and valid, the one made by the lieutenant-governor or the one made by the governor of the State of Montana. This question was not decided by the Senate either directly or indirectly by any action of the Senate in the case.

The history of the case here given consists of the proceedings of the Senate in the case as published in the Congressional Record, a statement of the days on which the resolution to refer the matter to the Committee on Privileges and Elections was debated in the Senate, with a reference to the pages of the Congressional Record containing the same.

PROCEEDINGS IN THE SENATE.

SATURDAY, *May 19, 1900.*

The President pro tempore laid before the Senate the following telegram from the governor of Montana:

"BUTTE, MONT., *May 18, 1900.*

"Hon. WILLIAM P. FRYE,
"*President of the United States Senate, Washington, D. C.*

"SIR: This will inform you and the Senate of the United States that on account of collusion and fraud by Hon. W. A. Clark in resigning and securing an appointment to the Senate by the lieutenant-governor, I have this day disregarded and revoked said appointment by the lieutenant-governor, and have this day appointed Hon. Martin Maginnis, of Montana, United States Senator, to fill the vacancy caused by the resignation of Hon. W. A. Clark. His credentials will be forwarded in due course.

"ROBT. B. SMITH,
"*Governor of Montana.*"

(Cong. Rec., vol. 33, p. 5732.)

TUESDAY, *May 22, 1900.*

Mr. Carter presented the following credentials; which were read and laid on the table:

STATE OF MONTANA, EXECUTIVE CHAMBER,
Helena, Mont., May 15, 1900.

"Whereas a vacancy has occurred in the representation of the State of Montana in the Senate of the United States, caused by the resignation of Senator William Andrews Clark; and

"Whereas the legislature of said State is not in session, but in recess;

"Therefore, be it known that, pursuant to the power vested in me by the Constitution of the United States, I, A. E. Spriggs, the lieutenant-governor and acting governor of said State, do hereby apoint William Andrews Clark, a citizen and inhabitant of said State, to be a member of the Senate of the United States, to fill the vacancy so caused and existing as aforesaid, to have and to hold the said office and membership until the next meeting of the legislature of this State.

"In witness whereof I have hereunto set my hand and affixed the great seal of said State, at the city of Helena, in said State, this 15th day of May, A. D. 1900.

A. E. SPRIGGS, *Acting Governor.*

"[SEAL.]

"By his excellency the acting governor:
"T. S. HOGAN, *Secretary of State.*"

(Cong. Rec., vol. 33, p. 5850.)

FRIDAY, *May 25, 1900.*

Mr. Carter presented a certificate from the governor of the State of Montana, appointing Martin Maginnis to fill a vacancy in the Senate of the United States, which was read, as follows:

"In the name and by the authority of the State of Montana.

"*To all to whom these presents shall come, greeting:*

"Whereas a vacancy has happened in the representation of the State of Montana in the Senate of the United States by reason of the resignation of William Andrews Clark; and

"Whereas the legislature of said State of Montana is not in session, but in recess;

"Therefore, know ye that I, Robert B. Smith, governor of the State of Montana, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby appoint Martin Maginnis, a citizen of the United States and an inhabitant of the State of Montana, to be United States Senator for said State of Montana, to fill the vacancy caused as aforesaid; and by virtue of the authority in me vested as aforesaid I do commission him, the said Martin Maginnis, to be United States Senator for Montana, hereby authorizing and empowering him to execute and discharge all and singular the duties appertaining to said office, and to enjoy all the privileges and immunities thereof, until the next meeting of the legislature of said State.

"In witness whereof I have hereunto set my hand and caused the great seal of the State to be affixed at Helena, the capital, this 19th day of May, A. D. 1900.

"[SEAL.] ROBT. B. SMITH.

"By the governor:

"T. S. HOGAN, *Secretary of State.*"

The credentials were ordered to lie on the table.

Mr. Chandler submitted a resolution, which was read and laid on the table, as follows:

"*Resolved*, That the credentials showing the appointment as Senator from the State of Montana of William A. Clark, signed by Acting Governor A. E. Spriggs, and the credentials showing a like appointment of Martin Maginnis, signed by Governor Robert B. Smith, be taken from the table and referred to the Committee on Privileges and Elections, and that said committee be directed to inquire whether either of said appointees has been duly and legally appointed to a seat in the Senate as Senator from said State of Montana; and if so, to report which of said appointees is entitled to be admitted to the seat."

(Cong. Rec., vol. 33, pp. 6017, 6018.)

TUESDAY, *June 5, 1900.*

Mr. Chandler submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate, and ordered to be printed:

Resolved, That the Committee on Privileges and Elections, while making inquiry as to the respective claims of William A. Clark and Martin Maginnis to a seat in the Senate from the State of Montana, be authorized to send for persons and papers, to swear and examine witnesses, and to employ a stenographer; that said committee may act by a subcommittee, and may sit during the recess of Congress and during the sessions of the Senate, and that the expenses of the inquiry may be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

(Cong. Rec., vol. 33, p. 6693.)

The resolution submitted by Mr. Chandler on the 25th day of May, 1900, was called up in the Senate December 4, 1900, December 5, 1900, and December 6, 1900 (Cong. Rec., vol. 34, pp. 29, 58, 93); was debated in the Senate December 11, 1900 (Cong. Rec., vol. 34, pp. 216–219), and December 17, 1900. (Ibid., pp. 354, 355.)

WEDNESDAY, *December 19, 1900.*

Mr. Chandler offered the following resolution:

"*Resolved*, That the Committee to Audit and Control the Contingent Expenses of the Senate be discharged from further consideration of the resolution authorizing the Committee on Privileges and Elections to send for persons and papers in connection with the inquiry concerning the appointments of William A. Clark and Martin Maginnis as Senators from the State of Montana."

(Cong. Rec., vol. 34, p. 419.)

The foregoing resolution was laid before the Senate and debated December 20, 1900. (Cong. Rec., vol. 34, pp. 462–466.)

COMPENSATION OF CONTESTANTS.

THURSDAY, *February 21, 1901.*

Mr. Chandler submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That there be paid out of the contingent fund of the Senate to Martin Maginnis the sum of $2,500, in payment of expenses necessarily incurred by him in prosecuting his title to a seat in the Senate from the State of Montana under appointment of the governor of Montana."

(Cong. Rec., vol. 34, p. 2726.)

SATURDAY, *February 23, 1901.*

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That there be paid out of the contingent fund of the Senate to Martin Maginnis the sum of $2,000 in payment of expenses necessarily incurred by him in prosecuting his title to a seat in the Senate from the State of Montana under appointment of the governor of Montana."

(Cong. Rec., vol. 34, p. 2869.)

THURSDAY, *February 28, 1901.*

Mr. Jones, of Nevada, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution reported by Mr. Hoar on the 23d instant, reported it without amendment; and it was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 34, p. 3189.)

A LIST SHOWING ALL THE APPOINTMENTS OF SENATORS BY GOVERNORS OF STATES PRIOR TO MARCH 4, 1913, ARRANGED IN THE ORDER OF TIME THAT THE CREDENTIALS WERE READ IN THE SENATE.

1. John Walker, Virginia.—Appointed March 31, 1790; produced credentials and took seat April 26, 1790; death of William Grayson, and refusal of George Mason to act after election. James Monroe elected November 9, 1790, to fill unexpired term ending March 3, 1791; credentials dated November 10, 1790; produced credentials and took seat December 6, 1790.

2. Kensey Johns, Delaware.—Appointed March 19, 1794; produced credentials March 24, 1794; resignation of George Read; Mr. Johns not admitted. Henry Latimer elected February 7, 1795, to fill unexpired term ending March 3, 1797; produced credentials and took seat February 28, 1795.

3. George Walton, Georgia.—Appointed November 16, 1795; credentials dated November 18, 1795; produced credentials and took seat December 18, 1795; resignation of James Jackson. Josiah Tatnall elected February 20, 1796, to fill unexpired term ending March 3, 1799; credentials dated February 27, 1796; produced credentials and took seat April 12, 1796.

4. William Cocke, Tennessee.—Appointed April 22, 1797; produced credentials and took seat May 15, 1797; expiration of his previous term on March 3, 1797, and non-election of a successor. Under these credentials Mr. Cocke held the seat the first session of the Fifth Congress, May 15 to July 10, 1797. Andrew Jackson elected September 26, 1797, for term ending March 3, 1803; credentials dated October 19, 1797; produced credentials and took seat November 22, 1797.

5. William North, New York.—Appointed May 5, 1798; produced credentials and took seat May 21, 1798; resignation of John Sloss Hobart. James Watson elected August 17, 1798, to fill unexpired term ending March 3, 1803; produced credentials and took seat December 11, 1798.

6. Daniel Smith, Tennessee.—Appointed October 6, 1798; produced credentials and took seat December 3, 1798; resignation of Andrew Jackson. Joseph Anderson elected to fill unexpired term ending March 3, 1803; produced credentials and took seat December 2, 1799.

7. Franklin Davenport, New Jersey.—Appointed December 5, 1798; produced credentials and took seat December 19, 1798; resignation of John Rutherfurd. James Schureman elected to fill unexpired term ending March 3, 1803; credentials dated February 14, 1799; produced credentials and took seat December 3, 1799.

8. Uriah Tracy, Connecticut.—Appointed February 20, 1801; produced credentials and took seat March 4, 1801; vacancy about to result from expiration of his term, March 3, 1801, and non-election of a successor. Under these credentials Mr. Tracy held the seat during the special session of the Senate, March 4 and 5, 1801. In the following May he was elected for term ending March 3, 1807; credentials dated July 8, 1801; produced credentials and took seat December 7, 1801.

9. Samuel White, Delaware.—Appointed February 28, 1801; produced credentials and took seat March 4, 1801; resignation of Henry Latimer. Mr. White elected January 14, 1802, to fill unexpired term ending March 3, 1803; credentials dated January 15, 1802; produced credentials and took seat January 21, 1802.

10. William Hindman, Maryland.—Appointed March 4, 1801; produced credentials and took seat March 5, 1801; expiration of his previous term March 3, 1801, and non-election of a successor. Mr. Hindman held his seat under these credentials March 5, 1801. Robert Wright elected November 19, 1801, for term ending March 3, 1807; produced credentials and took seat December 7, 1801.

11. George Logan, Pennsylvania.—Appointed July 13, 1801; produced credentials and took seat December 7, 1801; resignation of Peter Muhlenberg. Mr. Logan elected to fill unexpired term ending March 3, 1807; credentials dated December 16, 1801; produced credentials and took seat December 21, 1801.

12. John Taylor, Virginia.—Appointed June 4, 1803; produced credentials and took seat October 17, 1803; death of Stephens Thompson Mason. Abraham Venable elected to fill unexpired term ending March 3, 1809; credentials dated December 8, 1803; produced credentials and took seat December 13, 1803.

13. John Condit, New Jersey.—Appointed September 1, 1803; produced credentials and took seat October 17, 1803; expiration of term of Aaron Ogden ending March 3, 1803. Under these credentials Mr. Condit held the seat from October 17 till Novem-

ber 10, 1803. Mr. Condit elected for term ending March 3, 1809; credentials dated November 3, 1803; produced credentials and took seat November 10, 1803.

14. John Armstrong, New York.—Appointed November 10, 1803; produced credentials and took seat December 8, 1803; resignation of De Witt Clinton. John Smith elected February 4, 1804, to fill unexpired term ending March 3, 1807; produced credentials and took seat February 23, 1804.

15. William B. Giles, Virginia.—Appointed August 11, 1804; produced credentials and took seat November 5, 1804; resignation of Abraham B. Venable. Andrew Moore elected December 4, 1804, to fill unexpired term ending March 3, 1809; credentials dated December 5, 1804; produced credentials and took seat December 17, 1804.

16. Andrew Moore, Virginia.—Appointed August 11, 1804; produced credentials and took seat November 6, 1804; resignation of Wilson C. Nicholas. William B. Giles elected to fill unexpired term ending March 3, 1805; credentials dated December 5, 1804; produced credentials and took seat December 17, 1804.

17. George Jones, Georgia.—Appointed August 27, 1807; produced credentials and took seat October 26, 1807; death of Abraham Baldwin. William H. Crawford elected November 7, 1807, to fill unexpired term ending March 3, 1811; credentials dated November 10, 1807; produced credentials and took seat December 9, 1807.

18. Joseph Anderson, Tennessee.—Appointed February 6, 1809; credentials read February 21, 1809; oath administered March 4, 1809; vacancy about to result from expiration of his term March 3, 1809, and non-election of a successor. Under these credentials Mr. Anderson held the seat during the special session of the Senate March 4 to March 7, 1809. Mr. Anderson elected April 11, 1809, for term ending March 3, 1815; credentials dated April 12, 1809; produced credentials and took seat May 22, 1809.

19. Samuel Smith, Maryland.—Appointed March 4, 1809; produced credentials and took seat March 4, 1809; expiration of his term and non-election of a successor. Under these credentials Mr. Smith held the seat during the extra session of the Senate, March 4–7, 1809, and during the first session of the Eleventh Congress, May 22 to June 28, 1809. Mr. Smith elected November 16, 1809, for term ending March 3, 1815; produced credentials and took seat December 4, 1809.

20. John Condit, New Jersey.—Appointed March 21, 1809; produced credentials and took seat May 24, 1809; resignation of Aaron Kitchell. Mr. Condit elected to fill unexpired term ending March 3, 1811; credentials dated November 2, 1809; produced credentials and took seat November 30, 1809.

21. Stanley Griswold, Ohio.—Appointed May 18, 1809; produced credentials and took seat June 2, 1809; resignation of Edward Tiffin. Alexander Campbell elected December 11, 1809, to fill unexpired term ending March 3, 1813; credentials dated December 12, 1809; produced credentials and took seat January 12, 1810.

22. Thomes Posey, Louisiana.—Appointed October 8, 1812; produced credentials and took seat December 7, 1812; resignation of John N. Destréhan. James Brown elected December 1, 1812, to fill unexpired term ending March 3, 1817; produced credentials and took seat February 5, 1813.

23. Charles Cutts, New Hampshire.—Appointed April 2, 1813; produced credentials and took seat May 24, 1813; expiration of his previous term March 3, 1813, and non-election of a successor. Under these credentials Mr. Cutts held the seat from May 24–June 21, 1813. Jeremiah Mason elected for term ending March 3, 1819; credentials dated June 10, 1813; produced credentials and took seat June 21, 1813.

24. William Bellinger Bullock, Georgia.—Appointed April 8, 1813; produced credentials and took seat May 24, 1813; resignation of William H. Crawford. William Wyatt Bibb elected November 6, 1813, to fill unexpired term ending March 3, 1817; credentials dated November 6, 1813; produced credentials and took seat December 6, 1813.

25. Christopher Gore, Massachusetts.—Appointed May 5, 1813; produced credentials and took seat May 28, 1813; resignation of James Lloyd. Mr. Gore elected May 29, 1813, to fill unexpired term ending March 3, 1815; credentials dated May 29, 1813; produced credentials and took seat June 4, 1813.

26. Jesse Wharton, Tennessee.—Appointed March 17, 1814; produced credentials and took seat April 9, 1814; resignation of George W. Campbell. John Williams elected October 4, 1815, to fill unexpired term ending March 3, 1817; credentials dated October 27, 1815; produced credentials and took seat December 4, 1815.

27. George Walker, Kentucky.—Appointed August 30, 1814; produced credentials and took seat October 10, 1814; resignation of George M. Bibb. William T. Barry elected December 16, 1814, to fill unexpired term ending March 3, 1817; credentials dated December 17, 1814; produced credentials and took seat February 2, 1815.

28. Martin D. Hardin, Kentucky.—Appointed November 13, 1816; produced credentials and took seat December 5, 1816; resignation of William T. Barry. Mr. Hardin elected December 5, 1816, to fill unexpired term ending March 3, 1817; credentials dated December 12, 1816; produced credentials and took seat December 24, 1816.

29. John Williams, Tennessee.—Appointed January 20, 1817; credentials read February 10, 1817; took seat March 4, 1817; vacancy about to result from expiration of his

term, March 3, 1817, and non-election of his successor. Under these credentials Mr. Williams held the seat during the special session of the Senate, March 4–6, 1817. Mr. Williams elected October 2, 1817, for term ending March 3, 1823; credentials dated October 4, 1817; produced credentials and took seat December 1, 1817.

30. John Henry Eaton, Tennessee.—Appointed September 5, 1818; produced credentials and took seat November 16, 1818; resignation of George W. Campbell. Mr. Eaton elected October 9, 1819, to fill unexpired term ending March 3, 1821; credentials dated October 11, 1819; produced credentials and took seat December 6, 1819.

31. David Holmes, Mississippi.—Appointed August 30, 1820; produced credentials and took seat November 13, 1820; resignation of Walter Leake. Mr. Holmes held his seat under these credentials the remainder of the term ending March 3, 1821. January 17, 1821, he was elected for the succeeding term.

32. Samuel L. Southard, New Jersey.—Appointed January 26, 1821; produced credentials and took seat February 16, 1821; resignation of James J. Wilson. Under these credentials Mr. Southard held the seat for the remainder of the term ending March 3, 1821. He had been elected for the succeeding term; credentials dated November 15, 1820.

33. Henry W. Edwards, Connecticut.—Appointed October 8, 1823; produced credentials and took seat December 1, 1823; death of Elijah Boardman. Mr. Edwards elected first Wednesday in May, 1824, to fill unexpired term ending March 3, 1827; credentials dated May 31, 1824; produced credentials and took seat December 6, 1824.

34. James Lanman, Connecticut.—Appointed February 8, 1825; credentials read March 4, 1825; vacancy about to result from expiration of his term on March 3, 1825, and non-election of a successor. Mr. Lanman was not admitted on these credentials. Calvin Willey was afterwards elected for term ending March 3, 1831.

35. Powhatan Ellis, Mississippi.—Appointed September 28, 1825; produced credentials and took seat December 12, 1825; resignation of David Holmes. Thomas B. Reed elected January 28, 1826, to fill unexpired term ending March 3, 1827; credentials dated January 30, 1826; produced credentials and took seat March 11, 1826.

36. William Harper, South Carolina.—Appointed March 8, 1826; produced credentials and took seat March 28, 1826; death of John Gaillard. William Smith elected November 29, 1826, to fill unexpired term ending March 3, 1831; credentials dated November 30, 1826; produced credentials and took seat December 7, 1826.

37. Israel Pickens, Alabama.—Appointed February 20, 1826; produced credentials and took seat April 10, 1826; death of Henry Chambers. John McKinley elected to fill unexpired term ending March 3, 1831; credentials dated November 27, 1826; produced credentials and took seat December 21, 1826.

38. Daniel Rodney, Delaware.—Appointed November 8, 1826; produced credentials and took seat December 4, 1826; death of Nicholas Van Dyke. H. M. Ridgely elected January 12, 1827, to fill unexpired term ending March 3, 1829; credentials read January 19, 1827; took seat January 23, 1827.

39. George Poindexter, Mississippi.—Appointed October 15, 1830; produced credentials and took seat December 6, 1830; death of Robert H. Adams. Mr. Poindexter elected November 18, 1830, to fill unexpired term ending March 3, 1835; credentials dated November 25, 1830; produced credentials and took seat December 15, 1830.

40. David J. Baker, Illinois.—Appointed November 12, 1830; produced credentials and took seat December 6, 1830; death of John McLean. John M. Robinson elected to fill unexpired term ending March 3, 1835; credentials dated December 11, 1830; produced credentials and took seat January 4, 1831.

41. Robert Hanna, Indiana.—Appointed August 19, 1831; produced credentials and took seat December 5, 1831; death of James Noble. John Tipton elected December 9, 1831, to fill unexpired term ending March 3, 1833; credentials dated December 10, 1831; produced credentials and took seat January 3, 1832.

42. John Black, Mississippi.—Appointed November 12, 1832; produced credentials and took seat December 12, 1832; to fill seat of Powhatan Ellis, vacated by his acceptance of office of judge of a United States court. Under these credentials Mr. Black held the seat for the remainder of the term ending March 3, 1833. November 22, 1833, he was elected for the succeeding term.

43. Lewis F. Linn, Missouri.—Appointed October 25, 1833; produced credentials and took seat December 16, 1833; death of Alexander Buckner. Mr. Linn elected November 20, 1834, to fill unexpired term ending March 3, 1837; credentials dated November 20, 1834; produced credentials and took seat December 15, 1834.

44. John M. Niles, Connecticut.—Appointed December 14, 1835; produced credentials and took seat December 21, 1835; death of Nathan Smith. Mr. Niles elected to fill unexpired term ending March 3, 1839; credentials dated May 11, 1836; produced credentials and took seat May 16, 1836.

45. Judah Dana, Maine.—Appointed December 7, 1836; produced credentials and took seat December 21, 1836; resignation of Ether Shepley. Ruel Williams elected February

22, 1837, to fill unexpired term ending March 3, 1839; credentials dated February 22, 1837; produced credentials and took seat March 4, 1837.

46. Ambrose H. Sevier, Arkansas.—Appointed January 17, 1837; credentials read February 27, 1837; oath administered March 8, 1837; vacancy about to result from expiration of his term March 4, 1837, and non-election of successor. Under these credentials Mr. Sevier held the seat during the remainder of the special session, March 8–10, 1837, during the first session of the Twenty-fifth Congress, September 4–October 16, and from December 4–13 of the second session. November 7, 1837, he was elected for term ending March 3, 1843.

47. Ephraim H. Foster, Tennessee.—Appointed September 17, 1838; produced credentials and took seat December 3, 1838; resignation of Felix Grundy. Mr. Foster held the seat under these credentials during the remainder of the term ending March 3, 1839. He was elected for the succeeding term but resigned.

48. Thomas H. Williams, Mississippi.—Appointed November 12, 1838; produced credentials and took seat December 13, 1838; resignation of James F. Trotter. Mr Williams elected January 30, 1839, to fill unexpired term ending March 3, 1839; credentials dated February 1, 1839; produced credentials and took seat February 19, 1839.

49. Alfred O. P. Nicholson, Tennessee.—Appointed December 25, 1840; produced credentials and took seat January 11, 1841; death of Felix Grundy. Ephraim H. Foster elected October 17, 1843, to fill unexpired term ending March 3, 1845; credentials dated November 13, 1843; produced credentials and took seat December 4, 1843.

50. Leonard Wilcox, New Hampshire.—Appointed March 1, 1842; produced credentials and took seat March 7, 1842; resignation of Franklin Pierce. Mr. Wilcox elected to fill unexpired term ending March 3, 1843; credentials dated June 9, 1842; produced credentials and took seat June 13, 1842.

51. Samuel C. Crafts, Vermont.—Appointed April 23, 1842; produced credentials and took seat April 30, 1842; resignation of Samuel Prentiss. Mr. Crafts elected October 26, 1842, to fill unexpired term ending March 3, 1843; credentials dated October 26, 1842; produced credentials and took seat December 7, 1842.

52. William L. Dayton, New Jersey.—Appointed July 2, 1842; produced credentials and took seat July 6, 1842; death of Samuel L. Southard. Mr. Dayton elected October 28, 1842, to fill unexpired term ending March 3, 1845; credentials dated November 8, 1842; produced credentials and took seat December 7, 1842.

53. James Semple, Illinois.—Appointed August 16, 1843; produced credentials and took seat December 4, 1843; death of Samuel McRoberts. Mr. Semple elected December 11, 1844, to fill unexpired term ending March 3, 1847; credentials dated December 19, 1844; produced credentials and took seat January 28, 1845.

54. David R. Atchison, Missouri.—Appointed October 15, 1843; produced credentials and took seat December 4, 1843; death of Lewis F. Linn. Mr. Atchison elected November 20, 1844, to fill unexpired term ending March 3, 1849; produced credentials and took seat December 9, 1844.

55. Dixon H. Lewis, Alabama.—Appointed April 22, 1844; produced credentials and took seat May 7, 1844; resignation of William R. King. Mr. Lewis elected to fill unexpired term ending March 3, 1847; credentials dated December 10, 1844; produced credentials and took seat January 28, 1845.

56. Henry A. Foster, New York.—Appointed November 30, 1844; produced credentials and took seat December 9, 1844; resignation of Silas Wright. John A. Dix elected January 18, 1845, to fill unexpired term ending March 3, 1849; produced credentials and took seat January 27, 1849.

57. Daniel S. Dickinson, New York.—Appointed November 30, 1844; produced credentials and took seat December 9, 1844; resignation of Nathaniel P. Tallmadge. Mr. Dickinson elected January 18, 1845, to fill unexpired term ending March 3, 1845; produced credentials and took seat January 27, 1845.

58. Joseph W. Chalmers, Mississippi.—Appointed November 3, 1845; produced credentials and took seat December 1, 1845; death of Robert J. Walker. Mr. Chalmers elected January 10, 1846, to fill unexpired term ending March 3, 1847; credentials dated January 16, 1846; produced credentials and took seat February 4, 1846.

59. Benning W. Jenness, New Hampshire.—Appointed November 12, 1845; produced credentials and took seat December 1, 1845; resignation of Levi Woodbury. Joseph Cilley elected to fill unexpired term ending March 3, 1847; credentials dated June 13, 1846; produced credentials and took seat June 22, 1846.

60. Jefferson Davis, Mississippi.—Appointed August 10, 1847; produced credentials and took seat December 6, 1847; death of Jesse Speight. Mr. Davis elected January 11, 1848, to fill unexpired term ending March 3, 1851; credentials dated January 31, 1848; produced credentials and took seat February 15, 1848.

61. Roger S. Baldwin, Connecticut.—Appointed November 11, 1847; produced credentials and took seat December 7, 1847; death of Jabez W. Huntington. Mr. Baldwin elected first Wednesday of May, 1848, to fill unexpired term ending March 3, 1851; credentials dated June 1, 1848; produced credentials and took seat June 5, 1848.

62. Wyman B. S. Moor, Maine.—Appointed January 5, 1848; produced credentials and took seat January 17, 1848; death of John Fairfield. Hannibal Hamlin elected May 26, 1848, to fill unexpired term ending March 3, 1851; produced credentials and took seat June 12, 1848.

63. Herschell V. Johnson, Georgia.—Appointed February 4, 1848; produced credentials and took seat February 14, 1848; resignation of Walter T. Colquitt. Under these credentials Mr. Johnson held the seat for the remainder of the term ending March 3, 1849. William C. Dawson had been elected for the succeeding term on November 13, 1847.

64. Solon Borland, Arkansas.—Appointed March 30, 1848; produced credentials and took seat April 24, 1848; resignation of Ambrose H. Sevier. Mr. Borland elected November 17, 1848, to fill unexpired term ending March 3, 1849; credentials dated November 20, 1849; produced credentials and took seat December 11, 1848.

65. William K. Sebastian, Arkansas.—Appointed May 12, 1848; produced credentials and took seat May 31, 1848; death of Chester Ashley. Mr. Sebastian elected November 17, 1848, to fill unexpired term ending March 3, 1853; credentials dated November 20, 1848; produced credentials and took seat December 21, 1848.

66. Thomas Fitzgerald, Michigan.—Appointed June 8, 1848; produced credentials and took seat June 20, 1848; resignation of Lewis Cass. Lewis Cass elected January 20, 1849, to fill his own unexpired term ending March 3, 1851, produced credentials and took seat March 3, 1849.

67. Thomas Metcalfe, Kentucky.—Appointed June 23, 1848; produced credentials and took seat July 3, 1848; resignation of John J. Crittenden. Mr. Metcalfe elected January 3, 1849, to fill unexpired term ending March 3, 1849; credentials dated January 3, 1849; produced credentials and took seat January 26, 1849.

68. William R. King, Alabama.—Appointed July 1, 1848; produced credentials and took seat July 13, 1848, resignation of Arthur P. Bagby. Under these credentials Mr. King held his seat the remainder of the term ending March 3, 1849. He was elected for succeeding term November 30, 1849. The seat was vacant during the special session of the Senate in 1849.

69. Benjamin Fitzpatrick, Alabama.—Appointed November 25, 1848; produced credentials and took seat December 11, 1848; death of Dixon H. Lewis. Jeremiah Clemens elected to fill unexpired term ending March 3, 1853; credentials dated November 30, 1849; produced credentials and took seat December 6, 1849.

70. David Stewart, Maryland.—Appointed December 6, 1849; produced credentials and took seat December 8, 1849; resignation of Reverdy Johnson. Thomas G. Pratt elected to fill unexpired term ending March 3, 1851; credentials dated January 12, 1850; produced credentials and took seat January 14, 1850.

71. Franklin H. Elmore, South Carolina.—Appointed April 11, 1850; credentials read April 16, 1850; took seat May 6, 1850; death of John Caldwell Calhoun. Robert W. Barnwell appointed June 4, 1850, on death of Franklin H. Elmore; produced credentials and took seat June 24, 1850. R. Barnwell Rhett elected December 18, 1850, for unexpired term of J. C. Calhoun ending March 3, 1853; credentials dated December 20, 1850; produced credentials and took seat January 6, 1851.

72. Robert W. Barnwell, South Carolina.—Appointed June 4, 1850; produced credentials and took seat June 24, 1850; death of Franklin H. Elmore, who had been appointed by governor to fill vacancy happening by death of John Caldwell Calhoun. Robert Barnwell Rhett elected December 18, 1850, for remainder of term of J. C. Calhoun ending March 3, 1853; credentials dated December 20, 1850; produced credentials and took seat January 6, 1851.

73. Thomas Ewing, Ohio.—Appointed July 20, 1850; produced credentials and took seat July 27, 1850; resignation of Thomas Corwin. Under these credentials Mr. Ewing held the seat the remainder of the term ending March 3, 1851. Benjamin F. Wade was elected March 15, 1851, for the succeeding term.

74. Robert C. Winthrop, Massachusetts.—Appointed July 27, 1850; produced credentials and took seat July 30, 1850; resignation of Daniel Webster. Robert Rantoul elected February 1 1851, to fill unexpired term ending March 3, 1851; credentials read February 7, 1851; took seat February 22, 1851.

75. John I. McRae, Mississippi.—Appointed December 1, 1851; produced credentials and took seat December 19, 1851; resignation of Jefferson Davis. Stephen Adams elected February 19, 1852, to fill unexpired term ending March 3, 1857; produced credentials and took seat March 17, 1852.

76. William F. Desaussure, South Carolina.—Appointed May 10, 1852; produced credentials and took seat May 24, 1852; resignation of R. Barnwell Rhett. Mr. Desaussure elected November 29, 1852, to fill unexpired term ending March 3, 1853; credentials dated December 9, 1852; produced credentials and took seat December 20, 1852.

77. Robert M. Charlton, Georgia.—Appointed May 18, 1852; produced credentials and took seat June 11, 1852; resignation of John M. Berrien. Under these credentials

Mr. Charlton held the seat the remainder of the term ending March 3, 1853. Robert Toombs had on November 10, 1851, been elected for succeeding term.

78. David Meriwether, Kentucky.—Appointed July 6, 1852; produced credentials and took seat July 15, 1852; death of Henry Clay. Under these credentials Mr. Meriwether held the seat till September 1, 1852. Archibald Dixon had been elected December 30, 1851, to fill unexpired term ending March 3, 1855, about to result from resignation of Mr. Clay, which had been made and was to take effect the first Monday in September, 1852. Mr. Dixon's credentials read December 6, 1852; took seat December 20, 1852.

79. Charles W. Cathcart, Indiana.—Appointed November 23, 1852; produced credentials and took seat December 6, 1852; death of James Whitcomb. John Pettit elected January 11, 1853, to fill unexpired term ending March 3, 1855; credentials dated January 11, 1855; produced credentials and took seat January 18, 1853.

80. Samuel S. Phelps, Vermont.—Appointed January 17, 1853; produced credentials and took seat January 17, 1853; death of William Upham. Lawrence Brainerd elected to fill unexpired term ending March 3, 1855; credentials dated October 14, 1854; produced credentials and took seat December 4, 1854.

81. Benjamin Fitzpatrick, Alabama.—Appointed January 14, 1853; produced credentials and took seat January 20, 1853; resignation of William R. King. Mr. Fitzgerald elected to fill unexpired term ending March 3, 1855; credentials dated December 12, 1853; produced credentials and took seat December 19, 1853.

82. Robert W. Johnson, Arkansas.—Appointed July 6, 1853; produced credentials and took seat December 5, 1853; resignation of Solon Borland. Mr. Johnson elected November 10, 1854, to fill unexpired term ending March 3, 1855; credentials dated November 24, 1854; produced credentials and took seat December 18, 1854.

83. Jared W. Williams, New Hampshire.—Appointed November 29, 1853; produced credentials and took seat December 12, 1853; death of Charles G. Atherton. Under these credentials Mr. Williams held the seat until August 4, 1854, when it was determined that the "right of representation under appointment" had expired. John P. Hale elected to fill unexpired term ending March 3, 1859; credentials dated July 30, 1855; produced credentials and took seat December 4, 1855.

84. Julius Rockwell, Massachusetts.—Appointed June 3, 1854; produced credentials and took seat June 15, 1854; resignation of Edward Everett. Henry Wilson elected to fill unexpired term ending March 3, 1859; credentials dated February 1, 1855; produced credentials and took seat February 10, 1855.

85. John S. Wells, New Hampshire.—Appointed January 16, 1855; produced credentials and took seat January 22, 1855; death of Moses Norris. Under these credentials Mr. Wells held the seat the remainder of the term ending March 3, 1855. James Bell elected for succeeding term; credentials dated July 30, 1855.

86. Joseph P. Comegys, Delaware.—Appointed November 19, 1856; produced credentials and took seat December 4, 1856; death of John W. Clayton. Martin W. Bates elected January 14, 1857, to fill unexpired term ending March 3, 1859; credentials dated January 14, 1857; credentials read January 19, 1857; took seat December 6, 1858.

87. Thomas L. Clingman, North Carolina.—Appointed May 6, 1858; produced credentials and took seat May 7, 1858; resignation of Asa Biggs. Mr. Clingman elected to fill unexpired term ending March 3, 1861; credentials dated November 23, 1858; produced credentials and took seat December 6, 1858.

88. Arthur P. Hayne, South Carolina.—Appointed May 11, 1858; produced credentials and took seat May 20, 1858; death of Josiah J. Evans. James Chestnut, jr., elected December 4, 1858, to fill unexpired term ending March 3, 1859; credentials dated December 7, 1858; produced credentials and took seat January 5, 1859.

89. Matthias Ward, Texas.—Appointed September 27, 1858; produced credentials and took seat December 6, 1858; death of J. Pinkney Henderson. Louis T. Wigfall elected December 5, 1859, to fill unexpired term ending March 3, 1863; credentials dated December 8, 1859; produced credentials and took seat January 4, 1860.

90. Henry P. Haun, California.—Appointed November 3, 1859; produced credentials and took seat December 5, 1859; death of David C. Broderick. Milton S. Latham elected January 11, 1860, to fill unexpired term ending March 3, 1863; credentials dated January 14, 1860; produced credentials and took seat March 5, 1860.

91. Orville H. Browning, Illinois.—Appointed June 26, 1861; produced credentials and took seat July 4, 1861; death of Stephen A. Douglas. William A. Richardson elected January 12, 1863, to fill unexpired term ending March 3, 1865; credentials dated January 12, 1863; produced credentials and took seat January 30, 1863.

92. Robert Wilson, Missouri.—Appointed January 17, 1862; produced credentials and took seat January 24, 1862; expulsion of Waldo P. Johnson. B. Gratz Brown elected November 13, 1863, to fill unexpired term ending March 3, 1867; credentials dated November 14, 1863; produced credentials and took seat December 14, 1863.

93. John B. Henderson, Missouri.—Appointed January 17, 1862; produced credentials and took seat January 29, 1862; expulsion of Trusten Polk. Mr. Henderson

elected January 6, 1863, to fill unexpired term ending March 3, 1863; credentials dated February 12, 1863; produced credentials and took seat February 18, 1863.

94. Benjamin Stark, Oregon.—Appointed October 29, 1861; credentials presented January 6, 1862; took seat February 27, 1862; death of E. D. Baker. Benjamin F. Harding elected September 12, 1862, to fill unexpired term ending March 3, 1865; credentials dated September 26, 1862; produced credentials and took seat December 1, 1862.

95. Joseph A. Wright, Indiana.—Appointed February 24, 1862; produced credentials and took seat March 3, 1862; expulsion of Jesse D. Bright. David Turpie elected January 14, 1863, to fill unexpired term ending March 3, 1863; credentials dated January 14, 1863; produced credentials and took seat January 22, 1863.

96. Richard S. Field, New Jersey.—Appointed November 21, 1862; produced credentials and took seat December 1, 1862; death of John R. Thompson. James W. Wall elected January 14, 1863, to fill unexpired term ending March 3, 1863; produced credentials and took seat January 21, 1863.

97. Thomas H. Hicks, Maryland.—Appointed December 29, 1862; produced credentials and took seat January 14, 1863; death of James A. Pearce. Mr. Hicks elected to fill unexpired term ending March 3, 1867; produced credentials and took seat January 19, 1864.

98. Nathan A. Farwell, Maine.—Appointed October 27, 1864; produced credentials and took seat December 5, 1864; resignation of William Pitt Fessenden. Mr. Farwell elected January 11, 1865, to fill unexpired term ending March 3, 1865; credentials dated January 12, 1865; produced credentials and took seat February 6, 1865.

99. Luke P. Poland, Vermont.—Appointed November 21, 1865; produced credentials and took seat December 4, 1865; death of Jacob Collamer. Mr. Poland elected October 24, 1866, to fill unexpired term ending March 3, 1867; produced credentials and took seat December 3, 1866.

100. George F. Edmunds, Vermont.—Appointed April 3, 1866; produced credentials and took seat April 5, 1866; death of Solomon Foot. Mr. Edmunds elected October 24, 1866, to fill unexpired term ending March 3, 1869; credentials dated October 24, 1866; produced credentials and took seat December 3, 1866.

101. Edmund G. Ross, Kansas.—Appointed July 19, 1866; produced credentials and took seat July 25, 1866; death of James H. Lane. Mr. Ross elected January 23, 1867, to fill unexpired term ending March 3, 1871; credentials dated January 24, 1867; produced credentials and took seat February 14, 1867.

102. George G. Fogg, New Hampshire.—Appointed August 31, 1866; produced credentials and took seat December 3, 1866; resignation of Daniel Clark. Mr. Fogg held the seat under these credentials the remainder of the term ending March 3, 1867. James W. Patterson had on August 29, 1866, been elected for succeeding term.

103. F. T. Frelinghuysen, New Jersey.—Appointed November 12, 1866; produced credentials and took seat December 3, 1866; death of William Wright. Mr. Frelinghuysen elected to fill unexpired term ending March 3, 1869; credentials dated January 23, 1867; produced credentials and took seat January 24, 1867.

104. James A. Bayard, Delaware.—Appointed April 5, 1867; produced credentials and took seat April 11, 1867; death of George Read Riddle. Mr. Bayard elected January 19, 1869, to fill unexpired term ending March 3, 1869; credentials dated January 20, 1869; produced credentials and took seat January 22, 1869.

105. William Pinkney Whyte, Maryland.—Appointed July 13, 1868; produced credentials and took seat July 14, 1868; resignation of Reverdy Johnson. Under these credentials Mr. Whyte held the seat the remainder of the term ending March 3, 1869. William T. Hamilton had been elected for the succeeding term; credentials dated February 7, 1868.

106. Lot M. Morrill, Maine.—Appointed October 30, 1869; produced credentials and took seat December 6, 1869; death of William Pitt Fessenden. Mr. Morrill elected January 19, 1870, to fill unexpired term ending March 3, 1871; produced credentials and took seat January 24, 1870.

107. William Windom, Minnesota.—Appointed July 16, 1870; produced credentials and took seat December 5, 1870; death of Daniel S. Norton. O. P. Stearns elected January 18, 1871, to fill unexpired term ending March 3, 1871; produced credentials and took seat January 25, 1871.

108. Daniel T. Jewitt, Missouri.—Appointed December 19, 1870; produced credentials and took seat December 22, 1870; resignation of Charles D. Drake. Francis P. Blair elected to fill unexpired term ending March 3, 1873; credentials dated January 20, 1871; credentials read January 24, 1871; took seat January 25, 1871.

109. Willis B. Machen, Kentucky.—Appointed September 27, 1872; produced credentials and took seat December 2, 1872; death of Garrett Davis. Mr. Machen elected January 21, 1873, to fill unexpired term ending March 3, 1873; credentials dated February 3, 1873; produced credentials and took seat February 10, 1873.

110. Robert Crozier, Kansas.—Appointed November 24, 1873; produced credentials and took seat December 1, 1873; resignation of Alexander Caldwell. James M. Harvey

elected February 2, 1874, to fill unexpired term ending March 3, 1877; credentials dated February 7, 1874, produced credentials and took seat February 12, 1874.

111. William W. Eaton, Connecticut.—Appointed February 10, 1875; produced credentials and took seat February 13, 1875; death of William A. Buckingham. Under this appointment Mr. Eaton held his seat during the remainder of the term ending March 3, 1875. He had been elected May 20, 1874, for the succeeding term.

112. David M. Key, Tennessee.—Appointed August 18, 1875; produced credentials and took seat December 6, 1875; death of Andrew Johnson. James E. Bailey elected January 19, 1877, to fill unexpired term ending March 3, 1881; credentials dated January 20, 1877; credentials read January 24, 1877; took seat January 29, 1877.

113. James E. English, Connecticut.—Appointed November 27, 1875; produced credentials and took seat December 7, 1875; death of Orris S. Ferry. William H. Barnum elected May 16, 1876, to fill unexpired term ending March 3, 1879; credentials dated May 17, 1876; produced credentials and took seat May 22, 1876.

114. Robert H. Marr, Louisiana.—Appointed December 16, 1875; credentials read December 20, 1875; resignation of William L. McMillen. Neither Mr. McMillen nor Mr. Marr was admitted.

115. James G. Blaine, Maine.—Appointed July 10, 1876; credentials read July 12, 1876; took seat December 4, 1876; resignation of Lot M. Morrill. Mr. Blaine elected January 16, 1877, to fill unexpired term ending March 3, 1877; credentials dated January 17, 1877; credentials read January 19, 1877; took seat January 22, 1877.

116. Samuel Price, West Virginia.—Appointed August 26, 1876; produced credentials and took seat December 4, 1876; death of Allen T. Caperton. Frank Hereford elected January 26, 1877, to fill unexpired term ending March 3, 1881; credentials dated January 29, 1877; produced credentials and took seat January 31, 1877.

117. David H. Armstrong, Missouri.—Appointed September 29, 1877; produced credentials and took seat October 16, 1877; death of Louis V. Bogy. James Shields elected January 22, 1879, to fill unexpired term ending March 3, 1879; credentials dated January 24, 1879; produced credentials and took seat January 27, 1877.

118. Daniel W. Voorhees, Indiana.—Appointed November 6, 1877; produced credentials and took seat November 12, 1877; death of Oliver P. Morton. Mr. Voorhees elected to fill unexpired term ending March 3, 1879; credentials dated January 31, 1879; produced credentials and took seat February 3, 1879.

119. Charles H. Bell, New Hampshire.—Appointed March 13, 1879; credentials read March 18, 1879; took seat April 10, 1879; expiration of term of Bainbridge Wadleigh, ending March 3, 1879, and nonelection of a successor. Henry W. Blair elected June 17, 1879, for term ending March 3, 1885; credentials dated June 18, 1879; produced credentials and took seat June 20, 1879.

120. Henry P. Baldwin, Michigan.—Appointed November 17, 1879; produced credentials and took seat December 3, 1879; death of Zachariah Chandler. Mr. Baldwin elected January 18, 1881, to fill unexpired term ending March 3, 1881; credentials dated January 20, 1881; produced credentials and took seat January 31, 1881.

121. Luke Pryor, Alabama.—Appointed January 7, 1880; produced credentials and took seat January 15, 1880; death of G. S. Houston. James L. Pugh elected November 24, 1880, to fill unexpired term ending March 3, 1885; credentials dated November 29, 1880; produced credentials and took seat December 6, 1880.

122. Joseph E. Brown, Georgia.—Appointed May 21, 1880; produced credentials and took seat May 26, 1880; resignation of John B. Gordon. Mr. Brown elected November 16, 1880, to fill unexpired term ending March 3, 1885; credentials dated December 2, 1880; produced credentials and took seat December 6, 1880.

123. Thomas Courtland Manning, Louisiana.—Appointed November 16, 1880; credentials read December 7, 1880; death of Henry M. Spofford, claimant of seat held by William Pitt Kellogg. Mr. Manning not admitted. Mr. Kellogg held the seat during the term.

124. James W. McDill, Iowa.—Appointed March 8, 1881; produced credentials and took seat March 14, 1881; resignation of Samuel J. Kirkwood. Mr. McDill elected January 18, 1882, to fill unexpired term ending March 3, 1883; credentials dated January 19, 1882; produced credentials and took seat January 24, 1882.

125. Alonzo J. Edgerton, Minnesota.—Appointed March 12, 1881; produced credentials and took seat March 17, 1881; resignation of William Windom. William Windom elected October 26, 1881, to fill his own unexpired term ending March 3, 1883; credentials dated October 27, 1881; produced credentials and took seat December 5, 1881.

126. George M. Chilcott, Colorado.—Appointed April 11, 1882; produced credentials and took seat April 17, 1882; resignation of Henry M. Teller. Horace A. W. Tabor, elected January 27, 1883, to fill unexpired term ending March 3, 1883, credentials dated January 27, 1883; produced credentials and took seat February 2, 1883.

127. William P. Sheffield, Rhode Island.—Appointed November 19, 1884; credentials read December 1, 1884; took seat December 2, 1884; death of Henry B. Anthony.

Jonathan Chace elected January 20, 1885, to fill unexpired term ending March 3, 1889; credentials dated January 21, 1885; credentials read January 24, 1885; took seat January 26, 1885.

128. Henry W. Blair, of New Hampshire.—Appointed March 5, 1885; presented credentials March 9, 1885; the oath was administered and he took his seat March 10, 1885; expiration of his previous term and failure of legislature to elect successor. June 17, 1885, Mr. Blair was elected by the legislature for the unexpired term ending March 3, 1891; credentials dated June 18, 1885; produced credentials and took his seat December 7, 1885.

129. Edward C. Walthall.—Appointed March 9, 1885; produced credentials and took seat March 12, 1885; resignation of L. Q. C. Lamar. Mr. Walthall elected by the legislature January 20, 1886, for the unexpired term ending March 4, 1889; January 25, 1886, he produced his credentials and took his seat.

130. George Hearst, California—Appointed March 23, 1886; produced credentials and took his seat April 9, 1886; death of John F. Miller. A. P. Williams elected by the legislature, August 4, 1886, for the unexpired term ending March 3, 1887; produced his credentials and took his seat December 6, 1886.

131. Washington C. Whitthorne, Tennessee.—Appointed April 16, 1886; produced his credentials and took his seat April 26, 1886; resignation of Howell E. Jackson January 18, 1887. Mr. Whitthorne was elected by the legislature for the unexpired term ending March 4, 1887; credentials dated January 26, 1887; produced his credentials and took his seat February 3, 1887.

132. Person C. Cheney, New Hampshire.—Appointed November 24, 1886; produced credentials and took seat December 7, 1886; death of Austin F. Pike. William E. Chandler elected by the legislature June 14, 1887, for the unexpired term ending March 3, 1889; credentials dated June 15, 1887; produced credentials and took seat December 5, 1887.

133. Gilman Marston, New Hampshire.—Appointed March 4, 1889; produced credentials and took seat March 5, 1889; expiration of term of William E. Chandler and failure of legislature to elect a successor. William E Chandler elected by the legislature June 18, 1889, for the unexpired term ending March 3, 1895; credentials dated June 19, 1889; produced his credentials and took seat December 2, 1889.

134. Charles H. Gibson, Maryland.—Appointed November 19, 1891; produced credentials and took seat December 7, 1891; death of Ephraim King Wilson. Mr. Gibson elected by the legislature January 21, 1892, for the unexpired term ending March 3, 1897; credentials dated February 3, 1892; produced credentials and took seat February 10, 1892.

135. Redfield Proctor, Vermont.—Appointed November 2, 1891; produced credentials and took seat December 7, 1891; resignation of George F. Edmunds.

136. Horace Chilton, Texas.—Appointment made April 25, 1891, to take effect June 10, 1891; produced credentials and took seat December 7, 1891; resignation of John H. Reagan. Roger Q. Mills elected by the legislature March 22, 1892, for the unexpired term ending March 3, 1893; credentials dated March 25, 1892; produced his credentials and took his seat March 30, 1892.

137. Bishop W. Perkins, Kansas.—Appointed January 1, 1892; produced credentials and took seat January 6, 1892; death of Preston B. Plumb.

138. Eppa Hunton, Virginia.—Appointed May 28, 1892; produced credentials and took seat June 1, 1892; death of John S. Barbour.

139. Donelson Caffery, Louisiana.—Appointed January 7, 1893; presented credentials and took seat January 13, 1893; death of Randall L. Gibson.

140. Samuel Pasco, Florida.—Appointed February 27, 1893; presented credentials March 3, 1893; expiration of term of Samuel Pasco, March 3, 1893, the legislature of Florida not being in session in time to elect a successor.

141. Lee Mantle, Montana.—Appointed March 4, 1893; presented credentials March 9, 1893; expiration of term of Wilbur S. Sanders, March 3, 1893. (Not admitted.)

142. Asahel C. Beckwith, Wyoming.—Appointed March 9, 1893; presented credentials March 15, 1893; expiration of term of Francis E. Warren, March 3, 1893. (Not admitted.)

143. John B. Allen, Washington.—Appointed March 10, 1893; presented credentials March 20, 1893; expiration of term of John B. Allen, March 3, 1893. (Not admitted.)

144. George C. Perkins, California.—Appointed July 24, 1893; presented credentials and took seat August 8, 1893; death of Leland Stanford.

145. Newton C. Blanchard, Louisiana.—Appointed March 7, 1894; presented credentials and took seat March 12, 1894; resignation of Edward D. White.

146. Patrick Walsh, Georgia.—Appointed April 2, 1894; presented credentials and took seat April 9, 1894; death of Alfred H. Colquitt.

147. Thomas J. Jarvis, North Carolina.—Presented credentials and took seat April 23, 1894; death of Zebulon B. Vance.

148. John Patton, Michigan.—Presented credentials and took seat May 8, 1894; death of Francis B. Stockbridge.

149. Marcus A. Hanna, Ohio.—Presented credentials and took seat March 5, 1897; resignation of John Sherman.

150. Andrew T. Wood, Kentucky.—Appointed March 5, 1897; presented credentials March 10, 1897; expiration of term of Joseph C. S. Blackburn, March 3, 1897. (Not admitted.)

151. Henry W. Corbett, Oregon.—Appointed March 6, 1897; presented credentials March 15, 1897; expiration of term of John H. Mitchell, March 3, 1897. (Not admitted.)

152. John A. Henderson, Florida.—Appointed March 6, 1897; presented credentials March 16, 1897; expiration of term of Wilkinson Call, March 3, 1897. (Not admitted.

153. John C. McLaurin, South Carolina.—Presented credentials and took seat June 1, 1897; death of Joseph Earle.

154. Thomas B. Turley, Tennessee.—Presented credentials and took seat July 22, 1897; death of Isham G. Harris.

155. Hernando D. Money, Mississippi.—Appointed October 8, 1897; presented credentials and took seat December 7, 1897; death of J. Z. George.

156. William V. Sullivan, Mississippi.—Presented credentials and took seat May 31, 1898; death of Edward C. Walthall.

157. Jonathan Ross, Vermont.—Appointed January 11, 1899; presented credentials and took seat January 16, 1899; death of Justin S. Morrill.

158. Samuel Pasco, Florida.—Presented credentials March 3, 1899; expiration of term of Samuel Pasco, March 3, 1899. Credentials filed.

159. Matthew S. Quay, Pennsylvania.—Appointed April 21, 1899; presented credentials December 4, 1899; expiration of term of Matthew S. Quay, March 3, 1899. (Not admitted.)

160. William V. Allen, Nebraska.—Appointed December 13, 1899; presented credentials and took seat December 18, 1899; death of Monroe L. Hayward.

161. William A. Clark, Montana.—Appointed May 15, 1900; presented credentials May 22, 1900; resignation of Willam A. Clark. (Not admitted.)

162. Martin Maginnis, Montana.—Appointed May 19, 1900; presented credentials May 25, 1900; resignation of William A. Clark. (Not admitted.)

163. Jonathan P. Dolliver, Iowa.—Appointed August 23, 1900; presented credentials and took seat December 3, 1900; death of John H. Gear.

164. Alfred B. Kittredge, South Dakota.—Appointed July 11, 1901; presented credentials and took seat December 2, 1901; death of James H. Kyle.

165. Russell A. Alger, Michigan.—Appointed September 27, 1902; presented credentials and took seat December 2, 1902; death of James McMillan.

166. W. Murray Crane, Massachusetts.—Appointed October 12, 1904; presented credentials and took seat December 6, 1904; death of George F. Hoar.

167. Philander C. Knox, Pennsylvania.—Appointed June 10, 1904; presented credentials and took seat December 6, 1904; death of Matthew S. Quay.

168. John M. Gearin, Oregon.—Appointed December 13, 1905; presented credentials and took seat December 21, 1905; death of John H. Mitchell.

169. William P. Whyte, Maryland.—Appointed June 8, 1906; presented credentials and took seat June 11, 1906; death of Arthur P. Gorman.

170. Alfred W. Benson, Kansas.—Appointed June 11, 1906; presented credentials and took seat June 14, 1906; resignation of Joseph R. Burton.

171. John H. Bankhead, Alabama.—Appointed June 18, 1907; presented credentials, December 5, 1907; took seat January 13, 1908; death of John T. Morgan.

172. William J. Bryan, Florida.—Appointed December 26, 1907; presented credentials and took seat January 9, 1908; death of Stephen R. Mallory.

173. John W. Stewart, Vermont.—Appointed March 24, 1908; presented credentials and took oath March 30, 1908; death of Redfield Proctor.

174. William H. Milton, Florida.—Appointed March 27, 1908; presented credentials and took seat April 6, 1908; death of William J. Bryan.

175. Fountain L. Thompson, North Dakota.—Appointed November 10, 1909; presented credentials and took seat December 7, 1909; death of Martin N. Johnson.

176. James Gordon, Mississippi.—Appointed December 27, 1909; presented credentials and took seat January 5, 1910; death of Anselm McLaurin.

177. William E. Purcell, North Dakota.—Appointed January 29, 1910; presented credentials and took seat February 1, 1910; resignation of Fountain L. Thompson.

178. Claude A. Swanson, Virginia.—Appointed August 1, 1910; presented credentials and took seat December 6, 1910; death of John W. Daniel.

179. Joseph M. Terrill, Georgia.—Appointed November 17, 1910; presented credentials and took seat December 6, 1910; death of Alexander S. Clay.

180. Lafayette Young, Iowa.—Appointed November 12, 1910; presented credentials and took seat December 6, 1910; death of Jonathan P. Dolliver.

181. John R. Thornton, Louisiana.—Appointed August 27, 1910; subsequently elected by legislature; presented credentials and took seat December 12, 1910; death of Samuel D. McEnery.

182. Davis Elkins, West Virginia.—Appointed January 9, 1911; presented credentials and took seat January 9, 1911; death of Stephen B. Elkins.

183. Obadiah Gardner, Maine.—Appointed September 23, 1911; presented credentials and took seat December 4, 1911; death of William P. Frye.

184. Newell Sanders, Tennessee.—Appointed April 8, 1912; presented credentials and took seat April 11, 1912; death of Robert L. Taylor.

185. William A. Massey, Nevada.—Appointed July 1, 1912; presented credentials and took seat July 6, 1912; death of George S. Nixon.

186. Kirkland I. Perky, Idaho.—Appointed November 16, 1912; presented credentials and took seat December 3, 1912; death of Weldon B. Heyburn.

187. William P. Jackson, Maryland.—Appointed November 29, 1912; presented credentials and took seat December 3, 1912; death of Isidor Rayner.

188. John N. Heiskell, Arkansas.—Appointed January 6, 1913; presented credentials and took seat January 9, 1913; death of Jeff Davis.

189. Rienzi M. Johnston, Texas.—Appointed January 4, 1913; presented credentials and took seat January 7, 1913; resignation of Joseph W. Bailey.

SENATE ELECTION CASES.

II.

MISCELLANEOUS CASES.

[Third Congress—First session.]

ALBERT GALLATIN,

Senator from Pennsylvania from December 2, 1793, *to February* 28, 1794.

Albert Gallatin, a native of Geneva, came to Boston, Mass., in 1780. After changing his residence a few times he went, in November, 1783, to Virginia, where he had purchased lands. In October, 1785, he took an oath of allegiance to Virginia. In December, 1785, he purchased a plantation in Fayette County, Pennsylvania, on which he was living in 1793. On the 28th of February, 1793, he was elected from that State to the Senate of the United States, which office he held until February 28, 1794, when it was determined that he was not entitled to his seat, not having been "nine years a citizen of the United States."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 3d Cong., 1793-'95, within pages 9-61.

It will be observed that the Senate resolved that the doors of the Senate be opened during the discussion upon this contested election. A discussion of the merits of this case, and of the decision of the Senate regarding it, may be found in the "Life of Albert Gallatin," by Henry Adams, pages 119, 120.

MONDAY, *December* 2, 1793.

The Vice-President administered the oath required by law to Mr. Gallatin, and he took his seat.

The Vice-President laid before the Senate the petition of Conrad Laub and others, relative to the appointment of Mr. Gallatin, a Senator of the United States; which was read and ordered to lie on the table.

WEDNESDAY, *December* 11, 1793.

Ordered, That Messrs. Rutherfurd, Cabot, Ellsworth, Livermore, and Mitchell be a committee to take into consideration the petition of Conrad Laub and others, stating that the Hon. Albert Gallatin, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the Constitution, and report thereon to the Senate.

TUESDAY, *December* 31, 1793.

Mr. Rutherfurd reported, from the committee to whom was referred the petition of Conrad Laub and others, stating that the Hon. Albert Gallatin, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the Constitution; which report was read and ordered to lie for consideration.

WEDNESDAY, *January* 1, 1794.

The Senate proceeded to the consideration of the report of the committee to whom was referred the petition of Conrad Laub and others.

On motion to postpone the consideration of the report until to-morrow, it was agreed to amend this motion by striking out the word "to-morrow," and to insert in lieu thereof, "Thursday, the 9th instant."

THURSDAY, *January* 9, 1794.

Agreeably to the order of the day, the Senate took into consideration the report of the committee on the petition of Conrad Laub and others, respecting the appointment of Albert Gallatin to be a Senator of the United States.

On motion,

Ordered, That the further consideration of the report be postponed until to-morrow.

FRIDAY, *January* 10, 1794.

The Senate resumed the consideration of the report of the committee on the petition of Conrad Laub and others, respecting the appointment of Albert Gallatin, a Senator of the United States; which report is as follows:

REPORT OF SELECT COMMITTEE.

[This committee consisted of Messrs. Rutherford, Cabot, Ellsworth, Livermore, and Mitchell.]

The committee, to whom was referred the petition of Conrad Laub and others, stating that Albert Gallatin, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the Constitution, report:

That the committee have conferred with Mr. Michael Schmyser, agent for the petitioners, and with Mr. Gallatin; that Mr. Schmyser has declared that the petitioners are ready to adduce proofs in support of the petition at such time as the Senate may think proper to appoint; that Mr. Gallatin states no objection to the trial's commencing at an early day. The committee therefore recommend that the Senate agree to the following resolution:

Resolved, That —— be assigned for hearing the petition of Conrad Laub and others, respecting Mr. Gallatin's right to a seat in the Senate, and that Messrs. Gallatin and Schmyser be furnished with a copy of this resolution.

On motion, it was agreed to postpone the report of the committee, and to take into consideration the following resolution:

"*Resolved*, That a committee of elections, to consist of seven, be appointed to report rules for receiving petitions and conducting inquiries relative to the qualifications of a Senator; and that the petition of Conrad Laub and others be referred to the same committee, to state the facts, and that they be authorized to send for persons and papers."

On which a motion was made and seconded to postpone this motion and to take up the following:

"That —— be a committee to ascertain and state to the Senate the facts relative to the time when Albert Gallatin became a citizen of the United States, and that the said committee have power to send for persons and papers."

Whereupon a motion was made and seconded to postpone the preceding, and to take into consideration the following motion:

"*Resolved*, That a committee of elections be appointed, and that the petition of Conrad Laub and others be referred to it, to report their opinion on the merits of the said petition."

And, after debate, the Senate adjourned.

MONDAY, *January* 13, 1794.

The Senate resumed the consideration of the petition of Conrad Laub and others, respecting the appointment of Mr. Gallatin to be a Senator of the United States.

On motion,

Ordered, That a committee of elections, to consist of seven, be appointed, and that the petition of Conrad Laub and others be referred, without prejudice as to any questions which may, upon the hearing, be raised by the sitting member, as to the sufficiency of the parties and the matter charged in the petition, to the same committee, to state the facts, and that they be authorized to send for persons and papers; also, that Messrs. Bradley, Ellsworth, Mitchell, Rutherfurd, Brown, Livermore, and Taylor be this committee.

MONDAY, *February* 10, 1794.

Mr. Bradley reported from the committee to whom was referred the petition of Conrad Laub and others, respecting the appointment of Mr. Gallatin to be a Senator of the United States; and the report was read.

Ordered, That Wednesday next be assigned to take this report into consideration, and that in the mean time it be printed for the use of the Senate.

On motion that the Senate adopt the following resolution:

"*Resolved*, That the doors of the Senate be opened, and continue open, during the discussion upon the contested election of Albert Gallatin,"

Ordered, That this motion lie on the table until to-morrow.

TUESDAY, *February* 11, 1794.

Agreeably to the order of the day, the Senate took into consideration the motion made yesterday that the doors of the Senate be opened during the discussion of the contested election of Mr. Gallatin. Whereupon,

Resolved, That the doors of the Senate be opened, and continue open, during the discussion upon the contested election of Albert Gallatin.

WEDNESDAY, *February* 12, 1794.

On motion that the consideration of the report of the committee on the petition of Conrad Laub and others respecting the appointment of Mr. Gallatin to be a Senator of the United States be postponed until Monday next, it was passed in the affirmative.

MONDAY, *February* 17, 1794.

The petition of Michael Schmyser, agent for Conrad Laub and others, petitioners against the election of Albert Gallatin to be a Senator of the United States, was presented and read, praying to be heard by counsel.

Ordered, That the prayer of the petition be granted.

The consideration of the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States, was resumed, and, after progress, it was ordered that the consideration thereof be postponed until Wednesday next.

WEDNESDAY, *February* 19, 1794.

Agreeably to the order of the day, the Senate resumed the consideration of the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States.

Ordered, That the consideration thereof be further postponed until to-morrow.

THURSDAY, *February* 20, 1794.

Agreeably to the order of the day, the Senate resumed the consideration of the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States.

The report of the committee states the evidence, and concludes with an opinion that to controvert the allegations set forth in the petition against Mr. Gallatin it lays with him to prove his citizenship.

Accordingly Mr. Gallatin presented a written statement of facts, which the President of the Senate read. It contained a narrative of several transactions from the time of Mr. Gallatin's arrival in the Province of Maine, or Massachusetts, about thirteen years ago; of his having contributed by money and his own services as a volunteer in the cause of the Revolution; of his having taken oaths of allegiance and purchased lands in that State, and also in the State of Virginia. In the back parts of the last-mentioned State he had formed an interesting settlement, and had been extremely useful in bringing settlers from Europe. The dates of those transactions and times of his arrival in Pennsylvania and of being sent to the State convention are also recited, up to the time of his being chosen one of their representatives in the Senate of the United States.

After the President had done reading the statement of facts, Mr. Gallatin addressed the Senate by observing that he felt himself rather in an awkward predicament, not knowing whether the counsel for the prosecutors or himself were the proper persons to speak the first, as this preliminary was not yet laid down by the Senate; neither had he provided any counsel. He should have supposed himself in the situation of defendant were it not that the weight of proving the affirmative in regard to citizenship had been laid on him, under which predicament it might perhaps be necessary for him to begin, and after the counsel for the petitioners had spoken that he should then be allowed to close the arguments.

Mr. Livermore was of opinion that the sitting member should begin the debate, as the *onus probandi* lay with him.

The counsel for the petitioners, Mr. Lewis, rose. He was attended by Mr. Schmyser, one of the members of the senate of Pennsylvania, who, we understand, manages the prosecution on the part of the petitioners. Mr. Lewis hoped he would be permitted to say a few words in the early stage of the business in regard to the manner of conducting it. He recapitulated sundry offices and posts of honor that had been conferred on him, from which he humbly presumed he had gathered much experience, and particularly in cases of contested elections. He would, therefore, beg leave of the honorable Senate to offer an observation before they should determine on the mode of conducting the trial. When the question for postponement, which was debated the other day, was before them the sitting member did then consider himself as defendant, and for an hour had fought

phantoms of his own imagination; but now he has changed his ground and desires to have the privileges which belong to the petitioners only, namely, the right of opening the prosecution and afterwards concluding the arguments.

Mr. Gallatin submitted to the decision of the Senate, and said he did not wish to contend for mere matters of form.

Mr. Martin, from North Carolina, thought it immaterial who began or concluded, if in the end the Senate should be enabled to arrive at a just degree of information.

Mr. Jackson, from Georgia, made some observations on the manner of conducting the business. He thought it would be incumbent on the counsel for the petitioners to prove that Mr. Gallatin was not a citizen, &c.

Mr. King, from New York, and some other gentleman of the Senate said a few more words on the motion; it was agreed that the sitting member should begin.

Mr. Gallatin accordingly rose and recapitulated the facts stated in the written paper which he had presented to the President, commenting on each of them as he proceeded. He proved that he had been an inhabitant of the United States for thirteen years, and was one before the peace of 1783 and before the Confederation. He quoted the laws previous thereto respecting aliens, and also the British statutes, and he maintained that they were all done away by the Revolution. He conceived himself a citizen in common with the other citizens of the United States from the time of his first qualifying after his arrival and attachment to the country. He concluded by saying he would reserve the remainder of his defense until after he should hear the counsel on behalf of the petitioners.

Mr. Lewis commenced his speech by observing that he appeared there on behalf of Conrad Laub and other respectable men who complained of the unconstitutionality of admitting Mr. Gallatin to a seat in the Senate. He was glad to find by the gentleman's expressions that the ground of debate had been narrowed into so small a compass, and he would therefore take him up from the argument where he had left off speaking, that of his being a citizen in common of the United States from the time of his qualifying in Massachusetts or Virginia. But in Virginia two oaths are required, and they must be taken in a court, not before a magistrate, to entitle a man to citizenship. He must also be possessed of a certain quantity of property and be a resident for two years. It appears Mr. Gallatin did not remain in Virginia more than two months. [Here Mr. Lewis read the law of Virginia of the 20th October, 1783.] On this law Mr. Lewis argued that Mr. Gallatin had not gone through the necessary qualifications to entitle him to citizenship there; and he observed that he admired the gentleman's candor in not insisting on it here. In this State he had certainly not qualified himself agreeably to the law. Under these circumstances Mr. Lewis, for his part, could never admit of the gentleman's right to citizenship so far back as to entitle him to the suffrage of a vote for a seat in the Senate, &c.

The mischievous consequences of permitting such innovations he represented in strong terms; and he called to the recollection of the Senate the conduct of ancient and modern governments on this question. One of the ancient republics made it death for an alien to intermeddle in their politics. The sentiments of antiquity and those of men in modern days proved the justice of these conclusions.

With regard to the arguments of the gentleman respecting his being entitled to be a citizen of the Union, or of any individual State of it, because he had qualified himself to be a citizen of one of them, Mr. Lewis said was a mere bubble, for surely the gentleman was not one of the mass of citizens at the accomplishment of independence.

The doctrine of the old law, which the gentleman says was done away by the Revolution, in respect to aliens may have been so with regard to the British king; it was still, however, virtually in force against the gentleman. But, supposing it to be done away, how do the constitutions of the different States stand on this head? Is it not implied by all of them that certain oaths, residence, and property make the requisites to form citizenship? In Massachusetts a foreigner is not a citizen without he complies with those terms. [Here he quoted page 70 of the small volume of the laws of Massachusetts. He also cited the act in favor of John Jarvis and others; also page 104 of the same book and pages 191 and 192.] From these he maintained that no such wild idea was ever contemplated by either the law of Massachusetts or Virginia as to admit foreigners or persons from other States to citizenship immediately on their entrance within their limits.

The situation of the sitting member with respect to the constitution and laws of Pennsylvania he had little doubt was similar to what he had mentioned in regard to the other States, although he would not assert it as a fact. [He read the forty-second section and also in page 43 of the Law of Pennsylvania, 13th of March, 1789, a proviso which contains some precautions requiring records to be kept by the master of the rolls of the persons admitted to citizenship.] The same principle pervades all the States as well as it does the Constitution of the United States. The absurdity of applying it in any other sense was severely pictured by Mr. Lewis, and to admit the idea advanced by the sitting

member was as inadmissible as it was novel. In support of what he wished to impress on the minds of the Senate Mr. Lewis quoted the first volume of the Journals of Congress in 1774 and 1775, pages 28 and 29. He then recurred to Blackstone, vol. 1, pages 63, 64, and 69; also 73 and 79.

It was not his intention to quote the parliamentary laws of England in support of anything, but such parts of their common law as could be got over—that common law of England which was imported by our ancestors and handed down to them by the people, not the Parliament. The people had made the common law from time to time. The Saxons, Normans, &c., were all concerned in making and improving it until it had finally reached that degree of perfection in which it was given to us by our ancestors, and it was founded in wisdom and justice.

Mr. Lewis next quoted first Blackstone, 402, which was one of the British laws that had never been admitted in this country and which he hoped never would, viz: That wherein the distinction is drawn between the commoner and the peer, an oath being required of the commoner upon all occasions, and no more than "upon my honor" from a peer, except in giving evidence in civil or criminal trials.

Mr. Lewis concluded by saying that the difficulties which stood between Mr. Gallatin and his seat were insurmountable and could not be removed without showing a law of Massachusetts, Virginia, &c., repealing those laws in regard to the qualification of citizens which he had mentioned, but which repeal he was certain did not exist. He therefore stated that to insist upon the gentleman's right to a seat was both novel and absurd. These were his opinions, which he had given in a perfectly extempore way, not having been allowed time nor expecting to meet the subject on the new ground which it had this day taken in the Senate.

Mr. Gallatin said he would pledge himself to the Senate to prove that the grounds of his arguments and his construction of the confederation and laws of the States was neither novel nor absurd, except in Mr. Lewis's construction of them, but had been admitted in many instances. However, as the common law of England was now introduced by Mr. Lewis, which was new ground to him, and as the hour of adjournment was nearly approaching, he would beg leave to make his reply to-morrow.

On motion, the further consideration of this subject was postponed until to-morrow.

FRIDAY, *February* 21, 1794.

Agreeably to the order of the day, the Senate resumed the consideration of the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States.

Mr. Gallatin commenced his defense by laying down the principles on which he intended to argue. His was a very serious situation for a person to be placed in who had been so long in America and who had mingled with the inhabitants in the common cause, that he should afterwards be called before so solemn a tribunal with an intention to wrest from him his right of citizenship. He confessed that on this occasion his feelings were deeply interested, particularly as the manner of the counsel for the prosecutors was so personal and went not only to deny him a seat in the Senate of the United States, but even to contest his citizenship and denounce him as being yet an alien.

This was a matter of consequence to many thousands as well as himself who have long considered themselves in possession of all the privilege of denizens and yet may be deprived of their rights if the doctrines of the counsel for the prosecutors should obtain any sanction from the body who were now to judge of its merits.

Mr. Gallatin entered into a series of observations on the various points of law, &c., which had been adduced by Mr. Lewis, and he particularly remarked that the common law of England was entirely inapplicable to the subject under consideration. He read the laws of Virginia respecting naturalization, &c., from which he insisted that he had long since become a citizen of the United States. He also quoted first Blackstone, page 374, and Viner's Abridgment, Vol. II, page 266, respecting the different acceptations of denizen and citizen, and he went back so far as the British statutes in 1740 to show the intention of the old government was to naturalize all persons who would go and reside in the Colonies. He next mentioned the act of Pennsylvania of 31st of August, 1778, and commented on the principles generally entertained by most writers on the subjects of allegiance and citizenship—Blackstone, 266, &c.

An alien is a man born out of the allegiance of the king. But allegiance in England is not an allegiance to the country or to society as it is understood in this country.

In order to explain the principle of reciprocity, he observed that when the two crowns of England and Scotland were united under James the inhabitants of Scotland became naturalized in England as if they had been natural-born subjects of that country. The allegiance in Britain was personal to the king, and it has there this remarkable quality that by the British laws allegiance can never be shaken off.

This country, before the Revolution, owed allegiance to the king, but that was de-

stroyed by the Declaration of Independence, and then the inhabitants of the States became mutually citizens of every State reciprocally; and they continued so until such time as the States made laws of their own afterwards respecting naturalization.

As soon as separate governments existed allegiance was due to each, and here the allegiance was a reality, it was to the Government and to society, whereas in Britain it is merely fictitious, being only to one man.

Every man who took an active part in the American Revolution was a citizen according to the great laws of reason and of nature, and when afterwards positive laws were made they were retrospective in regard to persons under this predicament; nor did those posterior laws invalidate the rights which they enjoy under the Confederation.

Mr. Gallatin here mentioned his having been an inhabitant of Massachusetts before October, 1780, and he also observed that the law passed in that State was decisive against the common law of England.

In quoting the laws of Massachusetts, which were passed in 1785 and afterwards, for naturalizing John Gardner and James Martin, he remarked that they clearly implied that even a natural-born subject who had not acted in the Revolution and an absentee was not entitled to citizenship. He likewise took notice of the case of Mr. William Smith, of South Carolina, against whose election as a Representative in Congress a petition was presented by Dr. Ramsey, although the decision of South Carolina on that subject was exactly the reverse of Massachusetts.

In speaking of the difficulties that occurred in explaining the terms citizen and alien he ran over a number of cases and asked whether if a person had arrived in the United States during the war, from Nova Scotia or elsewhere, and had taken an active part against the enemy, would he not be better entitled to the right of a citizen than even those who afterwards subscribed to the acts? The counsel for the prosecutors had admitted that a person who had been one of the mass of the people at the Declaration of Independence was a citizen. On the same principle, until a law passes to disprove that a man who was active in the Revolution previous to the treaty of peace was a citizen he must be one *ipso facto*.

Mr. Gallatin next read a quotation from the first volume of Woodison, page 382, an English writer who acknowledged that all persons were aliens at the recognition of independence, and that is a more liberal construction than the counsel for the petitioners would admit of, for by his construction our sailors, &c., ought to be naturalized, lest they be alarmed by the British.

The new Constitution of the United States requires certain qualifications for members of Congress, &c., but it does not deprive persons of their rights who were actually citizens before this Constitution was ratified that made the States the United States. They were united by consent before, and consequently he was one of the people before the United States existed.

He went on to read from the constitution of Massachusetts and several other States sundry clauses in support of his reasoning, and recapitulated the several heads of Mr. Lewis's arguments, to each of which he replied.

Mr. Gallatin said that Mr. Lewis was unfortunate in producing the law of Pennsylvania, for by proving too much he had proved nothing, for the forty-second section of the constitution is retrospective and by acknowledging the Articles of Confederation to be the supreme law of the land persons who were reciprocally citizens before are still left in full possession of the right.

So far from any dangerous consequences arising on my construction of citizenship, said he, I think it must be evident that there is more danger and absurdity in the counsel's own constructions. For in remarking on the policy of nations we find even slaves have been enfranchised by the great republics in times of common danger. The policy of America should be to make citizenship as easy as possible for the purpose of encouraging population; even during the British dominion that was a principle laid down, and afterwards it was attempted to be varied; it is made one of the principal subjects of complaint in the Declaration of Independence, where it is expressly said that the king endeavored to prevent the population of these States by having laws made to obstruct the naturalization of foreigners.

If there was any dangerous consequences to be apprehended from the former regulations on this subject they are all remedied by the new Constitution.

Therefore no ill consequence or absurdity can follow. The author of the Federalist supports this principle in Vol. II, page 54, for he says that it is a construction scarcely avoidable that citizens of each of the States are mutually so in all of them.

The first words in the Constitution, "We, the people," furnished another argument in support of Mr. Gallatin's principles, which he turned to great advantage, still drawing an inference to show that Mr. Lewis's construction of the subject was most liable to difficulties and to mischievous consequences.

He concluded by observing that if there was any disfranchising clauses in the Consti-

tution of the United States tending to deprive citizens of antecedent rights, all such clauses must be construed favorably, and were evidently on his side. With regard to a sentence that had been added by the advice of counsel to the affidavit of Pelatiah Webster, he made some remarks which tended to establish his own personal character, which he trusted would be found, when traced back to his nativity, to stand the test; and that his right to a seat in the Senate would also stand upon an equally just foundation.

Mr. Lewis denied ever having seen the affidavit of Mr. Webster until it was shown him at the time the examination before the committee was going forward.

Mr. Gallatin recriminated that the clause of which he took notice was not in the affidavit when Mr. Webster brought it to the committee, and that he had permitted it to be added with great reluctance. It was only the recital of a few words which passed between Mr. Gallatin and Mr. Webster in jest some years since, wherein Mr. Gallatin had ironically said his name was Sidney, probably alluding to some essays that had appeared in the newspapers under that signature which have been generally attributed to the pen of another gentleman in this State.

Mr. Jackson, in order to bring the merits of the subject directly before the Senate, said he would move a resolution that would have that effect; but upon Mr. Lewis's observing that he had not yet closed his arguments, and at the instance of Mr. Butler, from South Carolina, who said he would second Mr. Jackson's motion hereafter, it was withdrawn for the present.

Ordered, That the further consideration thereof be postponed until to-morrow.

SATURDAY, *February* 22, 1794.

The Senate resumed the consideration of the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States.

The greater part of the day was taken up by Mr. Lewis's pleadings, wherein he entered into a very extensive field of reasoning, and quoted a great number of authorities in support of the principles on which he had set out last Thursday, and to prove that in the true sense of the Constitution of the United States, as well as of that of the State of Pennsylvania, Mr. Gallatin was not duly qualified for the office of a Senator, and therefore he trusted that the honorable Senate, upon mature reflection, would vacate his seat.

Mr. Gallatin closed his defense in a short speech, wherein he quoted Vattel, page 167, and explained the forty-second section of the constitution of Pennsylvania, the liberal construction of which, he said, was in his favor, and the construction contended for by the counsel absurd. He finished by reading a passage from Lord Bacon's works to show that where there is any doubt in the laws it should operate in favor of the defendant, and he accordingly made no doubt but that the Senate would validate his election.

Ordered, That the further consideration of the subject be postponed until Monday next.

A motion was made as follows:

"*Resolved*, That Albert Gallatin, returned to this House as a member for the State of Pennsylvania, is duly qualified for, and elected to, a seat in the Senate of the United States."

Ordered, That the consideration of this motion be postponed until Monday next, and that a number of copies of the fourth article of the First Confederation of United States be printed for the use of the Senate.

MONDAY, *February* 24, 1794.

The Senate resumed the consideration of the motion made the 22d instant, on the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States; and,

After progress,

Ordered, That the further consideration thereof be postponed until to-morrow.

TUESDAY, *February* 25, 1794.

The Senate resumed the consideration of the motion made the 22d instant, on the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States; and,

After progress,

Ordered, That the further consideration thereof be postponed until to-morrow.

WEDNESDAY, *February* 26, 1794.

The Senate resumed the consideration of the motion made the 22d instant, on the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States; and,

After progress,

Ordered, That the further consideration thereof be postponed until to-morrow.

THURSDAY, *February* 27, 1794.

The Senate resumed the consideration of the motion, made the 22d instant, on the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States; and,

After progress,

Ordered, That the further consideration thereof be postponed until to-morrow.

FRIDAY, *February* 28, 1794.

The Senate resumed the consideration of the 22d instant, on the report of the committee on the petition of Conrad Laub and others, respecting the election of Mr. Gallatin to be a Senator of the United States, and,

On the question to agree to the motion, as follows:

"*Resolved*, That Albert Gallatin, returned to this House as a member for the State of Pennsylvania, is duly qualified for, and elected to, a seat in the Senate of the United States,"

It passed in the negative—yeas 12, nays 14; as follows:

YEAS—Messrs. Bradley, Brown, Burr, Butler, Edwards, Gunn, Jackson, Langdon, Martin, Monroe, Robinson, and Taylor.

NAYS—Messrs. Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Hawkins, Izard, King, Livermore, Mitchell, Morris, Potts, Strong, and Vining.

On motion that it be

Resolved, That the election of Albert Gallatin to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States,

A motion was made to divide the question at the word "void;" and

On motion to agree to the first paragraph of the motion so divided, it passed in the affirmative—yeas 14, nays 12; as follows:

YEAS—Messrs. Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Hawkins, Izard, King, Livermore, Mitchell, Morris, Potts, Strong, and Vining.

NAYS—Messrs. Bradley, Brown, Burr, Butler, Edwards, Gunn, Jackson, Langdon, Martin, Monroe, Robinson, and Taylor.

On motion to adopt the resolution, as follows:

"*Resolved*, That the election of Albert Gallatin to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States,"

It passed in the affirmative—yeas 14, nays 12; as follows:

YEAS—Messrs. Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Hawkins, Izard, King, Livermore, Mitchell, Morris, Potts, Strong, and Vining.

NAYS—Messrs. Bradley, Brown, Burr, Butler, Edwards, Gunn, Jackson, Langdon, Martin, Monroe, Robinson, and Taylor.

Resolved, That an attested copy of the resolution of the Senate, declaring the election of Albert Gallatin to be void, be transmitted by the President of the Senate to the executive of the Commonwealth of Pennsylvania.

REPORT OF COMMITTEE ON ELECTIONS.

[This committee consisted of Messrs. Bradley, Ellsworth, Mitchell, Rutherford, Brown, Livermore, and Taylor.]

The report of the committee on the petition of Conrad Laub and others, above referred to, and made on the 10th instant, is as follows:

The Committee of Elections, to whom was referred the petition of Conrad Laub and others, against the election of the Hon. Albert Gallatin as a Senator of the United States for the State of Pennsylvania, report:

That they have had the same under consideration, and, having given due notice, as well the petitioners, by their agent, Michael Schmyser, as the said Mr. Gallatin appeared before them, and, on the part of the petitioners, the following evidence was produced, to wit:

Robert Morris, esq., being duly sworn, deposeth: "That during the war two of his sons went to Geneva for their education, and that at that place they became acquainted with some of the friends of Mr. Albert Gallatin, who had gone for America, and they being solicitous to hear of his safety, desired Mr. Morris's sons to write to their father to make inquiry and give the information he should obtain. That frequently afterwards he received letters for Mr. Gallatin from Europe, which he always supposed to come from the friends of Mr. Gallatin in Geneva. He supplied Mr. Gallatin with money for a bill upon London, and there supposed the funds to pay the same were remitted from Geneva. Mr. Morris paid Mr. Gallatin about one thousand guineas, by order of Messrs.——— ——— & Co., bankers in Paris, believing always that they were reimbursed from Geneva. Mr.

Morris does not recollect dates, not having for a long while seen any of the letters that passed on the subject; he does not know the place of Mr. Gallatin's nativity, but from the general course of the circumstances which came under his observation he always did suppose he was born in Geneva.

"Sworn to and subscribed, January 22, 1794."

Nathaniel Cabot Higginson, esq., being duly sworn, deposeth: "That he does not know directly anything of Mr. Gallatin's being a foreigner or native; that he recollects knowing him by reputation and sight at Boston, in one of the years 1781, 1782, or 1783, and that he was generally reputed to be a foreigner. This deponent believes that Mr. Gallatin then taught the French language, and did not speak the English with facility; and further recollects that Mr. Gallatin was resident there or thereabouts a considerable time. This deponent further says that he never had any conversation with Mr. Gallatin, but founds his belief with respect to Mr. Gallatin's not speaking the English with facility on the information received from others.

"Sworn to and subscribed, January 22, 1794."

Mr. John Breakbill, being duly sworn, testifies: "That last winter, being a member of the legislature of Pennsylvania, previous to the election of Senator for the State of Pennsylvania, I heard Mr. Gallatin say his citizenship would not admit his being a Senator; what were his reasons for making the declaration I cannot say; I took it he did not wish to be elected. This declaration by Mr. Gallatin was made at a meeting of a number of members of the Pennsylvania legislature, held for the purpose of agreeing who should be set up as a candidate. The deponent further says he does not recollect Mr. Gallatin's assigning any other reason for his backwardness to serve as a Senator than the want of citizenship.

"Sworn to and subscribed, January 22, 1794."

Henry Kammerer, esq., being duly sworn, testifies: "That last winter, being a member of the legislature of Pennsylvania, and previous to the election of Senator for the said State, at a meeting of a number of the members of the State legislature to agree upon a candidate to fill said office, I heard Mr. Gallatin say when his name was proposed, 'As for my name, it is out of the question; I have not been a citizen long enough to entitle me to serve in that station.' That at a second meeting for the same purpose Mr. Gallatin was again proposed as a proper person for a candidate, and then the deponent understood (not from Mr. Gallatin, but from some of the members of assembly then present) that the doubt about his citizenship was then put to rights; and then it was almost unanimously agreed to put up Mr. Gallatin's name. That on the morning succeeding Mr. Gallatin's election the deponent heard it observed that notwithstanding Mr. Gallatin's election he could not take his seat, in consequence of his declaration that he had not been long enough a citizen. That he the same day mentioned this to Mr. Gallatin, who said that he had made this declaration under a mistaken idea that it was necessary for him to have been nine years a citizen of Pennsylvania, but that upon examining the Constitution he had found that to have been nine years a citizen of the United States was sufficient, and that he had been above nine years a citizen of the United States, or words to that effect.

"Sworn to and subscribed, January 22, 1794."

Pelatiah Webster, being duly qualified, testifies: "That eleven years ago last summer I let my house in Philadelphia to Mary Linn, who proposed to take lodgers; I reserved apartments for myself and boarded with her. Soon after Mr. Savery and Mr. Gallatin took lodgings of her and continued a number of months there. Mr. Savery spoke no English; Mr. Gallatin spoke good English and served as interpreter for him. They appeared to be well-bred gentlemen, and their conduct was agreeable and conciliating, and they soon gained the esteem and respect of the family. I do not know that they ever declared their country, but we all supposed they were French, and of course the people, customs, and country of France often made the topic of fireside chat. In one of these transient conversations Mr. Gallatin took occasion to say that his knowledge of French affairs was not very perfect, for he was not a native of France, nor had ever resided long in that country, but was from Geneva. No one interesting circumstance made any further inquiry necessary, nor do I recollect that he made any more explication of the subject.

"N. B. Mr. Gallatin once said that his original name was not Gallatin, but I think he said it was Sidney, but this conversation was in drollery, and not in earnest, as I conceived at the time of speaking from the manner and air of his speaking thereon.

"Sworn to and subscribed, January 28, 1794."

Mr. John Smilie, member of the House of Representatives of the United States, being sworn, saith: "That at a meeting of sundry members of the legislature of Pennsylvania, previous to Mr. Gallatin's election as a Senator of the United States, that gentleman was mentioned as a proper person to fill the said office; at which time Mr. Gallatin started

some doubt respecting his being qualified, but in what words the deponent does not recollect.

"That the deponent did not understand upon what the doubt was founded, though he thinks from something said by Mr. Gallatin that it related to Mr. Gallatin's citizenship, for, as the deponent conceived, the conversation proceeded from that kind of modesty which gentlemen usually feel upon having their names proposed upon such occasions, he did not pay much attention to it, and that his reason for forming this opinion was his having frequently observed gentlemen to make excuses in similar situations, and from his knowledge of Mr. Gallatin's modesty of disposition. When being asked whether he ever heard Mr. Gallatin say that he had not been a citizen of the United States nine years previous to his election, the deponent replies he never did. Upon being asked by Mr. Lewis, counsel for the petitioners, what he had ever heard Mr. Gallatin say touching his citizenship, the deponent replies that a considerable time subsequent to Mr. Gallatin's election Mr. Gallatin, in conversations with the deponent, expressed an opinion that he was qualified with respect to citizenship. What else did you ever hear Mr. Gallatin say with respect to his citizenship? The deponent answers that he recollects having heard him say something with respect to the laws of Massachusetts not requiring an oath of allegiance at the time of his giving his opinion as aforesaid. Did you ever hear Mr. Gallatin say he was born in Europe? The deponent replies that he does not recollect Mr. Gallatin's saying that he was born in Europe, but that he has heard Mr. Gallatin speak of himself as a Genevan, mention his family in Geneva, and in conversations with him hath always understood him to be of Geneva. Did you ever hear Mr. Gallatin mention the time of his coming into America? He replies that he thinks Mr. Gallatin, about a year past, mentions that he had been then thirteen years in this country, and that he was nineteen years old when he came. Did you ever hear Mr. Gallatin say when or where he took the oath of allegiance? He replies he heard Mr. Gallatin say that he took the oath of allegiance in Virginia, but as to the time the deponent cannot be precise, but he thinks, if he can recollect, that Mr. Gallatin did mention to him, though he cannot be certain; but it was not nine years before he was elected. That the deponent thinks Mr. Gallatin's doubts respecting his citizenship were founded on this ground, the witness referring in this part of his testimony to the meeting before mentioned, when these doubts were expressed; but he cannot specify the time of Mr. Gallatin's having mentioned to him the circumstance of his having taken the oath of allegiance.

"Sworn to and subscribed, January 28, 1794."

Mr. Thomas Stokely, being sworn, deposeth and saith: "That some few days before a Senator was chosen for the State of Pennsylvania a meeting was had to fix on a proper person to represent the State in that office; sundry persons were started as candidates, among whom was Mr. Gallatin, who, upon his being named, observed that there were many other persons more proper to fill that office; and also observed that there might be doubts as to his citizenship, though the deponent, from the length of time, and not expecting to have been called upon, retains too slight an impression of what then passed to be able to recollect the words with precision. That at a subsequent meeting for the same purpose Mr. Gallatin was finally agreed to be nominated, and the deponent heard no objection stated thereto, either by Mr. Gallatin (who was present) or any other person.

"Sworn to and subscribed, February 1, 1794."

The before-recited evidence being introduced and closed on the part of the petitioners, Mr. Gallatin was asked whether he had any testimony to produce on his part, to which he gave the following answer in writing, to wit:

"The committee to whom the petition of Conrad Laub, &c., was referred, having informed me that the petitioners had closed their evidence, and asked me 'whether I had any testimony to produce on my side,' I answer that it appears to me that there is not sufficient matter charged in the petition and proved by the testimony to vacate my seat; that by the resolution appointing the committee the petition is referred to them to state the facts, 'without prejudice as to any questions which may, upon the hearing, be raised by the sitting member as to the sufficiency of the parties and the matter charged in the petition;' that upon the hearing, and in the present stage of the same, the question as to the sufficiency of matter, as above stated, is raised by me; that I conceive from the evident construction of the resolution I have a right to have that question decided by the Senate; that until the same shall have been decided I do not wish to be at the trouble and expense of collecting evidence at a great distance; and therefore that at present I do not mean to produce any testimony, reserving, however, to myself the right which I conceive I have to produce any testimony in my favor after the said question shall have been decided by the Senate, in case it is decided against me.

"ALBERT GALLATIN."

Which being duly read and considered, the committee came to the following resolution, to wit:

"Whereas the evidence on the part of the petitioners having been closed, and it appearing that Mr. Gallatin was an alien in the year 1780, and his answer in writing as-

signing reasons why he should not adduce evidence on his part in the present stage of the inquiry not being, in the opinion of the committee, sufficient,

"*Resolved*, That in the opinion of the committee it is now incumbent on Mr. Gallatin to show that he has become a citizen of the United States, and when."

Which resolution being read to Mr. Gallatin, he informed the committee he should rely on the answer he had before given.

All which is respectfully submitted to the honorable Senate by the committee.

And subjoined is the statement of facts exhibited by Mr. Gallatin and agreed to between him and the counsel for the petitioners, as mentioned the 20th instant:

"Albert Gallatin was born at Geneva on the 29th day of January, 1761. He left that place for the United States in April or May, 1780; arrived in Boston, Mass., on the 14th or 15th of July of the same year, and has ever since resided within the United States. In October, 1780, he removed from Boston to Machias, in the Province of Maine, in which place and its neighborhood he resided one year, and commenced a settlement on a tract of vacant land. During that time he furnished out of his own funds supplies amounting in value to more than sixty pounds Massachusetts currency to Col. John Allen, who was the commanding officer stationed there, and also superintendent of Indian affairs for the Eastern department, for the use of the American troops, and on several occasions acted as a volunteer under the same officer's command. For the said supplies he received one year after a warrant on the treasury of the State of Massachusetts, which he sold at a considerable depreciation. In October, 1781, he returned to Boston, and in the spring of 1782 was, by a vote of the corporation of the University of Cambridge, otherwise called Harvard College, chosen instructor of the French language of the said university. By the same vote he was allowed a room in the college, the privilege of the commons at the tutor's table, the use of the library, and also the right of having his pay, which depended on the voluntary subscription and attendance of the students, collected by the steward of the institution, together with the other charges against the students for board and education. Those terms he accepted and remained in that station for the term of one year. In July, 1783, he removed to Pennsylvania, and in November of the same year proceeded to Virginia, in which State he had purchased more than one thousand acres of land, and amounting to more than one hundred pounds Virginia currency in value, some time between July and November, 1783. Between this last-mentioned period and the month of October, 1785, he purchased other lands in the said State to a very large amount, and in the said last-mentioned month he took an oath of allegiance to the said State. In December, 1785, he purchased the plantation in Fayette County, in Pennsylvania, on which he has lived ever since. In October, 1789, he was elected member of the convention to amend the constitution of Pennsylvania, and in October, 1790, 1791, and 1792, he was elected member of the legislature of the same State. On the 28th of February, 1793, he was chosen Senator to represent the said State in the Senate of the United States, and took his seat in December following."

[Fourth Congress—First session.]

HUMPHREY MARSHALL,

Senator from Kentucky from March 4, 1795, *to March* 4, 1801.

In February, 1796, the Vice-President laid before the Senate a letter from the governor of Kentucky and a memorial from the Representatives of said State, which memorial stated that in February, 1795, a pamphlet was published by George Muter and Benjamin Sebastian (two judges of the court of appeals), in which they said that Humphrey Marshall had had a suit in chancery in said court of appeals, in which, it appearing manifest from the records and documents that he had committed a gross fraud, the court had given a decree against him; and that in the course of the investigation he had been publicly charged with perjury. The memorial further stated that the said representatives did not mean to give an opinion on the justice of the said charge, but requested that an investigation relative thereto might take place. Mr. Marshall was also solicitous that an investigation of the subject should take place in the Senate. It was determined that the memorial could not be sustained; also that as the Constitution does not give jurisdiction to the Senate the consent of the party cannot give it, and that therefore the said memorial ought to be dismissed.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 4th Cong., 1st sess., 1795–'96, within pages 47–59.

FRIDAY, *February* 26, 1796.

The Vice-President laid before the Senate a letter from the governor of the State of Kentucky, with divers papers accompanying the same.

The letter and papers therein referred to were read, and ordered to lie on the table.

MONDAY, *February* 29, 1796.

On motion by Mr. Marshall,

"That the letter from the governor of the State of Kentucky, with divers papers accompanying the same, communicated to the Senate on the 26th instant, be referred to a committee."

It was agreed to postpone the consideration of the motion until to-morrow.

WEDNESDAY, *March* 2, 1796.

The Senate resumed the consideration of the motion made on the 29th of February respecting the letter and papers from the governor of the State of Kentucky; and

Ordered, That they be referred to Messrs. Livermore, Ross, King, Rutherfurd, and Strong to consider and report thereon to the Senate.

FRIDAY, *March* 11, 1796.

Mr. Livermore reported from the committee to whom was referred the letter of the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them; and the report was read, and ordered to lie on the table.

TUESDAY, *March* 15, 1796.

The Senate resumed the consideration of the report of the committee to whom was referred the letter of the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them; and,

After debate, the Senate adjourned.

WEDNESDAY, *March* 16, 1796.

Ordered, That the consideration of the report of the committee to whom was referred the letter of the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them, be further postponed.

THURSDAY, *March* 17, 1796.

The Senate resumed the consideration of the report of the committee to whom was referred the letter from the governor and the memorial of the Representatives of the State of Kentucky, with the papers accompanying them, which is as follows:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Livermore, Ross, King, Rutherford, and Strong.]

That the representatives of the freemen of Kentucky state in their memorial that in February, 1795, a pamphlet was published by George Muter and Benjamin Sebastian (who were two judges of the court of appeals), in which they say that Humphrey Marshall had a suit in chancery in the said court of appeals, in which it appearing manifest

from the oath of the complainant, from disinterested testimony, from records, from documents furnished by himself, and from the contradictions contained in his own answer, that he had committed a gross fraud, the court gave a decree against him; and that in the course of the investigation he was publicly charged with perjury. That Mr. Marshall, in a publication in the Kentucky Gazette, called for a specification of the charge; to which the said George Muter and Benjamin Sebastian, in a like publication, replied that he was guilty of perjury in his answer to the bill in chancery exhibited against him by James Wilkinson, and that they would plead justification to any suit brought against them therefor. That no such suits, as the said representatives could learn, had been brought. The said representatives further say that they do not mean to give an opinion on the justice of the said charge, but request that an investigation may immediately take place relative thereto.

Your committee observe that the said suit was tried eighteen months before Mr. Marshall was chosen a member of the Senate, and that previous to his election mutual accusations had taken place between him and the judges of the said court relating to the same suit.

The representatives of Kentucky have not furnished any copy of Mr. Marshall's answer on oath, nor have they stated any part of the testimony, or produced any of the said records or documents, or the copy of any paper in the cause, nor have they intimated a design to bring forward those or any other proofs.

Your committee are informed by the other Senator and two Representatives in Congress from Kentucky that they have not been requested by the legislature of that State to prosecute this inquiry, and that they are not possessed of any evidence in the case, and that they believe no person is authorized to appear in behalf of the legislature.

Mr. Marshall is solicitous that a full investigation of the subject should take place in the Senate, and urges the principle that consent takes away error, as applying on this occasion, to give the Senate jurisdiction; but, as no person appears to prosecute, and there is no evidence adduced to the Senate, nor even a specific charge, the committee think any further inquiry by the Senate would be improper. If there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained. They think that in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State and district wherein the crime shall have been committed. If, in the present case, the party has been guilty in the manner suggested, no reason has been alleged by the memorialists why he has not long since been tried in the State and district where he committed the offense. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent. And the committee are compelled, by a sense of justice, to declare that in their opinion this presumption in favor of Mr. Marshall is not diminished by the recriminating publications of two men, who take no pains to conceal their personal resentment against him.

Whatever motives induced the legislature of Kentucky to call the attention of the Senate to the above-mentioned publications, the committee are of opinion that as the Constitution does not give jurisdiction to the Senate the consent of the party cannot give it, and that therefore the said memorial ought to be dismissed.

On motion to postpone the consideration of the report until to-morrow, it passed in the negative; and,

After debate, on motion to reconsider the question for postponement, it passed in the negative.

On motion to expunge all the words from "if in the present case," inclusive, to the end of the report, a motion was made to amend the part proposed to be struck out by expunging these words: "of two men who take no pains to conceal their personal resentment," and it was agreed that this motion was not in order.

A motion was made to divide the original motion for striking out, and retain the words from "if in the present case," inclusive, to the word, "innocent," at the end of the first paragraph; and,

After debate, the Senate adjourned.

FRIDAY, *March* 18, 1796.

The Senate resumed the consideration of the report of the committee to whom was referred the letter from the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them, together with the motion made thereon, and under debate yesterday; and a motion was made to amend the motion by expunging from the report all that follows the words, "the memorial could not be sustained;" and,

After debate, the Senate adjourned.

SATURDAY, *March* 19, 1796.

The Senate resumed the consideration of the report of the committee to whom was

referred the letter from the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them; also the motion made thereon and under debate yesterday, together with the motion for amendment by expunging from the report all that follows the words, "the memorial could not be sustained;" and a motion was made to postpone the report and the motions made thereon, and to take into consideration the following resolution:

"Whereas the honorable the legislature of the State of Kentucky have, by their memorial transmitted by the governor of said State, informed the Senate that Humphrey Marshall, a Senator from the said State, had been publicly charged with the crime of perjury, and requested that an inquiry might be thereupon instituted, in which request the said Humphrey Marshall has united; and it being highly interesting, as well to the honor of the said State as to that of the Senate, and an act of justice due to the character of the said Humphrey Marshall that such inquiry should be had: Therefore,

"*Resolved*, That the Senate will proceed to the examination of the said charge on the —— day of the next session of Congress; that in the opinion of the Senate a conviction or acquittal in the ordinary courts of justice of the said State would be the most satisfactory evidence on this occasion; but that if this should not be attainable by reason of any act of limitation or other legal impediment, such other evidence will be received as the nature of the case may admit and require.

"*Resolved*, That the Vice-President be requested to transmit a copy of the foregoing resolution to the governor of the said State."

After debate, the Senate adjourned.

MONDAY, *March* 21, 1796.

The Senate resumed the consideration of the motion, made on the 19th instant, to postpone the report of the committee to whom was referred the letter from the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them, together with the motions of amendment made thereon, in order to consider the following resolution:

"Whereas the honorable legislature of the State of Kentucky have, by their memorial, transmitted by the governor of the said State, informed the Senate that Humphrey Marshall, a Senator from the said State, had been publicly charged with the crime of perjury, and requested that an inquiry might be thereupon instituted, in which request the said Humphrey Marshall has united; and it being highly interesting, as well to the honor of the said State as to that of the Senate, and an act of justice due to the character of the said Humphrey Marshall that such inquiry should be had: Therefore,

"*Resolved*, That the Senate will proceed to the examination of the said charge on the —— day of the next session of Congress; that, in the opinion of the Senate, a conviction or acquittal in the ordinary courts of justice of the said State would be the most satisfactory evidence on this occasion; but that, if this should not be attainable, by reason of any act of limitation or other legal impediment, such other evidence will be received as the nature of the case may admit and require.

"*Resolved*, That the Vice-President be requested to transmit a copy of the foregoing resolution to the governor of the said State."

And on the question for postponement, it passed in the negative—yeas 7, nays 17; as follows:

YEAS—Messrs. Bloodworth, Brown, Burr, Langdon, Mason, Robinson, and Tazewell.

NAYS—Messrs. Bingham, Bradford, Cabot, Foster, Frelinghuysen, Gunn, Henry, Latimer, Livermore, Martin, Paine, Read, Ross, Rutherfurd, Strong, Trumbull, and Vining.

TUESDAY, *March* 22, 1796.

The Senate resumed the consideration of the report of the committee to whom was referred the letter from the governor and the memorial of the representatives of the State of Kentucky, with the papers accompanying them.

On the question to expunge these words: "if there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained," it passed in the negative.

On the question to expunge the following words:

"They think that in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State and district wherein the crime shall have been committed. If in the present case the party has been guilty in the manner suggested, no reason has been alleged why he has not long since been tried in the State and district where he committed the offense. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent"—

It passed in the negative.

On motion, it was agreed to amend the next paragraph to read as follows:

"And the committee are compelled by a sense of justice to declare that in their opin-

ion this presumption in favor of Mr. Marshall is not diminished by recriminating publications, which manifest strong resentment against him."

And on the question to expunge the paragraph as amended, it passed in the negative.

On motion, it was agreed to amend the last clause of the report to read as follows:

"And they are also of opinion that as the Constitution does not give jurisdiction to the Senate the consent of the party cannot give it; and that therefore the said memorial ought to be dismissed."

On motion to expunge the clause last agreed to be amended, it passed in the negative—yeas 7, nays 16; as follows:

YEAS—Messrs. Bloodworth, Burr, Langdon, Martin, Mason, Robinson, and Tazewell.

NAYS—Messrs. Bingham, Bradford, Cabot, Foster, Frelinghuysen, Gunn, Henry, Latimer, Livermore, Paine, Read, Ross, Rutherfurd, Strong, Trumbull, and Vining.

Mr. Brown requested and was excused from voting on the question.

On motion, it was agreed to amend the last paragraph but two of the report, beginning with the words "if in the present case," by inserting the words "by the memorialists" after the word "alleged."

On the question to adopt the report as amended, it passed in the affirmative—yeas 16, nays 8; as follows:

YEAS—Messrs. Bingham, Bradford, Cabot, Foster, Frelinghuysen, Gunn, Henry, Latimer, Livermore, Paine, Read, Ross, Rutherfurd, Strong, Trumbull, and Vining.

NAYS—Messrs. Bloodworth, Brown, Burr, Langdon, Martin, Mason, Robinson, and Tazewell.

So the report was adopted, as follows:

REPORT AS ADOPTED.

The committee to whom was referred the letter of the governor and the memorial of the representatives of Kentucky, with the papers accompanying them, report:

That the representatives of the freemen of Kentucky state in their memorial that in February, 1795, a pamphlet was published by George Muter and Benjamin Sebastian (who were two judges of the court of appeals), in which they say that Humphrey Marshall had a suit in chancery in the said court of appeals, in which it appearing manifest from the oath of the complainant, from disinterested testimony, from records, from documents furnished by himself, and from the contradictions contained in his own answer, that he had committed a gross fraud, the court gave a decree against him; and that in the course of the investigation he was publicly charged with perjury. That Mr. Marshall, in a publication in the Kentucky Gazette, called for a specification of the charge; to which the said George Muter and Benjamin Sebastian, in a like publication, replied that he was guilty of perjury in his answer to the bill in chancery exhibited against him by James Wilkinson, and that they would plead justification to any suit brought against them therefor That no such suit, as the said representatives could learn, had been brought. The said representatives further say that they do not mean to give an opinion on the justice of the said charge, but request that an investigation may immediately take place relative thereto.

Your committee observe that the said suit was tried eighteen months before Mr. Marshall was chosen a member of the Senate, and that previous to his election mutual accusations had taken place between him and the judges of the said court relating to the same suit.

The representatives of Kentucky have not furnished any copy of Mr. Marshall's answer on oath, nor have they stated any part of the testimony, or produced any of the said records or documents, or the copy of any paper in the cause, nor have they intimated a design to bring forward those or any other proofs.

Your committee are informed by the other Senator and the two Representatives in Congress from Kentucky that they have not been requested by the legislature of that State to prosecute this inquiry, and that they are not possessed of any evidence in the case, and that they believe no person is authorized to appear on behalf of the legislature.

Mr. Marshall is solicitous that a full investigation of the subject shall take place in the Senate, and urges the principle that consent takes away error, as applying, on this occasion, to give the Senate jurisdiction; but, as no person appears to prosecute, and there is no evidence adduced to the Senate, nor even a specific charge, the committee think any further inquiry by the Senate would be improper. If there were no objections of this sort, the committee would still be of opinion that the memorial could not be sustained. They think that in a case of this kind no person can be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and that in all such prosecutions the accused ought to be tried by an impartial jury of the State and district wherein the crime shall have been committed. If, in the present case, the party has been guilty in the manner suggested, no reason has been alleged by the memorialists why he has not long since been tried in the State and district where he com-

mitted the offense. Until he is legally convicted, the principles of the Constitution and of the common law concur in presuming that he is innocent. And the committee are compelled, by a sense of justice, to declare that in their opinion the presumption in favor of Mr. Marshall is not diminished by the recriminating publications, which manifest strong resentment against him.

And they are also of opinion that as the Constitution does not give jurisdiction to the Senate the consent of the party cannot give it; and that therefore the said memorial ought to be dismissed.

Resolved, That the Vice-President of the United States be requested to transmit a copy of the foregoing report to the governor of Kentucky.

[Fourth Congress—First session.]

WILLIAM BLOUNT AND WILLIAM COCKE,

of Tennessee.

The history of the case as here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 4th Cong., 1st sess., vol. 1, 1795–'96, and found within pages 83–122. The case simply shows that Messrs. Blount and Cocke were not admitted to seats in the Senate on papers presented to the Senate May 9, 1796, and purporting to be credentials of being duly elected Senators from the State of Tennessee. It does not show why they were not admitted. There is, however, an allusion to a pending "bill proposing to admit the Southwestern Territory into the Union," which bill was not approved until June 1, 1796. From this it may be inferred that Messrs. Blount and Cocke were not admitted to their seats because the papers purporting to be their credentials of election were of earlier date than that of the admission of Tennessee into the Union. Mr. Blount and Mr. Cocke were again elected August 2, 1796, by the legislature of Tennessee, after its admission as a State, and took their seats in the Senate December 6, 1796.

MONDAY, *May* 9, 1796.

On motion that a paper purporting to be the appointment of William Blount and William Cocke, respectively, to seats in the Senate, should be read, it was agreed that the motion be postponed till to-morrow.

TUESDAY, *May* 10, 1796.

Ordered, That the consideration of the paper, purporting to be the appointment of William Blount and William Cocke to a seat in the Senate, respectively, be postponed until Friday next.

SATURDAY, *May* 21, 1796.

A letter, signed William Cocke, purporting that he is appointed a Senator for the State of Tennessee, and claiming a seat in the Senate, was presented and read.

Ordered, That it lie on the table.

MONDAY, *May* 23, 1796.

A letter, signed William Blount and William Cocke, was read, stating that they have been duly and legally elected Senators to represent the State of Tennessee in the Senate.

On motion,

"That Mr. Blount and Mr. Cocke, who claim to be Senators of the United States, be received as spectators, and that chairs be provided for that purpose until the final decision of the Senate shall be given on the bill proposing to admit the Southwestern Territory into the Union,"

A motion was made to refer the consideration thereof to a committee; and it passed in the negative.

On motion to agree to the original motion, it passed in the affirmative—yeas 12, nays 11; as follows:

YEAS—Messrs. Bloodworth, Brown, Burr, Butler, Foster, Henry, Langdon, Martin, Potts, Robinson, Tattnall, and Tazewell.

NAYS—Messrs. Bingham, Bradford, Gunn, Latimer, Livermore, Marshall, Read, Ross, Rutherfurd, Strong, and Trumbull.

WEDNESDAY, *June* 1, 1796.

On motion by Mr. Martin that it be

"*Resolved*, That the Hon. William Blount and William Cocke, esquires, who have produced credentials of being duly elected Senators for the State of Tennessee, be admitted to take the oath necessary for their qualification, and their seats accordingly,"

Ordered, That a paper, purporting to be the credentials of Mr Blount and Mr. Cocke, be read.

And, on the question to agree to the resolution, it passed in the negative—yeas 10, nays 11; as follows:

YEAS—Messrs. Bloodworth, Brown, Burr, Butler, Gunn, Langdon, Martin, Robinson, Tattnall, and Tazewell.

NAYS—Messrs. Bingham, Bradford, Foster, Latimer, Livermore, Marshall, Potts, Read, Ross, Rutherfurd, and Trumbull.

[Eleventh Congress—First session.]

STANLEY GRISWOLD,

Senator from Ohio from June 2 to December 11, 1809.

Stanley Griswold had resided in Ohio from September, 1808, till May 18, 1809, when he was appointed by the governor of that State to fill a vacancy in the United States Senate. It was determined that the term of residence or other qualifications necessary to entitle a person to become an inhabitant of the State not being defined either by the constitution or laws of the State, the certificate of the governor that a person was a citizen thereof was sufficient for the Senate to proceed upon, he being otherwise entitled thereto.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 11th Cong., 1st and 2d sess., vol. 1, 1809–'10, within pages 23-37; together with the report of the committee in the case, copied from the original on file in the office of the Secretary of the Senate.

FRIDAY, *June* 2, 1809.

Stanley Griswold, appointed a Senator by the executive of the State of Ohio to fill the vacancy occasioned by the resignation of Edward Tiffin, was qualified and took his seat.

FRIDAY, *June* 9, 1809.

Resolved, That a committee of elections be appointed.

Ordered, That Messrs. Hillhouse, Giles, Crawford, Franklin, and Robinson be the committee.

On motion by Mr. Hillhouse,

Ordered, That the credentials of Stanley Griswold, appointed a Senator by the executive of the State of Ohio, be referred to this committee.

THURSDAY, *June* 15, 1809.

Mr. Hillhouse, from the Committee of Elections, to whom were referred the credentials of Stanley Griswold, esq., appointed a Senator of the United States by the executive of the State of Ohio, made report.

Whereupon,

Resolved, That Stanley Griswold, appointed by the governor of the State of Ohio as a Senator of the United States, to fill the vacancy occasioned by the resignation of Edward Tiffin, is entitled to his seat.

REPORT OF COMMITTEE.

Mr. Hillhouse, from the Committee of Elections, to whom was referred the credentials of an appointment by the governor of the State of Ohio of Stanley Griswold as a Senator of the United States, having had the same under consideration, reported:

That Edward Tiffin, a Senator for the State of Ohio, resigned his seat since the last session of the legislature of said State, and during their recess. That on the 18th day of May last, and during said recess of said legislature, said Stanley Griswold was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid. That said Stanley Griswold, being a citizen of the United States, removed into the said State of Ohio and has there resided since September last, but the term of residence or other qualifications necessary to entitle a person to become an inhabitant of said State are not, so far as the committee have been able to discover, defined either by the constitution or laws of said State; but the executive who made the appointment having certified that said Stanley Griswold is a citizen of said State, the committee submit the following resolution.

[Resolution given above.]

[Thirteenth Congress—Third session.]

JESSE BLEDSOE,

Senator from Kentucky from March 4, 1813, *to December* 24, 1814.

January 20, 1815, Mr. Bledsoe addressed a letter to the President of the Senate setting forth these facts: That previous to the 24th of the December preceding he had forwarded his resignation to the governor of the State to take place on that day, to be by the governor communicated to the legislature; that he had been advised by letter that the governor had received the resignation and would hold it up in the hope of hearing from him of a change in his determination on the subject, until about the last of that month, when he (the governor) would communicate it to the legislature; that newspaper information stated that the governor had done so, and that his successor had been appointed, which latter fact he had been informed was also stated in a letter to a gentleman of the House of Representatives; that he had received no more information. Mr. Bledsoe desired to know whether, under these circumstances, he was to be considered still a member of the Senate. It was determined that the facts stated in the letter to the President of the Senate vacated Mr. Bledsoe's seat, the grounds on which the Senate proceeded not being given. It appears from the Journals of the Senate that Isham Talbot produced credentials of election to fill Mr. Bledsoe's unexpired term February 2, 1815, and took his seat on the same day.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 13th Cong., 1814–'15, vol. 3, pages 175, 176.

FRIDAY, *January* 20, 1815.

The President laid before the Senate a letter from the Hon. Mr. Bledsoe, as follows:

WASHINGTON, *January* 20, 1815.

SIR: Doubts having arisen whether I have a right still to fill my seat in the Senate of the United States, with a view to have the question settled and a precedent established, and to save my own feelings on a point of duty, I beg leave, through you, to submit the following case for the decision of that honorable body:

Previous to the 24th December last I forwarded by mail my resignation to the governor of the State of Kentucky, to take place on that day, to be by him communicated to the legislature of that State then and, so far as I am informed, still in session. I was by a letter from the governor of that State advised that he had received my resignation and would hold it up, in the hope of hearing from me and of a change in my determination on that subject, until about the last of that month, when he would communicate it to the legislature. Newspaper information states that he did so, and that my successor has been appointed, which latter fact is also stated in a letter to a gentleman of the House of Representatives, as I have been informed. This is all the information I have received. Whether, under these circumstances, I am to be considered as still a member will be for the honorable Senate to decide. Wishing it to be understood I have no other solicitude as to the result than to be informed of my duty, which is concerned in continuing in my place if I have a right to do so,

I am, with high respect, your most obedient servant,

J. BLEDSOE.

The Hon. JOHN GAILLARD,
President of the Senate.

And the letter was read.

Whereupon

Mr. Roberts submitted the following motion:

"*Resolved*, That the facts stated in the letter of the Hon. Jesse Bledsoe addressed to the President of the Senate do not vacate his seat in the Senate."

A motion was made by Mr. King to amend the resolution by striking out therefrom the word "not;" and it was determined in the affirmative—yeas 25, nays 8; as follows:

YEAS—Messrs. Anderson, Barbour, Brown, Chace, Daggett, Fromentin, Gaillard, German, Giles, Goldsborough, Gore, Horsey, Howell, Hunter, Kerr, King, Lambert, Mason, Morrow, Robinson, Tait, Taylor, Thompson, Wells, and Wharton.

NAYS—Messrs. Bibb, Condit, Dana, Lacock, Roberts, Smith, Turner, and Varnum.

On the question, Shall the resolution pass as amended? it was determined in the affirmative—yeas 27, nays 6; as follows:

YEAS—Messrs. Anderson, Barbour, Brown, Chace, Daggett, Fromentin, Gaillard, German, Giles, Goldsborough, Gore, Horsey, Howell, Hunter, Kerr, King, Lacock, Lambert, Mason, Morrow, Robinson, Tait, Taylor, Thompson, Turner, Wells, and Wharton.

NAYS—Messrs. Bibb, Condit, Dana, Roberts, Smith, and Varnum.

So it was

Resolved, That the facts stated in the letter of the Hon. Jesse Bledsoe addressed to the President of the Senate do vacate his seat in the Senate.

[Twentieth Congress—First session.]

EPHRAIM BATEMAN,

Senator from New Jersey from December 7, 1826, till January 12, 1829, when he resigned.

Mr. Bateman's first term expired March 3, 1827. February 26, 1827, his credentials of election for the succeeding term were presented to the Senate. February 28, 1827, a remonstrance of a number of members of the general assembly of the State against the legality of the election was communicated to the Senate and ordered to lie on the table. December 3, 1827, Mr. Bateman took his seat. May 6, 1828, the remonstrance was referred to a select committee of five. It was to the effect that the election ought to be declared null and void for the reason that Mr. Bateman, being chairman of the joint meeting of the two houses of the legislature, had voted for himself. It stated that Theodore Frelinghuysen had 28 votes and Mr. Bateman 29, and claimed that Mr. Bateman was elected "by *his own* vote, without which he neither could nor would have been elected," and that it was "repugnant to the fundamental principles of our free institutions that the same man, at the same time, should be both *candidate* and *elector*." May 22, the committee reported the facts in regard to the election to be as stated in the remonstrance. On a preliminary point discussed, it reported that the Senate was "empowered by the Constitution to judge of the *elections, returns*, and qualifications of its members, and could not therefore be precluded by the commission emanating from the executive of a State from any inquiry which is necessary to the exercise of that judgment." On the chief point before the committee it reported that Mr. Bateman "was a member of the legislature of New Jersey, duly elected, and competent to the exercise of every legislative power not forbidden by its laws, among which the right to vote in the election of a Senator was one." The committee recommended the adoption of a resolution discharging the committee from the further consideration of the subject, which was agreed to.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journals, 2d sess. 19th Cong., 1826–'27, and 1st sess. 20th Cong., 1827–'28, with the report of the committee from Senate Documents, 1st sess. 20th Cong., vol 5, Doc. No. 202, pages 1–3.

The documents relating to the case which were printed are found in the volume of Senate Documents above referred to, Doc. No. 202, pages 4–21. It appears from Niles' Register, vol. 34, page 223, that some debate on the subject occurred, in which Messrs. Bateman, Van Buren, and Noble took part; but it is not there reported, nor is it found in the Congressional Debates.

MONDAY, *February* 26, 1827.

Mr. Dickerson communicated the credentials of the Hon. Ephraim Bateman, appointed a Senator by the legislature of the State of New Jersey for the term of six years, to commence on the 4th day of March next.

WEDNESDAY, *February* 28, 1827.

The Vice-President communicated a letter from Samuel J. Bayard, James S. Green, and John R. Thompson, inclosing the remonstrances of a number of the members of the legislative council and general assembly of New Jersey and of a number of citizens of that State against the legality of the election by the legislature of Ephraim Bateman to the Senate of the United States from the 3d of March next; and

Ordered, That it lie on the table.

MONDAY, *December* 3, 1827.

The Hon. Ephraim Bateman, appointed a Senator by the legislature of the State of New Jersey for the term of six years commencing on the 4th day of March last, attended, and the oath prescribed by law was administered to him and he took his seat in the Senate.

TUESDAY, *May* 6, 1828.

On motion by Mr. Eaton,

Resolved, That the remonstrance presented to the Senate at the last session against the legality of the election by the legislature of New Jersey of Ephraim Bateman to the Senate of the United States be referred to a select committee, to consist of five members, to consider and report thereon.

Ordered, That Mr. Berrien, Mr. Tazewell, Mr. McLane, Mr. Seymore, and Mr. Sanford be the committee.

Mr. Bateman presented his answer to the remonstrance against his election; and

Ordered, That it be referred to the last-mentioned committee.

Mr. Eaton laid on the table two papers relating to the subject of said remonstrance; and

Ordered, That they be referred to the last-mentioned committee.

THURSDAY, *May* 22, 1828.

Mr. Berrien, from the select committee to whom was referred the memorial of sundry citizens of New Jersey touching the election of Ephraim Bateman, a Senator from that State, made a report, accompanied by a request to be discharged from the further consideration of the subject; and the committee was discharged accordingly.

On motion by Mr. Eaton,

Ordered, That the report and the documents connected with it be printed.

REPORT OF COMMITTEE.

IN SENATE OF THE UNITED STATES.

MAY 22, 1828.

Mr. Berrien made the following report:

The select committee to whom was referred the memorial of sundry citizens of New Jersey touching the election of Ephraim Bateman, a Senator from that State, report:

That, by a reference to the proceedings of the legislature of New Jersey, assembled in joint meeting on the 9th November, 1826, of which a duly certified copy has been exhibited by the memorialists, it appears that an election for a Senator, to represent the said State of New Jersey in the Congress of the United States for six years from the 4th day of March then next ensuing, was on that day held; that Theodore Frelinghuysen, Ephraim Bateman, Thomas Chapman, and George K. Drake were put in nomination for the said appointment; that Ephraim Bateman was at that time a member of the said legislature of New Jersey, vice-president of the council and chairman of the joint meeting; that the names of Thomas Chapman and George K. Drake were with leave respectively withdrawn; that the said Ephraim Bateman thereafter withdrew from the chair of the joint meeting, and at his instance William B. Ewing, esq., was called to the same; and, on motion, the same was confirmed by the joint meeting; that, after some discussion as to the manner of proceeding, the said Ephraim Bateman returned to the assembly room and resumed the chair; that the secretary was thereupon directed to call the joint meeting, which being done, the members voting *viva voce*, it appeared that there were for Theodore Frelinghuysen 28 votes and for Ephraim Bateman 29 votes, and that the said Ephraim Bateman voted for himself, and was accordingly declared to be duly appointed.

It moreover appears to the committee that in virtue of such election, and the commission of the governor of New Jersey founded thereon, the said Ephraim Bateman now holds his seat in the Senate of the United States.

The memorialists object to the validity of this election, because the said Ephraim Bateman, being a member of the legislative council, vice-president of the State, and chairman of the joint meeting of the two houses of the legislature, permitted himself to be nominated as a candidate for the office of Senator in Congress of the United States; that he presided as chairman of the joint meeting during the said election; that, before the vote was taken, he made a motion that he should be excused from voting, because he was a candidate, and therefore interested; and, on the question being put on his said motion, voted that he should not be excused, the other members of the joint meeting being equally divided on the same; and that, on the vote for Senator for six years, the joint meeting, without the vote of the said Ephraim Bateman, being again equally divided, he, the said Ephraim Bateman, voted for himself.

The transcript of the proceedings of the legislature of New Jersey, which has been exhibited to the committee, does not show what motions were made and decided before the joint meeting proceeded to the election of a Senator; but it does show that on proceeding to that election, the votes of the joint meeting were for Theodore Frelinghuysen 28 and for Ephraim Bateman 29, and that Ephraim Bateman voted for himself. The question, therefore, which is presented to the consideration of the committee is whether this act invalidates the election.

On the preliminary point which is discussed in the argument forwarded in behalf of the memorialists, as well as in that submitted by the respondent, and which relates to the right of the Senate to look behind the commission granted by the governor, the committee cannot permit themselves to entertain a doubt.

The Senate is empowered by the Constitution to judge of the *elections*, *returns*, and qualifications of its members, and cannot therefore be precluded by the commission emanating from the executive of a State from any inquiry which is necessary to the exercise of that judgment. If this were not so, the governor of a State, by an abuse of his trust, either from misapprehension or design, might assume to himself the appointing power in exclusion of the legislature.

The question whether the election of the respondent is invalidated by the fact that he voted for himself, and that without such vote he had not a majority of the votes of the

joint meeting by which he was declared to be elected, is then forced upon the attention of the committee.

The following clauses of the Constitution of the United States relate to the *manner* of election:

"The Senate of the United States shall be composed of two Senators from each State, who *shall be chosen by the legislature thereof.*"

"The times, places, and *manner* of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The legislature of New Jersey has enacted the following provision:

"Senators of the United States on the part of this State shall be appointed by the council and general assembly, in joint meeting assembled, at the place where the legislature shall then sit."

It is manifest from the aforegoing clauses that Congress may prescribe the *mode* of electing Senators, and that in the absence of any provision by them it is competent to the legislatures of the several States to do so. It seems equally clear that each State must possess the power of defining by its organic law the constituents of its own legislative department, of prescribing the qualifications of its members, and the limitations under which the trust confided to them shall be exercised; and that the interest of a member in any subject of legislative action may be declared to constitute, as to that subject, a ground of disqualification to the exercise of his legislative functions by such interested member. But no such provision exists. For aught that appears to the committee the respondent was a member of the legislature of New Jersey duly elected and competent to the exercise of every legislative power not forbidden by its laws, among which the right to vote in the election of a Senator was one. The committee have not considered the question of the propriety or delicacy of the act complained of by the memorialists as coming within the scope of the reference made to them by the Senate. Nor have they felt themselves at liberty to apply to this question any abstract principles of right or of that system of jurisprudence which, however its principles may have become intermingled with our statutory regulations or its rules of proceeding may be seen to operate in the forms which are in use in our judicial tribunals, has no intrinsic validity in those tribunals or in any other forum in the United States.

Contenting themselves with this brief view of the subject, it appears to the committee that the facts set forth in the memorial referred to them are not sufficient to invalidate the election of Ephraim Bateman as a Senator of the State of New Jersey in the Congress of the United States, under the election had in the joint meeting of the assembly of that State on the 9th day of November, 1826. They therefore recommend the following resolution:

Resolved, That the select committee raised on the remonstrance and petition of sundry citizens of the State of New Jersey be discharged from the further consideration of the same.

[Twenty-third Congress—First session.]

ELISHA R. POTTER vs. ASHER ROBBINS,

of Rhode Island.

February 4 1833, Mr. Knight, of Rhode Island, presented in the Senate the credentials of Asher Robbins, elected a Senator from Rhode Island for the term beginning March 4, 1833, which were read. Mr. Robbins had been elected January 19, 1833; his credentials dated January 28, 1833. December 2, 1833, the first day of the first meeting of Congress in said term, the President of the Senate communicated an act of the State of Rhode Island declaring the election of January 19 void; also credentials of election to the Senate of Elisha R. Potter for the said term. The act had passed in October, 1833. Mr. Potter had been elected November 1, 1833; his credentials dated November 5, 1833. After debate on the question whether Mr. Robbins should be admitted at once to the seat to hold until the Senate should have decided to which of the contestants it belonged, it was determined that Mr. Robbins be admitted to take the oath, which he did December 2, 1833, and the credentials of Mr. Potter were laid on the table. December 5, 1833, the credentials of Mr. Potter were referred to a select committee of five elected by the Senate; and December 9 the credentials of Mr. Robbins were referred to the same committee. Majority and minority reports were made by the committee. The majority reported that the body electing Mr. Robbins was the legislature of Rhode Island; also a resolution "that Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate," which resolution passed in the affirmative May 27, 1834, by a vote of 27 yeas to 16 nays. The minority reported that the choice of Mr. Robbins was not made by the legislature of the State; that the terms of the governor and senators forming part of that body had expired in May, 1832, before the election of Mr. Robbins; that there had been no new election by the people; and that the act passed in January, 1832, by the legislature, providing that in case of a failure at any annual election by the people of the election of a governor, lieutenant-governor, or a quorum of the Senate, such of those officers who should then be incumbents should continue in office until their successors should be duly qualified, under which act the governor and senators referred to were holding office at the time of the election, was in violation of the charter granted to the State in 1633, and was null and void; and report that Mr. Potter was duly elected.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 1st sess. 23d Cong., 1833–34; the majority report (Report No. 139, Senate Documents, 1st sess. 23d Cong., vol. 2, 1833–'34); and the minority report (Report No. 246, Senate Documents, 1st sess. 23d Cong., vol. 3, 1833–'34), with the exception of certain accompanying documents, which may be found in the volume of Senate Documents containing the report.

The debate on the *prima facie* right of Mr. Robbins to the seat is found in Congressional Debates, vol. 10, part 1, 1833–'34, pages 2–11. A debate on the right of the minority to make report, and on the question whether a minority report should be responsive to the majority report, is found in the same volume, pages 804–807, 1229, 1230, 1252–1257. Special references to the other debates are inserted below. The vote on agreeing to the resolution reported by the committee was taken without debate.

The references here given are all either to the Senate Journal or to the Congressional Debates (Gales & Seaton). The case is also reported in the Congressional Globe and the Register of Debates (Green).

MONDAY, *February* 4, 1833.

Mr. Knight communicated the credentials of the Hon. Asher Robbins, appointed a Senator by the legislature of the State of Rhode Island and Providence Plantations for the term of six years, to commence on the 4th day of March next; which were read.

MONDAY, *December* 2, 1833.

The President communicated an act of the general assembly of the State of Rhode Island and Providence Plantations, declaring void the election by the general assembly of that State, on the 19th of January last, of Asher Robbins to the office of Senator to represent that State in the Senate of the United States for the term of six years from the 3d day of March last; and the certificate of the governor and secretary of that State of the election, by the said general assembly, of Elisha R. Potter to the same office; which act and certificate were read; and,

On motion by Mr. Poindexter,

Ordered, That they be laid on the table.

On motion by Mr. Poindexter that the oath prescribed by law be now administered to Mr. Robbins, whose credentials were received at the last session,

A motion was made by Mr. Benton that said motion be referred to a select committee to consider and report thereon.

It was determined in the negative—yeas 15, nays 19.

[A reference to the debate that took place on the two last motions is given in the head-note, it being pages 2–11 of the references.]

On motion by Mr. Benton, the yeas and nays being desired by one-fifth of the members present,

Those who voted in the affirmative are Messrs. Benton, Brown, Grundy, Hill, Kane, King of Alabama, Morris, Rives, Robinson, Shepley, Tallmadge, Tipton, White, Wilkins, and Wright.

Those who voted in the negative are Messrs. Bell, Bibb, Chambers, Clay, Ewing, Frelinghuysen, Hendricks, Kent, Knight, Mangum, Moore, Naudain, Poindexter, Prentiss, Silsbee, Smith, Swift, Tomlinson, and Tyler.

The question recurring on the motion by Mr. Poindexter, "that the oath prescribed by law be administered to Mr. Robbins," it was determined in the affirmative; and the oath was accordingly administered to Mr. Robbins and he took his seat in the Senate

WEDNESDAY, *December* 4, 1833.

On motion by Mr. Wright that the proceedings of the legislature of the State of Rhode Island, now upon the table of the Senate, showing the appointment of Elisha R. Potter as a Senator to represent that State in the Senate of the United States, be referred to a select committee of five members, to inquire and report upon the claim of the said Elisha R. Potter to the seat in the Senate now occupied by the Hon. Asher Robbins; and,

On motion by Mr. Clay,

Ordered, That the said motion be laid on the table.

[On Mr. Wright's motion was a brief debate on the method of appointment of select committees, which is found on pages 13, 14 of the volume of Congressional Debates above referred to.]

THURSDAY, *December* 5, 1833.

On motion of Mr. Wright the Senate resumed the consideration of the motion submitted by him yesterday, to refer to a select committee the claim of Elisha R. Potter to a seat in the Senate; and it was amended and agreed to, as follows:

"*Resolved*, That the proceedings of the legislature of the State of Rhode Island, now upon the table of the Senate, showing the appointment of Elisha R. Potter as a Senator to represent that State in the Senate of the United States, be referred to a select committee, *to be elected by the Senate*, to inquire and report upon the claim of the said Elisha R. Potter to the seat in the Senate now occupied by the Hon. Asher Robbins."

Ordered, That Mr. Poindexter, Mr. Rives, Mr. Frelinghuysen, Mr. Wright, and Mr. Sprague be the committee.

[Some remarks made on this motion of Mr. Wright are found on page 19 of the volume of Congressional Debates above referred to.]

MONDAY, *December* 9, 1833.

On motion by Mr. Poindexter,

Ordered, That the credentials of Mr. Robbins be referred to the select committee appointed on the claim of Elisha R. Potter to a seat in the Senate.

TUESDAY, *March* 4, 1834.

Mr. Poindexter, from the select committee to whom had been referred the credentials of Asher Robbins, appointed a Senator in Congress from the State of Rhode Island for the term of six years, to commence on the 4th day of March, 1833, and the proceedings of the legislature of said State, convened on the last Monday of October, 1833, declaring void the appointment of said Robbins, and the appointment of Elisha R. Potter for the said term, made a report,* accompanied by the following resolution:

"*Resolved*, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate."

[Here followed a debate on the right of the minority of the committee to submit a report, a reference to which is given in the head-note, it being pages 804–807 of the references.]

TUESDAY, *April* 1, 1834.

On motion by Mr. Wright that he have leave to present to the Senate a paper containing the views and opinions of the minority of the select committee to whom had been referred the appointments of Asher Robbins and Elisha R. Potter, by the State of Rhode Island, to the Senate of the United States.

[A reference to the debate on this motion is given in the head-note, it being pages 1229, 1230 of the references.]

On motion by Mr. Ewing,

Ordered, That it be laid on the table.

FRIDAY, *April* 4, 1834.

On motion by Mr. Wright, the Senate resumed the consideration of his motion to present to the Senate a paper containing the views and opinions of the minority of the select committee to whom had been referred the appointments of Asher Robbins and Elisha R. Potter by the legislature of Rhode Island to the Senate of the United States; and,

*Found on page 102.

On motion of Mr. Forsyth,

Ordered, That it be laid on the table, and that the said paper, with the documents herein referred to, except those marked G, H, and I, be printed.

[A reference to the debate following Mr. Wright's motion is given in the head-note, it being pages 1252–1257 of the references.]

[The consideration of the report was successively postponed April 10, May 8, May 12, and May 19.]

TUESDAY, *May* 27, 1834.

The Senate resumed the consideration of the report of the select committee on the respective claims of Messrs. Robbins and Potter to a seat in the Senate; and, on the question to concur in the resolution with which it concludes, as follows:

"*Resolved*, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate,"

It was determined in the affirmative—yeas 27, nays 16.

On motion of Mr. Wright, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs Bell, Bibb, Calhoun, Chambers, Clay, Clayton, Ewing, Frelinghuysen, Hendricks, Kent, Knight, Leigh, McKean, Mangum, Naudain, Poindexter, Porter, Preston, Silsbee, Smith, Southard, Sprague, Swift, Tipton, Tomlinson, Waggaman, and Webster.

Those who voted in the negative are Messrs. Benton, Brown, Forsyth, Grundy, Hill, Kane, King of Alabama, King of Georgia, Linn, Morris, Robinson, Shepley, Tallmadge, White, Wilkins, and Wright.

[Some remarks on the question of proceeding to a vote without debate are found in the Congressional Debates, vol. 10, part 2, 1833–'34, page 1813.]

COMPENSATION OF MR. POTTER.

THURSDAY, *June* 5, 1834.

The following motion, submitted by Mr. Wright, was considered and agreed to:

"*Resolved*, That the Committee on Finance be instructed to inquire into the justice and expediency of providing by law for the pay and mileage of the Hon. Elisha R. Potter from the commencement of the present session of Congress up to the time of the final decision of the contest for a seat in the Senate between the said Potter and the Hon. Asher Robbins, at the rate of pay allowed to the members of the Senate."

TUESDAY, *June* 10, 1834.

On motion of Mr. Webster,

Ordered, That the Committee on Finance be discharged from the consideration of the resolution relating to the claim of Elisha R. Potter for mileage and compensation.

FRIDAY, *June* 12, 1834.

The following motion submitted by Mr. Wright was considered:

"Whereas the Hon. Elisha R. Potter did at the commencement of the present session of Congress cause to be laid before the Senate a commission from the governor of the State of Rhode Island, duly authenticated, and constituting the regular *prima facie* evidence to entitle him to a seat in the Senate; and

"Whereas the contest for the seat claimed by Mr. Potter was not finally decided by the Senate until the 27th day of May now last past, when the said seat was awarded to the Hon. Asher Robbins: Therefore,

"*Resolved*, That the said Elisha R. Potter is entitled to the compensation of mileage allowed by law to members of Congress for his travel from his place of residence, in the State of Rhode Island, to the capital, and returning; and also to the per diem allowance of a member of Congress for the time he actually attended at the city of Washington during the contest pending before the Senate in relation to the seat claimed by him and occupied by the Hon. Mr. Robbins."

On motion of Mr. Wright,

Ordered, That it be postponed until to-morrow.

MONDAY, *June* 16, 1834.

The Senate resumed the consideration of the motion submitted by Mr. Wright on the 12th instant, to compensate Elisha R. Potter for mileage and per diem to the 27th ultimo, and

Ordered, That it be referred to the Committee on the Judiciary.

[Some remarks on the resolution are found in part 2 of the Congressional Debates already referred to, page 2021.]

THURSDAY, *June* 19, 1834.

On motion of Mr. Clayton,

Ordered, That the Committee on the Judiciary be discharged from the consideration of the resolution to compensate Elisha R. Potter for mileage and attendance to the 27th ultimo.

The Senate then proceeded to consider said resolution, and it was amended to read as follows:

"Whereas the Hon. Elisha R. Potter did at the commencement of the present session of Congress cause to be laid before the Senate *credentials authenticated by the governor of the State of Rhode Island declaring the election of Asher Robbins void, and that said Potter had been elected by the legislature a Senator from the State of Rhode Island;* and

"Whereas the contest for the seat claimed by Mr. Potter was not finally decided by the Senate until the 27th day of May now last past, when the said seat was awarded to the Hon. Asher Robbins: Therefore,

"*Resolved*, That the said Elisha R. Potter *ought, under the circumstances of the case, to be paid* the compensation of mileage allowed by law to members of Congress for his travel from his place of residence in the State of Rhode Island to the Capitol, and returning; and also the per diem allowance of a member of Congress for the time he actually attended at the city of Washington during the contest pending before the Senate in relation to the seat claimed by him, and occupied by the Hon. Mr. Robbins; *and that the Judiciary Committee be instructed to prepare a bill or resolution for that purpose.*"

On the question to agree to the resolution as amended, it was determined in the affirmative—yeas 24, nays 22.

On motion by Mr. Wright, the yeas and nays being desired by one-fifth of the members present,

Those who voted in the affirmative are Messrs. Benton, Bibb, Brown, Chambers, Grundy, Hendricks, Hill, Kane, King of Alabama, Knight, Linn, McKean, Moore, Morris, Preston, Robinson, Shepley, Silsbee, Tallmadge, Tyler, Waggaman, White, Wilkins, and Wright.

Those who voted in the negative are Messrs. Bell, Black, Clay, Clayton, Ewing, Forsyth, Frelinghuysen, Kent, King of Georgia, Leigh, Mangum, Naudain, Poindexter, Porter, Prentiss, Smith, Southard, Sprague, Swift, Tipton, Tomlinson, and Webster.

[Some remarks on the resolution are found in part 2 of the Congressional Debates already referred to, pages 2037, 2038.]

MONDAY, *June* 23, 1834.

[The Senate having under consideration the bill entitled "An act making appropriations for the civil and diplomatic expenses of Government for the year 1834."]

Pursuant to instruction of a majority of the Committee on the Judiciary,

Mr. Clayton moved further to amend the bill by inserting the following section:

"SEC. 4. *And be it further enacted*, That the Secretary of the Senate be, and he hereby is, directed to pay, out of the fund appropriated by law for the pay of members of Congress, to Elisha R. Potter, of the State of Rhode Island, such compensation as is allowed by law to members of Congress, for his travel from his place of residence to the city of Washington to claim a seat in the Senate, and for his return; and also the per diem compensation for the days he was in actual attendance at the seat of Government from the commencement of the present session of Congress until the final decision of the Senate against his right to the seat claimed by him."

It was determined in the affirmative—yeas 20, nays 19.

On motion of Mr. Clayton, the yeas and nays being desired by one-fifth of the members present,

Those who voted in the affirmative are Messrs. Benton, Bibb, Brown, Chambers, Grundy, Hendricks, Hill, Kane, King of Alabama, Knight, Linn, Preston, Robinson, Shepley, Silsbee, Tallmadge, Tyler, White, Wilkins, and Wright.

Those who voted in the negative are Messrs. Black, Clay, Clayton, Ewing, Forsyth, Frelinghuysen, Kent, King of Georgia, Leigh, Mangum, Naudain, Poindexter, Porter, Prentiss, Smith, Southard, Sprague, Tomlinson, and Webster.

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MARCH 4, 1834.—Ordered to be printed.

Mr. Poindexter made the following report:

The select committee to which was referred the credentials of Asher Robbins, chosen a Senator in Congress from the State of Rhode Island for the term of six years, to commence on the 4th day of March, 1833; and also the proceedings of the legislature of

said State, convened on the last Monday of October, 1833, declaring the election of the said Asher Robbins void, who thereupon proceeded to elect Elisha R. Potter a Senator in Congress for six years, to commence on the 4th day of March, 1833, instead of said Asher Robbins, whose election to fill said office had been declared void as aforesaid, have had the whole subject so referred to them under their serious and attentive consideration, and submit the following report:

That it appears by the credentials of Asher Robbins and the proceedings of the general assembly of the State of Rhode Island hereto appended, and marked A, that the senate and house of representatives of said State, then sitting in the city of Providence, met in grand committee in conformity to the usage of the legislature in such cases, for the purpose of choosing a Senator to represent said State in the Congress of the United States; and that, on counting the ballots, it appeared that Mr. Robbins was elected by a majority of four votes, who was thereupon declared to be duly elected a Senator to represent said State in the Congress of the United States for six years from and after the 4th day of March then next following; that, having performed the duty for which the two houses had met, the grand committee was dissolved, and the members of each house repaired to their respective chambers. It further appears to your committee that on the 28th day of the same month of January his excellency Lemuel H. Arnold, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Asher Robbins as aforesaid, and caused the said commission, signed and sealed as aforesaid, to be delivered to the said Asher Robbins, which was presented to the Senate of the United States in open session on the 4th day of February, 1833, and on motion read and entered on the journals of the Senate. By virtue of the force and effect of the aforesaid commission, the said Asher Robbins, Senator-elect from the State of Rhode Island, appeared in the Senate Chamber on the 2d day of December, 1833, was duly sworn to support the Constitution of the United States, and took his seat as a member of the Senate.

It further appears to your committee that at a subsequent session of the general assembly of Rhode Island, begun and held at the town of South Kingston in said State, on the last Monday of October, 1833, certain proceedings were had relative to the election of the said Asher Robbins as above mentioned, which resulted in the adoption of a declaration or act of the said general assembly, by which the election of Mr. Robbins is declared to be "null and void and of no effect," and the office vacated. Whereupon, at the same session of the general assembly the two houses met in grand committee on the 1st day of November, 1833, and proceeded to elect a Senator to represent the State of Rhode Island in the Congress of the United States for the term of six years, commencing on the 4th day of March preceding, to supply the vacancy created, or supposed to be created, by the act declaring the election of Mr. Robbins null and void; and the majority appearing to be in favor of Elisha R. Potter, the said Potter was thereupon declared to be duly elected a Senator in Congress from the said State for the term aforesaid, when the grand committee was dissolved and the members repaired to their respective chambers. That on the 5th day of the same month of November his excellency John Brown Francis, governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Elisha R. Potter as aforesaid, and cause the said commission, signed and sealed as aforesaid, to be delivered to the said Elisha R. Potter, which was presented to the Senate on the 2d day of December last, and on the 5th day of the same month referred to this committee. The documents relating to those proceedings are subjoined and marked B. This statement of the case is deemed sufficient to show the questions which arise for the consideration of your committee, and which they now proceed to examine:

1. Was the commission of Asher Robbins made and executed in conformity with the provisions of the Constitution of the United States, and the laws and usages of Rhode Island prescribing the time, place, and manner of choosing Senators to Congress?

2. Was Mr. Robbins, at the time of his election, eligible, according to the Constitution of the United States, to the office of Senator?

3 Was he chosen by the *legislature* of the State of Rhode Island?

If these questions be answered affirmatively it will be unnecessary to inquire into the validity of the subsequent election of Mr. Potter, or into the power of the legislature to create a vacancy by annulling the act of their predecessors; and therefore your committee limit the views which they deem it proper to take of the subject referred to them to the objections made to the commission of Mr. Robbins on the ground that the legislature by whom he was chosen had no power to elect a Senator to Congress, and that the governor who signed and sealed his commission was not at the time competent to exercise any power or perform any duty in his official character. These objections rest on the same general principle; and if they are supported by the facts disclosed in the case, connected with the constitution and laws of the State, it will *then* be proper to examine the claims of Mr. Potter to a seat in the Senate, and not otherwise.

The Constitution of the United States provides that "each house shall be the judge of the elections, returns, and qualifications of its own members." (Article 1, section 5.)

The members of the House of Representatives are to be chosen by the people of the several States having the qualifications requisite for electors of the most numerous branch of the State legislature. The members of the Senate are to be chosen by the legislatures of each State, and the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. Congress having passed no law on the subject, we must look into the statutes of the several States for those regulations and conform our action to them. The Senators from each State are equal in number, and cannot be increased or diminished even by an amendment of the Constitution without the consent of the States respectively. They are chosen by the States as political sovereignties, without regard to their representative population, and form the Federal branch of the National Legislature. The same body of men which possesses the powers of legislation in each State is alone competent to appoint Senators to Congress for the term prescribed in the Constitution. In the performance of this duty the State acts in its highest sovereign capacity, and the causes which would render the election of a Senator void must be such as would destroy the validity of all laws enacted by the body by which the Senator was chosen. Other causes might exist to render the election *voidable*, and these are enumerated in the Constitution, beyond which the Senate cannot interpose its authority to disturb or control the sovereign powers of the States vested in their legislatures by the Constitution of the United States. We might inquire, was the person elected thirty years of age at the time of his election? Had he been nine years a citizen of the United States? Was he at the time of his election a citizen of the State for which he shall have been chosen? Was the election held at the time and place directed by the laws of the State? These are facts capable of clear demonstration by proofs, and in the absence of the requisite qualifications in either of the specified cases, or if the existing laws of the State regulating the time and place for holding the election were violated, the Senate, acting under the power to judge of "the elections, returns, and qualifications of its own members," might adjudge the commission of the person elected void, although in all other respects it was legal and constitutional. But where the sovereign will of the State is made known through its legislature, and consummated by its proper official functionaries in due form, it would be a dangerous exertion of power to look behind the commission for defects in the component parts of the legislature, or into the peculiar organization of the body for reasons to justify the Senate in declaring its acts absolutely null and void. Such a power, if carried to its legitimate extent, would subject the entire scope of State legislation to be overruled by our decision, and even the right of suffrage of individual members of the legislature whose elections were contested might be set aside. It would also lead to investigations into the motives of members in casting their votes, for the purpose of establishing a charge of bribery or corruption in particular cases. These matters, your committee think, properly belong to the tribunals of the State, and cannot constitute the basis on which the Senate could, without an infringement of State sovereignty, claim the right to declare the election of a Senator void who possessed the requisite qualifications and was chosen according to the forms of law and the Constitution.

These general views are offered to show that contested elections in the popular branch of Congress, where the people exert in their primary capacity the right of suffrage under various limitations and restrictions in the choice of Representatives from certain prescribed districts, open a much wider field of inquiry and investigation than a like contest for a seat in the Senate, which is a body wholly federative in its character and organization and whose members hold their appointments from and represent the States as political sovereignties. Your committee having regard to these rules as applicable to all contested elections in the Senate, proceed to apply them to the case now under consideration.

It is admitted that the sitting member, Asher Robbins, possesses all the qualifications required by the Constitution of the United States to be a Senator in Congress, and that his commission as such is in due form according to the laws and usages of Rhode Island. These points being conceded, the remaining and the only question to be decided is, was the body by which he was chosen a Senator the *legislature* of Rhode Island? or was it merely an assemblage of citizens without authority to pass laws prescribing that which is right and prohibiting that which is wrong to the people of the State? On this ground both parties seem content to rest their claims to a seat in the Senate.

The general assembly of Rhode Island, as at present organized, consists of two separate and distinct branches: The senate, over which body the governor presides, and the house of representatives—each chosen by the people of the State who are freemen or freeholders and entitled to vote at elections. The governor and senate are elected annually; the members of the house of representatives, semi-annually. To constitute a

legislature capable of enacting laws or performing any other duty confided to that body by the constitution of the State or of the United States it is essential that there should be in existence at the same time a governor or some officer authorized to perform the executive functions, a senate, and a house of representatives. In the absence of either the other branches could not perform any act which would be obligatory on the people of the State. We are then brought to the inquiry whether these component parts of the legislature of Rhode Island were assembled at Providence in January, 1833, when Mr. Robbins was elected in grand committee a Senator to Congress? It is alleged on the one hand that the governor and senate had ceased to exist in the month of May, 1832, by the expiration of the term of one year for which they had been elected and the failure of the people to elect their successors by a majority of all the votes given in, according to the constitution and laws of the State. On the other, it is maintained that the powers of the governor and senate were by law extended until their successors should be duly chosen and engaged, for which purpose special elections were ordered and held, but without success, prior to the time at which Mr. Robbins was elected. For the purpose of forming a correct judgment of this anomaly in the constitution of the State it is necessary to recur to the ancient charter of Charles II, of England, granted to the colony of Rhode Island and Providence Plantations in 1663, which has not been superseded by a written constitution since the Revolution, and to the various laws which have been enacted modifying the provisions of that charter in such manner as to adapt it to the condition and convenience of the people of the State. By the charter certain political powers, rights, and privileges are granted to the inhabitants of the colony, among which are the following:

"And further, we will and ordain, and by these presents, for us, our heirs and successors, do declare and appoint that, for the better ordering and managing of the affairs of the said company and their successors, there shall be one governor, one deputy governor, and ten assistants, to be from time to time constituted, elected, and chosen, out of the freemen of the said company for the time being, in such manner and form as is hereafter in these presents expressed; which said officers shall apply themselves to take care for the best disposing and ordering of the general business and affairs of and concerning the lands and hereditaments hereinafter mentioned to be granted, and the plantation thereof, and the government of the people there."—*Charter of R. I.*, page 6, *Digest* 1822.

"And that forever hereafter, twice in every year, that is to say, on every first Wednesday in the month of May, and on every last Wednesday in October, or oftener in case it shall be requisite, the assistants, and such of the freemen of the said company, not exceeding six persons for Newport, four persons for each of the respective towns of Providence, Portsmouth, and Warwick, and two persons for each other place, town, or city, who shall be from time to time thereunto elected or deputed by the major part of the freemen of the respective towns or places for which they shall be so elected or deputed, shall have a general meeting or assembly, then and there to consult, advise, and determine in and about the affairs and business of the said company and plantations. And further, we do, of our especial grace, certain knowledge, and mere motion, give and grant, unto the said governor and company of the English colony of Rhode Island and Providence Plantations in New England, in America, and their successors, that the governor, or, in his absence, and by his permission, the deputy governor of the said company for the time being, the assistants, and such of the freemen of the said company as shall be so as aforesaid elected or deputed, or so many of them as shall be present at such meeting or assembly as aforesaid, shall be called the general assembly; and that they, or the greatest part of them then present, whereof the governor or deputy governor and six of the assistants, at least to be seven, shall have, and hereby have, given and granted unto them full power and authority from time to time, and at all times hereafter, to appoint, alter, and change such days, times, and places of meeting and general assembly as they shall think fit, &c." * * *

"And from time to time to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same, so as such laws, ordinances, and constitutions so made be not contrary and repugnant unto, but as near as may be agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there."—*Digest of* 1822, pages 6, 7, 8 *of Charter.*

"And further, our will and pleasure is, and we do hereby for us, our heirs and successors, establish and ordain that yearly, once in the year forever hereafter, namely, the aforesaid Wednesday in May, and at the town of Newport, or elsewhere, if urgent occasion do require, the governor, deputy governor, and assistants of the said company, and other officers of the said company, or such of them as the general assembly shall think

fit, shall be in the said general court or assembly to be held from that day or time, newly chosen for the year ensuing by such greater part of said company for the time being as shall be then and there present."—*Digest of* 1822, page 9 *of the Charter.*

These extracts from the charter will serve to show the original structure of the government of Rhode Island and Providence Plantations. The charter provides that the governor, deputy governor, and assistants shall be chosen annually on the first Wednesday of May in each and every year by a majority of the company at Newport. The deputies to the general assembly were to be chosen in the several towns for which they were elected semi-annually, and to assemble on the first Wednesday in May and the last Wednesday in October, or oftener, in case it should be requisite, at such place as might be designated by law. The governor, deputy governor, assistants, and deputies, as organized under the charter, formed one body, which is called the general assembly.

The unlimited power granted to this body to repeal or modify the existing regulations for the government of the colony, or to adopt such new regulations as might be deemed expedient for the convenience of the people, has been exercised from time to time before and since the Revolution, when Rhode Island became one of the States of the Union. These modifications have materially changed the provisions of the charter, and established fundamental principles of government inconsistent with those recognized and ordained by the charter, which now remains only the nominal foundation of the legislation of the State. Your committee think it necessary to present a summary of these interpolations on the charter, as they furnish a practical illustration of the powers claimed and exercised in this respect by the general assembly of Rhode Island, the validity of which does not seem to have been at any time questioned:

1. By the last clause of the charter above cited the election of governor, deputy governor, and assistants is required to be made at Newport on the first Wednesday of May in each year by the whole body of the freemen of the company assembled at that place in person. This is the literal requirement of the charter, and was made, we presume, in conformity to analogous customs in England and Wales in the elections for counties and boroughs. The difficulty of convening the freemen from the different towns of the colony at the season indicated, and the expense and inconvenience attending their assemblage at Newport for an uncertain length of time until an election could be effected, very speedily suggested a modification of this requirement. As early as October 26, 1664, a little more than one year after the reception of the charter, after stating the inconveniences attending a personal voting at Newport, the general assembly ordained that "voting by proxces be enjoyed by all the freemen of this collony, and that each freeman desiering to vote by proxy shall subscribe their names on the outside, and deliver his votts sealed up into the hands of a majestrate in the face of a towne metting lawfully called, and notice given for that porpose * * * which sayd votts shall be by such whome the General Assembly shall appoynt, opened and delivered forth as the respective choice of the several votts shall requier; provided that this order shall noe way prejudice or discorradge any who desier to be personally present."—*Ancient Records*, page 256.

This palpable departure from the original provisions of the charter continued to be the law of Rhode Island for nearly a century, viz, until August, 1760, when a different arrangement was substituted, but still more manifestly departing from the literal requirements of that instrument.

2. As stated in our remarks immediately following the passages of the charter above cited, the general assembly of the colony was constituted into one body, consisting of a governor, deputy governor, and ten assistants, and so many deputies elected from the freemen of the several towns as are specifically stated in the second of those quotations. This single body was invested with all the powers, legislative and judicial, which the clauses of the charter enumerate, and acted as a single body, determining its acts by a majority of voices for the three successive years subsequent to its creation by charter. In March 27, 1666, at the suggestion of the towns of Portsmouth and Warwick, an act passed the general assembly "concerning deputies sitting apart." After stating the inconveniences of a single assembly, they enact and declare that "it is freely agreed that the request of the towns aforesaid be granted, and ordered that the magestrates" (governor, deputy governor, and assistants) "sitt by themselves, and the deputies by themselves; and that each house soe sitting have equal power and priviledge in the proposing, composing, and propogatting any act, order, and law in generall assembly, and that nether house in generall assembly shall have power, without the concurrance of the majour part of the other house, to make any law or order to be accounted as an acte of the generall assembly."—*Ancient Records*, page 298.

This law of the assembly of 1666, and not the charter, is the whole basis of the present organization of the legislature of Rhode Island, which consists, as we have before stated, as at present constituted, of two branches—a senate and a house of representatives, each armed with a negative upon the other.

3. The act of August, 1760, is another and remarkable departure from the literal requirements of the charter of King Charles. By the charter itself the whole body of freemen

of the colony were to assemble, in person, at Newport, and to elect, by a major vote of the company, the governor, deputy governor, and assistants. The law of October, 1664, relaxed this provision and substituted a mixed system of voting for these officers, partly in person and partly by proxy. This continued to be in force until the session of the general assembly in August, 1760, when a law was passed entitled "An act regulating the general election." In the preamble to this act it is set forth "that it is found, by long experience, the freemen going to Newport to put in their votes for general officers at the elections is very injurious to the interest and public weal of the colony; * * * and that all the ends of voting may be as fully attained by the freemen's putting in their proxy votes at the town meeting in their own towns, appointed by law for that purpose, agreeable to the ancient and laudable custom of most of the prudent freemen: Therefore,

"*Be it enacted*, That, for the future, every freeman who is disposed to give his suffrage at the election of general officers in this colony shall do it by putting in a proxy vote in the town meeting *in the town* to which he belongs, on the third Wednesday of April next preceding the general election, agreeable to the law and well-known custom of proxing; and no freeman shall be permitted to vote for general officers at the general election held at Newport, on the first Wednesday in May, but only such as be members of the general assembly."

Thus, by this act of the legislature, the whole system of voting laid down by the charter is radically altered. The assembling of the freemen of the colony at Newport on the first Wednesday in May, as the charter prescribes, is entirely abrogated; the mixed method of voting, partly in person and partly by proxies sent to Newport from the other towns of the colony, is also modified; and the whole system is changed to the law as it now stands, with very slight variations, viz, that the freemen, on the third Wednesday of April in each year, in their *several towns*, shall proceed to elect a governor, deputy governor, and assistants, and not in one body assembled in Newport, on the first Wednesday in May.

The law of 1760 was deficient in one important particular, which the act of January, 1832 (the particular act now complained of), was intended to remedy. Formerly, and from the reception of the charter until August, 1760, a failure to elect general officers was a contingency not to be apprehended, because the freemen assembled at Newport would continue assembled and voting until a choice were effected. But by the act of August, 1760, the freemen were to vote *in separate towns*, and the votes thus given having been transmitted to Newport, were counted in the presence of the governor and assistants of the former year, in convention with the deputies then recently elected. If it appeared, on counting, that there was no choice by the major part of the freemen, there was no provision in this act for a second trial for these offices *in the separate towns;* and the body of the freemen not being assembled in Newport, it was impossible to go on in the ancient method and continue to vote till the choice was consummated. If the requirements of the charter, and the usages under it, had been strictly complied with, the body of the freemen would have appeared at Newport, the governor and assistants of the former year would have presided in the election, and the voting would have gone on until an election were completed. The act of August, 1760, having changed this arrangement in the manner above stated, all that the act of January, 1832, did was to follow out its provisions, and to declare that the governor and assistants of the former year should hold over, while other trials were had *in the separate towns*, and until an election of general officers was effected by those trials, exactly as they would have held over if the election had been made by the body of the freemen assembled at Newport. But of the character of this act your committee will speak more particularly hereafter.

4. Your committee will barely advert to two other acts of the legislature of Rhode Island which conflict more or less with the provisions of the charter, but whose validity they believe has never been disputed; such as the act devolving the powers and duties of governor on a person who had never been elected by the freemen to that office, in certain cases; also, the act authorizing the governor, in certain events, to appoint times and places of the meeting of the general assembly, although the charter provides that the assembly itself shall appoint such times and places; both these acts being embodied in "the act to provide for the performance of the duties of the governor in certain cases, and also for regulating the sitting of the general assembly."—*Digest of* 1822, page 99.

One other act of the general assembly deserves notice in this connection, as illustrating in a striking manner the peculiar character of legislation in Rhode Island. The bill of rights, which in all other States emanates from the people in their primary capacity, in this State is incorporated into its code of statutes in the form of an act declaratory of the rights of the people.

The foregoing review of the innovations made from time to time during the existence both of the colonial and State governments of Rhode Island on the provisions of the charter conferring on the people political rights demonstrates the power claimed and exer-

cised by the general assembly to alter or modify, without restraint, the fundamental principles of the form of government transmitted to them by the King of Great Britain. This power has never been denied either in reference to its validity or extent. The right of suffrage has been extended to a class of citizens who did not enjoy it under the charter; the elections directed to be held at Newport on the first Wednesday of May in each year are held throughout the State on such days and at such places as are provided for by law; the manner of holding and conducting elections and of returning the votes is changed; the general assembly is divided into two separate branches, each having a negative on the action of the other, contrary to the charter, by which it is constituted into one body; a bill of rights, which properly belongs to the constitutions of the several States as a part of the fundamental law, has been given to the people of Rhode Island by a simple act of legislation. These, and many other primary principles, are to be found in the code of statute law of that State, while of the ancient charter there seems to be scarcely a vestige remaining untouched, except that clause which prohibits the enactment of any law contrary to the laws of England, and this became obsolete by virtue of the Revolution.

The people of the State have ratified all these changes, not only by their silent acquiescence, but by their positive sanction. The power to make them was necessary to the welfare of the people, and was wisely reserved in the precise words of the charter. Your committee can perceive nothing in the act of January, 1832, entitled "An act in addition to an act entitled 'An act regulating the manner of admitting freemen, and directing the method of electing officers in this State,'" which assumes a power different in its character from that which had been previously recognized as appertaining to the general assembly. The necessity of proper precautions to prevent an *interregnum* in the government of the State was seen and duly considered by the legislature. They believed it to be not only possible but highly probable that the people might fail at the regular annual election to choose a governor, lieutenant-governor, and a sufficient number of senators to form a constitutional quorom for the transaction of business. The result proves that this apprehension was well founded. The first section of the act declares that in case there be no choice of a governor at an annual election the house of representatives shall order a new election for the choice of a governor, and that in case no choice should then be made, that the order shall be renewed as often as the votes are returned to the general assembly until a governor be elected, or until such proceedings shall become unnecessary by reason of the provision of law for the next annual election; and in the mean time that the governor of the preceding year shall continue, under his former engagement, to exercise all the powers and perform and execute all the functions or duties of the office of governor until another shall be elected and engaged in his place; and shall receive such proportion of the salary as corresponds with the time he shall so serve. The same provisions are made as to the lieutenant-governor and all the other general officers, in case of a like failure to elect those officers at the annual election. The third section of the act relates to the choice of senators (assistants), and directs that new elections shall be ordered as in the cases above mentioned and with the same limitations, unless six senators, being the requisite number to form a quorum, shall have been chosen at the annual election. The contingencies intended to be provided against by this act actually occurred. No governor nor lieutenant-governor was chosen to succeed those of the past year; the number of senators required for a quorum were not elected by the people; and, in compliance with the provisions of the act, new elections were ordered by the house of representatives where a failure to elect had happened, until in the judgment of that house "such proceedings had become unnecessary by reason of the provision of law for the next annual election."

The general assembly, in the mean time, as at that time constituted, continued to perform all the functions which properly belong to that body until the end of the session at Providence, January, 1833. It remains then to be inquired, was this body so assembled the *legislature* of Rhode Island? The law by virtue of which they continued to exercise the powers of legislation is said to be repugnant to the charter, and therefore void. If this be a sound objection it at once annuls every part of their proceedings, and as a necessary consequence, that of choosing a Senator in Congress.

Your committee are unable to find any clause in the charter which forbids the exercise of such a power as that claimed by the passage of the act of January, 1832. It seems, on the contrary, to have been the intention of the crown to perpetuate the existence of the legislative power in the colony by an express provision—that the authority, office, and power of the governor, deputy governor, and assistants shall cease and determine when their successors shall be elected and engaged, and not at the expiration of the term for which they were respectively chosen. The construction of this clause of the charter has been uniform from the commencement of the government up to the present time.

The governor, deputy governor, and senators (assistants) of the preceding year, at the opening of each annual session of the legislature in May, take their seats, and join the house of representatives in grand committee and continue to act until their successors are engaged. This is abundantly sufficient to prove that they hold over, as a matter of course

for the purpose of organizing the members newly elected to succeed them; and it does not seem to be material whether the time required for the performance of this duty be one or more days; for the same principle under which they hold over for a single day would apply to a longer time if it should be required to complete the organization. But it is not necessary to resort to this provision of the charter, or to the practice under it, to establish the validity of the power to pass the act of January, 1832. The general power given in the charter to the legislature, "from time to time to make, ordain, constitute, or repeal such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy as to them shall seem meet," without limitation, is broad enough to cover the whole ground assumed in justification of that act. If Rhode Island had followed the example of her sister States of the Union, and adopted a written constitution, it will not be denied that this power to continue in existence the legislative body until their successors should be chosen and engaged might have been given in that instrument. Shall we then deny to her the right to effect the same object by law when the people have, by a long and uninterrupted acquiescence in that mode of fixing the fundamental principles of the government, imparted to such laws the force and efficiency of a constitutional provision emanating from a convention chosen for that special purpose? Your committee hold it to be an undeniable principle, applicable to all forms of government, that there must exist in the supreme legislative power of the State a capacity to preserve itself from annihilation. Waiving, therefore, all the considerations arising out of the charter and the immemorial usage of the State, which might be safely relied upon to justify the act in question, there are other grounds on which the exercise of the power claimed may be sustained and vindicated. The constitutions of the several States are, in the broadest sense, *popular*, emanating directly from the people, and subject to be modified and amended as the people may think proper. The legislative power embraces every object without distinction which is not expressly prohibited by a declaration of rights or an article of the Constitution. The structure of the State governments differs in this important respect from the Government of the United States, which is restricted in its sphere of action to the delegated powers and such as are necessary and proper to carry them into effect. On this principle, the legislature of Rhode Island, in the absence of a written constitution, could only be restrained in the extent of its powers by some negative provisions of the charter or of the bill of rights subsequently adopted for the better security of the people in the enjoyment of liberty. In neither of these, nor in any other act or instrument now in force, is there to be found any prohibition of the power to continue over an existing legislature until their successors shall be duly chosen and engaged. The act of January, 1832, was deemed to be necessary to preserve the government from dissolution, and to provide for new and extraordinary elections by the people. It has been sanctioned by the people by their action under it, in their primary capacity, and by the constituted authorities of their State in the several departments. All the laws, either of a private or general nature, passed by the legislature at their several sessions from the first Wednesday of May, 1832, to the close of the session, January, 1833, are now in full force and operation. The highest judicial tribunal of the State was composed of judges elected in grand committee of the two houses at the August session, 1832, and their commissions were issued under the great seal of the State and the signature of the governor, who was continued in office by the provisions of the act of January, 1832.

Your committee could not expect to find evidence more satisfactory of the character of the body by which Asher Robbins, the sitting member, was elected a Senator to Congress in January, 1833.

The Constitution of the United States expressly declares that "the Senate of the United States shall be composed of two Senators from each State chosen by the legislature thereof." But what is the definition of the term legislature? Both its literal and technical meaning is, "the power that makes laws." It is the highest attribute of sovereignty, and merges all other powers when it does not transcend the limitations contained in the fundamental constitution of the State. When, therefore, we find that during the existence of the general assembly, one branch of which was continued and held their seats by virtue of the law of January, 1832, this legislature passed fourteen laws of a general nature and twenty-eight private acts, many of them acts of incorporation, besides numerous resolutions on various subjects falling within the range of legislative power, a schedule of which is hereunto annexed, marked C; and when these laws and resolutions remain on the statute-book of Rhode Island in full force and effect, sanctioned by judicial decisions, and tacitly submitted to by the people over whom they operate, it would seem to your committee a very dangerous assumption of power in one branch of Congress, or even in every department of the General Government combined, to interfere with the internal regulations of the State, and to denounce the body by which these laws and resolutions were passed as a mere assemblage of citizens without any public authority whatever, and not the legislature of the State. Such a power does not belong to the Federal Government, and would, if claimed and carried out to its full extent, an-

nihilate all the reserved rights of the States. It is a general principle of national law, applicable to all distinct and independent governments, that if there arise any disputes in a State on the fundamental laws and public administration, or on the prerogatives of the different powers of which it is composed, it is the business of the State alone to judge and determine them in conformity to its political constitution. No government has a right to intrude into the domestic affairs of another State and attempt to influence its deliberations or to control its action. This principle is recognized in the Constitution of the United States, by which the respective States united and formed themselves into a federal republic. Conceding, as we feel bound to do, to the State of Rhode Island, in common with all the other States of the Union, the power to decide for itself all questions relating to its domestic policy, there would seem to be no ground on which to rest a doubt that she has decided, in the most solemn manner, the character and powers of the body by which Mr. Robbins was chosen a Senator to Congress. They passed numerous laws which are in full force. They elected judges of the supreme court of the State, who have taken a new engagement or oath of office, and accepted new commissions from the governor; entered on their official duties, and condemned to death a citizen found guilty of a capital offense against the laws of the State. They received compensation out of the treasury of the State for their services, and disbursed the public money necessary for the support of the government. No question has arisen touching or impugning the validity of any one of these acts because they were passed or performed by an incompetent body, with the single exception of the attempt made by a succeeding legislature to vacate the election of Mr. Robbins. Your committee cannot omit to refer to the preamble of the act annulling that election, in which the legislature fully recognize their predecessors as "the general assembly" of the State. The only ground assumed to justify the act declaring the election null and void is comprised in a single sentence of the preamble, in the following words:

"Whereas the general assembly which elected Asher Robbins a Senator to the Senate of the United States on the 19th day of January last *did not comply with the provisions of an act* entitled 'An act in addition to an act entitled "An act regulating the manner of admitting freemen, and directing the method of electing officers in this State,"' by virtue of which the members of one branch of said assembly then held their offices, *but proceeded prematurely therein*, and the said election is *therefore* void, and ought so to be declared by this assembly: Therefore, *Be it enacted, &c.*"

Again, the same legislature at their session held in May, 1833, passed an act to repeal the law of January, 1832, in the ordinary form, but express no opinion that the law so repealed was null and void, and thereby admit its validity up to the date of the repealing act. It is worthy of remark, also, that the same legislature at the session held in October, 1833, passed a special act to carry into effect an act of the legislature passed in January, 1833, changing the mode of electing representatives to Congress, and declaring that a plurality of votes should in future decide the election in certain cases, contrary to the former and long established law of the State, by which a majority of all the votes polled at any such election was necessary to a choice in all cases. Thus the power of the legislature assembled in January, 1833, to enact this important law is fully acknowledged and conceded by their successors, while their power to elect a Senator to Congress is denied and declared null and void. Your committee advert to these acts as conclusive in reference to the character of the body of men which elected Mr. Robbins. If they were competent to bind the people of the State by general laws, which is nowhere contested, they could only exercise such a power in their capacity as the legislature of the State, and as such it was their constitutional right and incumbent duty to choose a Senator to Congress. There was but one governor and but one senate in the State claiming to be a part of the general assembly. If there had existed another body of men, however chosen, contending for the offices of the governor and senators in the State, it will not be denied that their respective rights might be the subject of inquiry in deciding a contested election in the Senate of the United States. But in the absence of any such conflicting claims to these offices when only one legislative body was known in the State which exercised all the power and performed all the functions of the legislature, and whose acts have in every form and by every department of the government been declared valid, it would seem to be a palpable invasion of the sovereignty of the State to abrogate its laws and overthrow its government by denying that a body capable of exercising the powers of legislation existed in the State after the term for which a governor, lieutenant-governor, and senators chosen at the annual election in April, 1831, had expired. To annul the election of Mr. Robbins would involve all these absurdities, and must be productive of confusion and anarchy in the State of which he has been chosen a Senator in Congress.

The time at which the election took place and *the manner* in which it was conducted were in strict conformity to the laws of Rhode Island. The two houses met in grand committee according to law at the session of the general assembly next preceding the expiration of the term of service of Asher Robbins, then a Senator in Congress, and elected

him for another term of six years, to commence on the 3d day of March, 1833, and then the grand committee assembled for this purpose was dissolved. The choice was made by the *legislature* of the State, whose laws are held to be valid and binding throughout the State; they command and receive obedience from the people. No objection is made or can be made either to *the time or manner* of the election. The Senator elected has all the requisite *qualifications* demanded by the Constitution, and his *commission or credentials* were *in due form* delivered to him and presented to the Senate. Your committee hold this to be a vested right, the obligation and effect of which no subsequent legislature of that State could impair; still less had they authority to proceed to the election of another Senator until the seat of the Senator-elect had been vacated by a solemn decision of the Senate of the United States. With these views of the subject referred to them, your committee recommend the adoption of the following resolution:

Resolved, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate.

A.

STATE OF RHODE ISLAND, &c.,
Saturday, January 19, 1833.

In grand committee, elected Asher Robbins Senator in Congress for six years from the fourth of March next.

Robbins 41: Potter 25: Pearce 12.

Grand committee rose.
True copy from senate journal.

HENRY BOWEN,
Secretary.

CREDENTIALS OF THE HON. ASHER ROBBINS.

By his excellency Lemuel H. Arnold, governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that Asher Robbins, of Newport, in the State aforesaid, qualified according to the Constitution of the United States for a Senator in the Congress thereof, was by the legislature of said State, at the session thereof holden by adjournment at Providence on the second Monday of January instant, elected a Senator from said State in the Congress of the United States for six years, commencing on the fourth of March next.

In testimony whereof I have hereunto set my hand and caused the seal of said State to be affixed, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-seventh.

LEMUEL H. ARNOLD.

[L. S.]
By his excellency's command:

HENRY BOWEN,
Secretary of State.

VACATING ACT.

State of Rhode Island and Providence Plantations, in general assembly, October session, A. D. 1833.

Whereas the general assembly which elected Asher Robbins a Senator to the Senate of the United States on the nineteenth of January last did not comply with the provisions of an act entitled "An act in addition to an act regulating the manner of admitting freemen and directing the method of electing officers in this State," by virtue of which the members of one branch of said assembly then held their offices, but proceeded prematurely therein, and the said election is therefore void, and ought to be so declared by this assembly: Therefore,

Be it enacted by the general assembly, and by the authority thereof it is enacted, That the said election be, and the same is hereby, declared to be null and void and of no effect; and the office is hereby declared to be vacant.

True copy of record. Witness:

HENRY BOWEN,
Secretary.

By his excellency John Brown Francis, governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that the name "Henry Bowen" to the aforewritten attestation subscribed is the proper handwriting of Henry Bowen, esquire, who at the time of subscribing the same was secretary of the State aforesaid, duly elected and qualified according to law: Wherefore, unto his said attestation full faith and credit are to be rendered.

In testimony whereof I have hereunto set my hand and caused the seal of said State to be affixed at Providence this fifteenth day of November, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

[L. S.] JOHN BROWN FRANCIS.

By his excellency's command:

HENRY BOWEN,
Secretary.

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B.

CREDENTIALS OF ELISHA R. POTTER.

By his excellency John Brown Francis, governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that Elisha R. Potter, of South Kingstown, in the State aforesaid, qualified according to the Constitution of the United States for a Senator in the Congress thereof, was by the legislature of said State, at the session thereof holden at South Kingstown on the last Monday in October last, elected a Senator from said State in the Congress of the United States for six years, commencing the fourth day of March last.

In testimony whereof I have hereunto set my hand and caused the seal of said State to be affixed at Providence the fifth day of November, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

[L. S.] JOHN BROWN FRANCIS.

By his excellency's command:

HENRY BOWEN,
Secretary.

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C.

Public acts passed by the general assembly of Rhode Island and Providence Plantations from May, 1832, to the close of the session, January, 1833.

1. An act relating to the Burrillville Bank.
2. An act authorizing the city council of the city of Providence to appoint a larger number of members of Engine Company No. 5.
3. An act relating to the overseers of the poor and to the asylum, in the town of Portsmouth
4. An act in relation to the returns of certain justices of the peace.
5. An act in further amendment of an act to establish public schools.
6. An act in addition to the acts in relation to quarantine and to the introduction and spreading of contagious and infectious sickness in this State.
7. An act authorizing certain military officers to be engaged in their commissions.
8. An act in addition to an act entitled an act appointing the several town councils in this State boards of health *ex officio*.
9. An act (November, 1832) in amendment of an act entitled an act relative to the election of Senators and Representatives to represent this State in Congress, and of electors for the elections of a President and Vice-President of the United States.
10. An act authorizing certain military officers to take their engagements or their commissions.
11. An act to prevent hogs going at large in Washington village, in Coventry.
12. An act in relation to extrajudicial oaths.
13. An act (January, 1833) in amendment of an act entitled an act relative to the election of Senators and Representatives to represent this State in Congress, and of electors for the election of a President and Vice-President of the United States.
14. An act regulating criminal process in certain cases.

Private acts passed by the general assembly of the State of Rhode Island and Providence Plantations from May, 1832, to the close of the session, January, 1833.

1. An act to incorporate certain persons as a society by the name of St. James Church, at Woonsocket Falls, in Smithfield.
2. An act to legitimate Maria, the daughter of Thomas A. and Mary Ann Potter.
3. An act to authorize Henry Yates and Archibald McIntyre to put forth a lottery for the benefit of public schools.
4. An act to incorporate the Greenville Fire Engine Company.
5. An act to revive the charters of certain military companies.
6. An act to incorporate the Providence Steamboat Company.
7. An act to incorporate the Phœnix Iron Foundry.
8. An act to revive the charters of certain military companies.
9. An act to amend the charter of the Providence Marine Corps of Artillery.
10. An act in amendment of an act incorporating a society by the name of the Pawcatuck Academy Company.
11. An act to incorporate the New York, Providence and Boston Railroad Company.
12. An act to incorporate the Rhode Island and Connecticut Railroad Company.
13. An act to authorize the corporation of St. John's Church, in Providence, to tax the pews in said church.
14. An act in addition to an act entitled an act to incorporate certain persons by the name of the "First Universalist Society in the town of Providence."
15. An act to authorize John A. Grace to hold, convey, and transmit real estate in this State.
16. An act to incorporate the Albion Village Fire Engine Company.
17. An act to incorporate the Commercial Insurance Company in Newport.
18. An act to authorize John Chatburn to hold, convey, and transmit real estate.
19. An act to incorporate the Warren Rhode Island Seaman Friends' Society.
20. An act in amendment of an act entitled an act to incorporate the Rhode Island and Connecticut Turnpike Corporation.
21. An act to authorize John Paine and Daniel Burgess to put forth a lottery for the benefit of public schools.
22. An act to incorporate certain persons by the name of the First General Baptist Church in Warwick.
23. An act to revive an act in amendment of an act to incorporate the Providence and Boston Railroad Company, and for other purposes, and in amendment thereof, and in addition thereto.
24. An act to incorporate certain persons by the name of the Woonsocket Falls Baptist Society.
25. An act to incorporate the Gloucester and Burrillville Safe-guards.
26. An act to incorporate the stockholders of the West Greenwich Farmers' Bank, in the town of West Greenwich.
27. An act to incorporate the stockholders of the Commercial Bank, in the city of Providence.
28. An act to incorporate the stockholders of the Citizens' Union Bank.

In addition to the above the same general assembly, from May, 1832, to January, 1833, inclusive, passed—

Thirty-one votes or resolutions liberating the persons or commuting the punishments of convicts;

Thirty-seven votes or resolutions authorizing the sales of real estates;

Three resolutions authorizing persons to apply to the supreme court for decrees of divorce;

Six votes or resolutions releasing the persons of insolvent debtors on giving bond, &c.;

A resolution for the payment of the salaries of the governor and lieutenant-governor of the preceding year;

A resolution for the payment of the State map;

Resolutions for the payment of a great variety of accounts;

Several votes authorizing new trials;

And, finally, elected all the officers, civil and military, of the State, who severally took their commissions, and acted under them during the whole of that year.

VIEWS OF THE MINORITY.

IN THE SENATE OF THE UNITED STATES.

APRIL 4, 1834.—Read, and ordered to be printed.

The minority of the select committee on the contested seat occupied by the Hon. Asher Robbins report:

The undersigned, a member of the select committee of the Senate to which was referred the subject of a contested seat in the Senate from the State of Rhode Island, the

Hon. Asher Robbins being the sitting member and the Hon. Elisha R. Potter claiming the seat occupied by the said Robbins, entertaining opinions and views different from those expressed by the majority of the said committee in their report submitted to the Senate on the 4th day of March instant, respectfully submits the following report:

The course adopted by the committee to settle the facts upon which their opinions were to be formed was to call upon the parties to the controversy for statements of the facts which they wished to prove, or which each wished admitted by his opponent, as being, in their estimation, material to their respective claims. This call was answered by Mr. Potter by the statement signed by him, and dated 11th December last, which is hereto annexed, marked D. Mr. Robbins replied to this statement of Mr. Potter by the paper hereto annexed, marked E. This reply of Mr. Robbins was submitted to Mr. Potter, and drew from him the additional statement signed by him, and dated 31st December last, which is hereto annexed, marked F. Here the statements of fact closed, and Mr. Potter was called upon for such arguments as he might choose to submit to the committee, when he returned the paper annexed, signed by him, dated 21st January last, and hereto annexed, marked G. To this argument Mr. Robbins replied by the paper signed by him, dated 24th January last, and hereto annexed, marked H. Mr. Potter rejoined by the paper signed by him, dated 3d February last, and hereto annexed, marked I. In this state the case was submitted to the committee, each party having accompanied their statements with such proofs from the journals of the legislature of their State and other public records as they considered required. Most of the points established by the proofs submitted are fully admitted and agreed upon by the parties in their statements of fact, and therefore such of them only will be referred to and annexed as may be found material to establish facts not so admitted. The statements and arguments of the parties are annexed, because the undersigned considers the question one of the highest importance, and that it is proper the Senate should see fully the facts which the immediate parties to the controversy have considered in any way material, the arguments by which they have sought to direct the judgments of the members of the committee, and the conclusions they have formed upon the points raised.

The majority of the committee, in the view they have taken of the subject, have not considered it important to print these statements, or but a very small portion of the proofs submitted, but as the course of reflection pursued by the undersigned and the opinion he has formed has been governed by the facts disclosed in these papers, and as the parties have so intermixed fact and argument in all their statements that the one cannot well be separated from the other, he feels that he may not be borne out in his facts without annexing to this report these statements entire, while he is sensible that the arguments he shall offer will be mostly repetitions of those which the parties have presented to him. That both of the parties have assumed positions which are untenable, as well as positions which are wholly irrelevant, is clear to his mind, as he does not doubt it will be to the judgment of the Senate; but he still thinks they have not omitted the true and material points of the controversy, and that their suggestions may do that justice to the subject which it will not receive from any effort of his. The undersigned believes that as to most of the facts assumed by the majority of the committee there will be no dispute; but as there are facts in the case which he considers material, and to which the majority of the committee do not refer in their report, a reference to the statements of the parties and to some of the proofs will be necessary to authorize him to use those facts to sustain his conclusions. And if, under this impression, he should connect with this report any portion of the documents before the committee, which upon examination may not appear to have been necessarily so connected, he feels sure that the Senate will find his excuse in the conviction he is under that the novelty and importance of the question demands a full exhibition of the facts and arguments which are material and relevant, and that the safe course is to withhold nothing which may be important, though that course may lead to the examination of much which is unimportant.

Having reference to these statements, and to such other documents as shall be hereafter referred to, the undersigned makes the following relation of facts upon which he supposes the decision of the question submitted to the committee must mainly rest.

Charles II, King of England, in the year 1663, granted to his colony in America known as the colony of Rhode Island and the Providence Plantations (now the State of Rhode Island) a charter for its civil government, which was submitted to the people of the colony and adopted by them, and thus became the fundamental law of the colonial government. (See the paper annexed, duly certified, and marked K.)

The said charter provided, among other things, that "for the better ordering and managing of the affairs and business of the said company and their successors there shall be one governor, one deputy governor, and ten assistants, to be from time to time constituted, elected, and chosen, out of the freemen of the said company for the time being, in such manner and form as is hereafter in these presents expressed." (See the Charter, page 6 of the Laws of Rhode Island, Digest of 1822.)

The charter appointed the first governor, deputy governor, and assistants "to continue in the said several offices, respectively, until the first Wednesday which shall be in the month of May now next coming. (See same page as above.)

The charter further provided "that for ever hereafter, twice in every year, that is to say, on every first Wednesday in the month of May and on every last Wednesday in October, or oftener in case it shall be requisite, the assistants and such of the freemen of the said company, not exceeding six persons for Newport, four persons for each of the respective towns of Providence, Portsmouth, and Warwick, and two persons for each other place, town, or city, who shall be, from time to time, thereunto elected or deputed by the major part of the freemen of the respective towns or places for which they shall be so elected or deputed, shall have a general meeting or assembly, then and there to consult, advise, and determine in and about the affairs and business of the said company and plantations." (See Charter, page 7, Digest of 1822.)

The charter further provided "that the governor, or, in his absence, or by his permission, the deputy governor of the said company for the time being, the assistants, and such of the freemen of the said company as shall be so as aforesaid elected or deputed, or so many of them as shall be present at such meeting or assembly as aforesaid, shall be called the general assembly, and that they, or the greatest part of them then present, whereof the governor or deputy governor and six of the assistants, at least to be seven, shall have, and have hereby, given and granted unto them full power and authority," &c.; thus constituting the legislative body for the colony. (See Charter, same page as last above.)

The charter further provided for the election, time of election, and term of office of the governor, deputy governor, and assistants, in the following words, to wit: "And further, our will and pleasure is, and we do hereby, for us, our heirs and successors, establish and ordain, that yearly, once in the year, for ever hereafter, namely, the aforesaid Wednesday in May, and at the town of Newport, or elsewhere if urgent occasion do require, the governor, deputy governor, and assistants of the said company, and other officers of the said company, or such of them as the general assembly shall think fit, shall be, in the said general court or assembly to be held from that day and time newly chosen *for the year ensuing* by such greater part of the said company, for the time being, as shall be then and there present." (See Charter, page 9, Digest of 1822.)

No charter was granted to this colony by the crown of Great Britain subsequent to that of Charles II above mentioned and previous to the American Revolution, but the colony remained subject to the provisions of that charter so long as it remained a British colony; and the people of the State of Rhode Island, since the Revolution, have formed no constitution of government, but have continued the system of government existing with them at the time of that event, having only changed their allegiance.

From the time of the adoption of the charter in 1663–'64 by the people of the colony up to the year 1831 no change had taken place in the qualifications for the offices of governor, deputy governor, or assistants, or in the terms of their respective offices, but all those officers were elected annually during all that period. The official name of the deputy governor had been changed in the laws to that of lieutenant-governor, the official name of assistants to that of senators, and the official name of the deputies to that of representatives; but these changes of official names or designations were not accompanied by any changes of official powers or duties.

The charter contemplated that all the freemen should assemble at Newport, "or elsewhere if urgent occasion do require," and should vote at the same poll for their governor, lieutenant-governor, and senators. This mode of voting was partially changed soon after the granting of the charter, and a privilege was given to each freeman to attend at Newport and vote in person, or to send his vote by a proxy. The increase of population in the colony and its diffusion over a large extent of territory in the course of time induced the legislature to extend this system of voting by proxy, and to provide for the holding of a poll in each town on the day of an annual election, giving to the freemen of the towns the right to prepare a written or printed ballot containing the names of the persons for whom each should choose to vote for governor, lieutenant-governor, and senators, and all such other general officers as were to be voted for, or as the voter should choose to vote for, with proper designations as to the office designed for each person voted for; which ballot, so prepared, with the full name of the voter written upon the back thereof, he was at liberty to deposit in the ballot-box of his town. Accurate poll-lists of the persons voting were to be kept, and after the close of the poll the ballots so deposited in the box and the indorsement of the name of the voter on the back thereof were to be compared with the poll-list, and when found to agree the original poll-list was to be deposited with the town clerk of the town for the inspection of the freemen thereof, and a copy of the same poll-list, together with the ballots so taken, carefully sealed up by the persons having charge of the poll, was to be delivered to the member of the house of representatives elected for the town, or to a senator, to be by him taken to Newport, and there delivered in the general assem-

bly on the day fixed by the charter for the election at Newport of the governor, lieutenant-governor, and senators, and other general officers. On that day the house of representatives newly elected for the half year then next following take the oath of office, and then proceed to open and count these votes so sent to them for the choice of a governor, lieutenant-governor, and senators, and such other general officers as are to be elected, to compare the votes with the poll-lists also sent and to pronounce the result; and the governor, lieutenant-governor, and senators elected, if any such officers are elected by a majority of all the votes thus given, the result being pronounced, take the oath of office, and the legislature is organized. This system of voting was substantially adopted by the colony as early as the year 1760, and has ever since been and still is the manner in which the freemen of Rhode Island vote for their governor, lieutenant-governor, senators, and other general officers. (See the statements of the parties annexed, and particularly the act of August, 1760, marked L.)

The charter seems also to have contemplated that the whole legislature should have formed one body or aggregate mass; but soon after the granting of the charter the practice was adopted of forming one house of the governor, lieutenant-governor, and assistants, or senators, called the senate, and another house of the representatives elected by the towns, called the house of representatives, and for the purposes of legislation of having the two houses set apart and act separately, each exercising equal legislative powers, and of consequence each having a negative upon the action of the other. This practice is still continued in the organization of the legislature of Rhode Island for legislative purposes, though when acting executively, or acting in the election of a Senator to represent the State in the Senate of the United States, the two houses still act together as one body, and in that State are termed by the laws and practice of the Government "The Grand Committee." (See Laws of the State and Journals of the Legislature.)

The time fixed by the charter for the annual elections of governor, lieutenant-governor, and senators is the first Wednesday in May; and to give time for the freemen to hold the polls in their respective towns, and to have their proxies delivered at Newport by the day required, the law prescribes the third Wednesday in April, in each year, for holding the town meetings, and for receiving and sealing up the proxies in the manner before related. (See page 94 of the Digest of 1822.)

Pursuant to these regulations an annual election for governor, lieutenant-governor, and senators was held in the State of Rhode Island on the third Wednesday of April, 1831; and upon counting the proxies returned to Newport on the first Wednesday in May thereafter, the day fixed by the charter, there appeared to have been a governor, lieutenant-governor, and eight of the ten senators duly elected. These, constituting more than a quorum of the senate, were duly sworn, and, together with the house of representatives, composed the legislature of the State; but no attempt was made to fill the two vacancies in the senate.

No question has been made before the committee, or is understood to exist, as to the proper organization of this legislature, or as to its powers as the legislature of the State—the senate for one year from the first Wednesday in May, 1831, and the house of representatives from the same first Wednesday in May until the last Wednesday in October of the same year.

A new house of representatives was duly elected, and qualified on the last Wednesday in October, 1831, which, together with the senate before mentioned, again constituted a regularly organized legislature of the State, with all the powers possessed by any legislature of Rhode Island.

This legislature, in January, 1832, being regularly convened for the transaction of business, passed an act providing, among other things, that, in case of a failure, at any annual election by the people, of the election of a governor, lieutenant-governor, or a quorum of the senate, such of those officers as had been elected previously, and who should then be the incumbents of the offices, and in whose places no others should be elected, should continue in the respective offices, and to possess the powers and discharge the duties thereof until others should be elected and duly qualified to take their places. (See a copy of this act annexed, marked M.)

The annual election pursuant to the law, for the election of a governor, lieutenant-governor, and senators was again held in the towns on the third Wednesday in April, 1832, and the proxies of the freemen of the State taken and sealed up in the usual form; and on the first Wednesday in May thereafter those proxies were opened and counted at Newport; when it was found that no election of governor, lieutenant-governor, or any senator had been made, no person having received the majority of all the votes given for any one of those offices. (See the statement of the parties annexed.)

The governor, lieutenant-governor, and eight senators elected in 1831, and whose official terms, according to all previous practice of the government, expired on that day, continued to act as the governor, lieutenant-governor, and senators of the State until the first Wednesday in May, 1833, just two years from the time of their last election and

qualification for their respective offices, there having been, in the mean time, between the first Wednesday in May, 1832, and the first Wednesday in May, 1833, five several elections for the choice of persons to fill these offices, the first four of which were special, and held in obedience to a provision contained in the act of January, 1832, before referred to and hereto annexed, and were all unsuccessful; and the fifth was the regular annual election for 1833, held on the third Wednesday in April in that year, in obedience to the general election law of the State, when an election was made of a governor, lieutenant-governor, and eight senators, who took the oaths of office and entered upon the duties on the first Wednesday in May, 1833. (See the statements of the parties annexed.)

During the whole of this period, from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, the house of representatives of the legislature of the State of Rhode Island was in regular organization, and composed of members regularly elected at the ordinary times and in the ordinary manner of electing members to that branch of the legislature of the State, according to the established laws. (See the statements of the parties annexed.)

On the first Wednesday in May, 1832, the Hon. Asher Robbins was a Senator in the Congress of the United States from the State of Rhode Island, and his official term was to expire on the 3d day of March, 1833; and, by a law of the State, its Senators in the Congress of the United States are to "be appointed at the session of the general assembly next preceding the expiration of the term of service of the Senator for the time being, and not before." (See Digest of 1822, page 107, section 6.)

In January, 1833, the body claiming to be the senate of the State of Rhode Island, and acting as such, consisting of the governor, lieutenant-governor, and eight senators, elected on the third Wednesday in April, 1831, and who took their oaths of office and entered upon their official duties on the first Wednesday of May, 1831, and the house of representatives of the State, regularly elected and qualified, being assembled, and acting as the legislature of the State, met in grand committee, and voted for a Senator to represent the State of Rhode Island in the Senate of the Congress of the United States for the term of six years from the 4th day of March then next following, when the term of Mr. Robbins would have expired. Upon counting the votes so given by the persons assuming to be the governor, lieutenant-governor, and senators of the State, and by the members of the house of representatives of the State present and voting, it was found that Asher Robbins had received a majority of the whole number of votes given; whereupon he was declared to be elected. (See the statements of the parties annexed.)

Pursuant to this proceeding, the person then assuming to be the governor of the State of Rhode Island, and acting as such, did, on the 28th day of January then instant, under his hand and the seal of the State, execute and deliver to Mr. Robbins a commission in the ordinary form, according to the laws and practice of the government of the State, for the office of Senator to represent the State in the Senate of the United States for the term of six years, to commence on the 4th day of March thereafter.

The validity of this election of Mr. Robbins to this office is contested upon the ground that the persons acting as the governor, lieutenant-governor, and senators of the State, and, as such, voting for a Senator at the time Mr. Robbins's election was made, were elected on the first Wednesday in May, 1831, "for the year ensuing," and for no longer term; that, upon counting the proxies, and pronouncing the result of the election for governor, lieutenant-governor, and senators, on the first Wednesday in May, 1832, these officers became *functus officii*, so far as related to their election in 1831, whatever that result might be; and that the legislature of the State had not the power to continue their official terms, or official existence, beyond the limits fixed in the charter, of "the year ensuing" their election by the people; and the act of January, 1832, so far as it attempts to perpetuate these officers, without a re-election by the freemen of the State, is pronounced to be contrary to the provisions of the charter, and therefore void.

Upon the other side, it is contended, first, that by the charter itself the offices, powers, and duties of these officers do not cease and determine until others are elected in their places; and, second, that the legislature of Rhode Island have, with the acquiescence of the people of that State, passed many laws in contravention of the charter; that the practice of the government, as shown by its legislation, proves that the charter has not been held to be the fundamental law of the State, except as to certain specific grants; and that the act of January, 1832, does not conflict with those grants, and is therefore a valid act in all its parts.

In view of this part of the controversy, the discussion of the following questions appears to be called for:

First. Is the charter before mentioned, granted by Charles II of England to the colony of Rhode Island and the Providence Plantations, to be now considered to any, and, if to any, to what extent as the constitution of government of the State of Rhode Island, and as a constitution binding upon the legislature of that State?

Second. Does that charter fix and prescribe the term of office of the governor, lieutenant-governor, and senators of that State?

Third. Can the legislature of that State, consistently with the powers granted to that body by the charter, extend the official terms of those officers beyond the limit fixed by the charter?

Fourth. Can the Senate of the United States, when these questions are presented to it by the action of the legislature of the State of Rhode Island, in the purported election of a member for this body, look into, and pronounce its opinion upon them, by way of inquiry into the rights of a sitting member to the seat he occupies?

That the charter of 1663 is, to some extent, to be considered as the fundamental law of the State of Rhode Island, and, as such, binding upon, and restrictive of, the legislative power of that State, is admitted by all, and has not been made a question before the committee. The extent to which it is to be so considered is a point upon which not only the parties before the committee, but the members of the committee themselves, disagree. This point, therefore, must be settled by such references to the history of the legislation and practices of the government and people of the State as have been laid before the committee, and by the inferences which that history shall be found to justify. The undersigned will, in the first instance, offer to the Senate some of the evidences which have operated most strongly upon his mind to show the tenacity with which the people, the government, and the legislature of that State have adhered to the charter in its inconvenient and unjust requirements; going most clearly, in his judgment, to show the strong, binding force which has been allowed to it up to this very day; and, having done this, he will review, as concisely as the importance of the subject will allow, the instances cited by the majority of the committee to show that the legislature have not regarded the charter as binding upon, or restrictive of, their powers when the public interests or the public convenience conflicted with its provisions.

First. The charter fixes the standard of representation for the towns of the State in the popular branch of the legislature by giving to the town of Newport six representatives, to the towns of Providence, Portsmouth, and Warwick four representatives each; and to each other "place, town, or city" in the State, two representatives, wholly without regard to population, property, or any other basis upon which representation is usually settled. By the census taken in 1830, in obedience to an act of Congress, the town of Newport, with six representatives, had a population of 8,010 souls, while the town of Providence, with four representatives, had a population of 16,833 souls; thus showing Providence with more than double the population of Newport, and with but two-thirds of its representation in the popular branch of the legislature. The town of Portsmouth has a population of 1,127 souls, a little more than one-sixteenth of the population of Providence, and a representation exactly equal to it. The town of Smithfield has a populatian of 6,857 souls, and two representatives, and the town of Jamestown has a population of 415 souls, and two representatives—equal to the representation of Smithfield. The whole county of Newport has a population of 16,535 souls, and twenty representatives, while the single town of Providence, with but four representatives, has a population of 16,833 souls. These are some of the instances of the greatest disparity, but the statement annexed, marked N, will show the names and population and representation of all the towns in the State, and, in a condensed form, the population and representation of each county in the State. Still, the legislature of Rhode Island have never attempted to equalize the representation of the State, because the charter has been held to be the fundamental law upon the subject, and to restrain its powers in this particular.

Second. Elections of members to the popular branch of the legislature of the State have continued to be made semi-annually, because such was the requirement of the charter; and to comply with this provision of that instrument, and with the custom of the government under it, the legislature is regularly convened four times in each year. Still no attempt has been made by the legislature, though the State is small and the business of legislation for it not extensive, to alter the forms of the government in this respect. The charter has been held to be paramount to its authority, and to control its action, and the action of the people of the State, in this particular.

Third. A majority of all the votes given at any election by the people has been held to be required to elect any officer of the State government, because the charter requires such majority to constitute an election; and notwithstanding that the present controversy has grown wholly out of that requirement, the legislature of the State has never assumed that it had the power to dispense with the rule, and to authorize the election of those officers by a less number of votes than a majority of all the votes given for the office to be filled. Here again the charter has been, and still is, to be held fundamental law.

Fourth. From the granting of the charter in 1663 to the present time, with the single exception now in dispute, the governor, lieutenant-governor, and senators of the State have been elected annually, and have entered upon the duties of their respective offices on the first Wednesday in May in each year, the time prescribed by the charter; have

held their offices and discharged the duties thereof for one year, and no longer, without a re-election. In repeated instances vacancies have existed in the Senate in consequence of a failure to elect, by a majority of all the votes given, persons to fill all the places in that body; and those places have, without an exception, until the first Wednesday in May, 1832, remained vacant for the year; nor was the idea ever suggested that the incumbents of the former year could continue to hold them, or that they could be otherwise filled than by an election by the freemen of the State. Until the act of January, 1832, the charter had ever been considered the fundamental law of the State upon this subject, and paramount to any authority existing in the legislature.

Fifth. The mode of conducting elections of the general officers of the State, and the plan of voting by proxy, before detailed, is considered by the undersigned as an evidence of the strongest character to prove the rigidity with which the people and the legislature of Rhode Island have adhered to the charter to the utmost extent of the spirit of even its minute provisions. The charter was granted when the colony was small, and the extent of territory inhabited was very limited. Indeed, it is fair to presume that Newport, Providence, Portsmouth, and Warwick were all the towns then containing a population of freemen, as those are the only towns named in the distribution of the representation of the colony. The population of the colony, too, must have been very small, and therefore the charter was framed under the contemplation that the annual elections could be conveniently held at one point, and that all the freemen could conveniently assemble and vote at the same poll. The practice of a very few years exhibited the inconvenience of this arrangement, and a law was passed presenting to the choice of every voter the alternative of attending the poll at Newport in person or of sending his written vote in the form and manner prescribed by the law. This mode of voting was continued without material alteration for nearly a century, and until the year 1760. Then the system was introduced of holding a poll in each town and of requiring the freemen to deposit their proxies there for the general officers, that being, for all purposes material to this argument, the same system which now prevails, and which has prevailed from the year 1760 to the present time. It is true that the votes are deposited in a ballot-box in each town, but it is also true that every vote is indorsed by the full name of the freeman who gives it, written upon the back of the ballot; that all the ballots, together with accurate poll-lists of the persons voting, are carefully sealed up at the closing of these polls; that they are in that state put into the hands of a member of the legislature, whose duty it is to deliver them, unopened, in the general assembly at Newport, at the time and place when and where, by the charter, the election of the officers voted for is required to be made; that the votes are there opened and counted, and the result ascertained and pronounced in all respects in strict conformity with the requirements of the charter, except that each freeman, instead of attending in person, has sent his written ballot indorsed with his full name, and expressing his free choice. This, in the common parlance of the people of the State, is the election; and the undersigned cannot but consider it a rigid regard to, and strict fulfillment of, the provisions of the charter in their spirit and beneficial meaning, furnishing the highest evidence of the great extent to which the people and the legislature of that State have observed that instrument as their fundamental law and constitution of government.

Sixth. At the January session of the legislature of Rhode Island, in the year 1824, a law was passed to provide for calling a convention to form a constitution of government for the State. The members of the convention were chosen at the annual election on the third Wednesday of April in that year, and assembled at Newport in June following, and entered upon the discharge of the duties assigned to them. They formed a constitution, which was submitted to the people of the State for their adoption or rejection at town meetings holden on the second Monday of October, 1824. The constitution so formed differed widely, in many respects, from the provisions of the charter, and it was rejected by the people of the State by a vote of only 1,668 for to 3,206 against it, thus commanding the approbation of but a trifle more than one-third of the persons voting. It is, from the nature of the case, impossible to say upon what particular grounds this strong rejection was made; but it cannot be improper to remark that the constitution so rejected contained, among other provisions varying from those of the charter, the following:

"The supreme executive power of this State shall be vested in a governor, who shall be chosen by the electors properly qualified, and shall hold his office for the term of one year from the first Tuesday in May next succeeding his election, *and until his successor be duly qualified. But if no person shall have a majority of votes, the senate and house of representatives, in joint committee, shall choose a governor, by ballot, from the two persons having the highest number of votes.*"

Here is a departure from the provisions of the charter in two important particulars: First, that the governor in office shall continue to hold "until his successor be duly qualified;" and, second, that in case of a failure by the people to elect by a majority of all the votes given, the legislature might fill the vacancy. It is freely conceded that the extent

to which this provision influenced the decision of the people can never be known, and must ever remain mere matter of opinion; but it is believed that the decisive rejection of this constitution may be properly assumed as a strong evidence of their unyielding attachment to the charter with all its imperfections; and that it would be doing great violence and injustice to the patriotism and intelligence of the people of Rhode Island to suppose that this action on their part took place while they believed that they were without a written constitution of government and wholly dependent for their fundamental law upon the will and pleasure of their legislative bodies.

Seventh. The result of the election in the State of Rhode Island in 1833, after one year of experience under the act of January, 1832, the repeal of that law by the new legislature as one of its first acts; the election again of a new house of representatives in August, 1833; the passage of the act declaring Mr. Robbins's appointment void, in October, 1833, and the appointment of Mr. Potter to represent the State in the Senate of the United States are considered strong evidences that the act of January, 1832, was held by the people of the State to be a violation of the charter, an usurpation of power on the part of the legislature which passed it, and calculated to retain in office men whom they had not elected and did not approve.

Such are the evidences offered to show that the charter has been and is considered by the legislature, the government, and the people of Rhode Island as their fundamental law and constitution of government, to some extent not only, but to the full extent of all its material provisions, except so far as those provisions have been rendered obsolete by the American Revolution and the consequent change of that people from the condition of colonists to that of citizens of a free State.

The majority of the committee entertain a different view upon this subject from that here expressed, and the importance of the question, as well as a proper respect for the opinions of his colleagues upon the committee who differ with him, make it the duty of the undersigned to notice the grounds upon which they rest the conclusion to which they have come. The majority of the committee seem to consider that the power conferred by the charter upon the legislature of the colony "from time to time to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms, and ceremonies of government and magistracy as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same, so as such laws, ordinances, and constitutions, so made, be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there," grants a power to that body to make laws at variance from, and in contravention of, the provisions of the charter, if such laws "to them shall seem meet for the good and welfare of the said company." This power, they say, "has been exercised from time to time before and since the Revolution, when Rhode Island became one of the States of the Union. These modifications have materially changed the provisions of the charter, and established fundamental principles of government inconsistent with those recognized and ordained by the charter, which now remains only the nominal foundation of the legislation of the State."

The undersigned is unable to assent to the construction which the majority of the committee seem thus to have put upon the clause of the charter above given. He supposes it to be an invariable rule for the construction of every deed or other instrument, and of every law or ordinance, that each part shall be so construed as to make it, to the greatest possible extent, harmonize with, and not be destructive of, any other part or portion of the same deed, instrument, law, or ordinance. The charter of Charles II to the colony of Rhode Island was designed as a system of civil government for the colony; it was a grant from the sovereign to a portion of his subjects for that purpose; it constituted certain offices, and prescribed the powers and the duties in a general manner which should pertain to them. These offices, it will be seen by an examination of the charter, were to constitute the legislature of the colony, and the officers who should fill them were to be the legislators of the colony. To this legislature very broad powers are granted by the charter, and the clause now under consideration is one among the clauses enumerating those powers. Other clauses give other powers, such as to elect and constitute "offices and officers," to grant commissions, "to appoint, order, and direct, erect and settle such places and courts of jurisdiction for the hearing and determining of all actions, cases, matters, and things happening within the said colony and plantation, and which shall be in dispute and depending there;" "to distinguish and set forth the several names and titles, duties, powers, and limits, of each court, office, and officer, superior and inferior;" to contrive and appoint forms of oaths and attestations; "to regulate and order the way and manner of all elections to offices and places of trust;" to limit and distinguish the numbers and bounds of all places, towns, and cities, which may have "the power of electing and sending of freemen to the general assembly;" to direct and au-

thorize the imposing of fines, mulcts, imprisonments, and executing other punishments, pecuniary and corporeal; "to alter, revoke, annul, or pardon, under their common seal, or otherwise, such fines, mulcts, imprisonments, sentences, judgments, and condemnations," with many other powers. Now it is respectfully suggested and urged that the power "to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet," granted to the legislature of the colony by the clause of the charter under consideration, should be understood as applicable to the powers and duties above enumerated, and to all the other powers and duties granted and assigned by the charter to the legislature, and not as conferring powers above and beyond the charter which makes the grant. This construction will make the clause in question act in aid of the charter and of the objects designed to be accomplished by it, while the other construction will make all the remaining portions of the charter entirely contingent and wholly dependent upon what shall "seem meet" to the legislature. It will also present the singular anomaly of a legislative body standing upon the charter as a constitution of government from which it derives its existence, its constitution, its organization and being as a legislative body, and claiming a power, granted in that charter itself, to subvert the whole instrument. Such a construction will not surely be given to this instrument when a different and at least equally natural one presents itself, which will not make the instrument a *felo de se*, but will make each part harmonize with the whole, and further the purposes which the whole was intended to accomplish.

But the undersigned respectfully suggests his belief that the majority of the committee are mistaken in the extent to which they seem to suppose the acts of the legislature of Rhode Island have conflicted with the provisions of the charter. And that he may make his views upon this point intelligible to the Senate, he will notice, as briefly as he is able, the instances, in their order, wherein the majority think the infractions upon the charter consist.

The first is the permission granted by the legislature of the colony to the freemen of the colony as early as 1664, one year after the granting of the charter, to send to Newport a sealed ballot, expressing the choice of each freeman sending it, for the general officers of the colony, instead of compelling each freeman to attend at Newport in person to express that choice; the ballot so sent being required to be sealed up, and to have the full name of the voter written upon its back, to make it a legal ballot. As the undersigned has already expressed his conviction that this law was not a violation of the charter, but a full compliance with it in its spirit and meaning, no further remarks will be required here, the same point being again raised under the third enumeration by the majority of the committee of the infringements by the legislature upon the provisions of the charter.

The second is the separation of the legislative body of the colony into two houses, each exercising equal legislative powers, and each possessing a negative upon the other, when acting legislatively. This separation took place in the year 1666, about three years after the granting of the charter. It was undoubtedly the contemplation of the charter, as the undersigned construes its language, that the governor, lieutenant-governor, assistants, and deputies should sit together in one body, but it is not seen that the separation by which the governor, lieutenant-governor, and assistants should form one body (now the senate), and the deputies should form another body (now the house of representatives) necessarily constituted any violation of the charter in its spirit and meaning. The members were all to be elected by the people, and at the periods required by the charter, notwithstanding the separation. The same persons were to constitute the legislature of the colony, whether acting together as one body, or separately as two branches of the same legislature. The only effect, therefore, of the separation would be to restrict the legislative power by giving the body, small in numbers, a negative, in all cases as to legislative acts, upon the more numerous body or house. This could not form a subject of complaint on the part of the crown which was one party to the charter, because the effect was to limit the exercise of that portion of sovereignty which had been granted to the colony, and not to extend it. It might have formed the subject of complaint to the people, in case it had operated as such an embarrassment upon the legislative power as to injure the public interests; but when we find that the measure was taken upon the suggestion of two of the most populous towns of the colony, and predicated upon the inconveniences of a single assembly for legislative purposes; that it was adopted after three years only of practice under the contemplation of the charter of a single house; and that it has, from that time to the present, received the acquiescence and approbation of the people, the undersigned respectfully submits that this change may be well considered one of those "forms and ceremonies of government and magistracy" which, to the legislature, might well "seem meet," and which that body might well consider within its powers under the charter "for the good and welfare of the said company," and not as the exercise of a power either above or beyond the specific grants made by the charter.

The third is the law of 1760, requiring polls to be held in the different towns and all the freemen to vote by proxy, and to deposit their proxies, indorsed in writing with their full proper names, in the ballot-boxes at those polls. This law, in all material particulars, established the system of voting which prevails to this day in the State of Rhode Island, and the question is, does this system constitute a violation of the charter of such a character as to authorize the assumption that the people of that State have ceased to consider it the fundamental law of their State government? The undersigned is compelled to say that he does not so consider it; and his reasons for this conclusion are:

1st. That the violation complained of relates solely to a privilege granted to the freemen of the colony by the charter, the exercise of which, either in person or by proxy, must concern them alone, and could not afford to the crown any cause of complaint, whatever might have been the mode of its exercise, so long as that mode only proposed to effect an election by the choice of the freemen of the colony of the officers directed by the charter, and at the times and for the terms fixed by the charter.

2d. That a continuance of the mode of election contemplated by the charter, of assembling all the freemen at the same place on the same day, and having them all then vote at the same poll, had, from the increase and extension of the population of the colony, become impossible in practice.

3d. That the change of form was avowedly adopted "for the good and welfare of the said company," and to the legislature did "seem meet," because the expression of the choice of the freeman made by his written ballot, designating the name of each person for whom he chose to vote, and the office which he designed each person voted for by him should fill, identified by the indorsement of his full proper name upon the back thereof, and sent to Newport under seal, was securing to that freeman as perfect an exercise of his privilege of voting as if he had gone to Newport to deposit that same ballot there.

4th. That for these causes the legislature well considered this change one of those "forms and ceremonies of government and magistracy" that they might "make, ordain, constitute, or repeal, for the good and welfare of the said company," without any violation of the spirit and meaning of the charter.

5th. That the only possible cause of complaint which could grow out of this change in the form of voting was the failure, upon the ballot, to make a choice of the officers to be voted for by a majority of all the votes given for each office, and that such failure was only an event, when it should happen, to operate to the inconvenience of those freemen for whose convenience the system of voting by proxy was adopted.

6th. That the system of voting adopted by the act of 1760, and, in all substantial particulars, yet maintained, is the least departure from the literal and technical requirements of the charter which could be devised if the personal attendance of the freemen of the whole State at Newport on the same day, to vote at the same poll, is to be dispensed with; and therefore goes far to exhibit a determination on the part of the legislature and the people to conform to the strict language of the charter so far as that can be done in the present state of the territory and population over which the authority of the charter is held to be binding.

The fourth infringement enumerated by the majority of the committee grows out of an act of the legislature of the State of Rhode Island entitled "An act to provide for the performance of the duties of governor in certain cases, and also for regulating the sitting of the general assembly." (See Digest of 1822, page 99.) By reference to the book here referred to, it will be perceived that this act also, in some form, was passed as early as 1663. The majority of the committee find in this act what they consider two material departures by the legislative power from the provisions of the charter. The first is found in the first section of the act which devolves the duties of governor upon the lieutenant-governor in case the office of governor shall be vacant "by reason of no election being made by the freemen, or by the governor's death or resignation, or in case of his absence from the State, or inability to perform the duties and functions of his office;" and in case of a vacancy, for similar reasons, of both the offices of governor and lieutenant-governor, the duties are devolved upon "the senior senator in rank for the time being." To determine how far this act may be assumed as an infringement upon the provisions of the charter, or a departure from them, those provisions, so far as the office and duties of the governor and deputy governor are concerned, should be examined; and the undersigned feels confident that such examination will not result in any necessary violation of, or departure from, the charter, to any extent whatever. The charter, in all cases, in speaking of the powers and duties of the governor, uses this or similar language: "And in his absence the deputy governor;" thus showing that the deputy governor, in case of the absence of the governor, whether occasioned by a vacancy in the office or otherwise, is to stand in his place and discharge his duties. It will be further seen that the governor, or, in his absence, the deputy governor, is constituted the presiding officer of the senate, and of the grand committee when the two houses are acting to-

gether as one body. Now, a vacancy may exist in both these offices at the same time, or during the absence of one a vacancy may be produced in the other. Still the senate, if in session, would require a presiding officer, and this law provides for the case. If a vacancy be occasioned in the office of governor, lieutenant-governor, or senator by death or removal from office, the legislature can fill the vacancy; but if vacancies for these causes should be produced in both the offices of governor and lieutenant-governor at the same time, the senate and grand committee would require a presiding officer and the State a person to do this duty until an election could be made by the legislature. The first section of this act is not understood to go any further than to make this provision, as the proviso would seem to negative the idea that this *pro tempore* governor can sign commissions, which is believed to be the only remaining important duty to be performed by the governor of the State. This, therefore, is not perceived to be an infringement of the charter in the sense in which it is used by the majority of the committee. The senator upon whom the duty is devolved in case the double contingency should happen must have been elected by the people as a member of the body over which he is to preside, and it is believed that by a fair implication from the charter itself the senate without this law would have had the right in the absence of both the governor and lieutenant-governor to have designated one of their body to preside over their deliberations.

The provision contained in the second section of the law authorizing the governor, or the person empowered to perform the duties of governor, to convene the legislature "when any emergent occasion shall require," and when the law shall not have provided for a meeting, forms the second ground assumed by the majority of the committee under this head. This provision, it is believed, instead of being a violation of or a departure from the charter, is expressly authorized by it. At pages 6 and 7 of the charter (see Digest of 1822 of the laws of Rhode Island) will be found the following provision:

"And further, we will and, by these presents for us, our heirs and successors, do ordain and grant that the governor of the said company for the time being, or in his absence by occasion of sickness or otherwise, by his leave and permission, the deputy governor for the time being, shall and may from time to time upon all occasions give order for the assembling of the said company and calling them together to consult and advise of the business and affairs of the said company."

Upon looking at the language of the charter it will be seen that its language when speaking of the legislature is most frequently "the governor, deputy governor, assistants, and company," and hence the conclusion is that the authority conferred in the above paragraph is to convene the legislature and not the whole body of the freemen of the whole colony, as the charter makes it the especial duty of the legislature and not of the whole body of the freemen "to consult and advise of the business and affairs of the said company." But if this view of this point be mistaken and the authority "to appoint times and places of the meeting of the general assembly" be, as the majority of the committee suppose, given to that body only, still it would appear to the undersigned not to be a usurpation of this legislative authority to fix those times and places so far as human foresight could measure the necessity of such meetings while the legislature should be together, and to provide that in case urgent occasion should require during any recess the governor should convene them. He cannot, therefore, view this provision in the legislation of the State as going at all to sanction the position for which it is referred to, that the legislature have not regarded the charter as the fundamental law of the State.

The majority of the committee draw an argument in favor of the power in the legislature of Rhode Island to pass laws fundamental in their character because that legislature has passed an act entitled "An act declaratory of certain rights of the people of this State," commonly called a bill of rights. They say that this bill "in all the other States emanates from the people in their primary capacity," while in Rhode Island it is a mere act of the legislature. The undersigned believes it to be true that most if not all of the States at the formation of their respective constitutions have either incorporated into that instrument or have accompanied it by a bill or declaration of rights which in the one shape or the other has received the approbation of the people in their primary assemblies, but he also believes that no State has presented to or had adopted by its freemen a bill or declaration of rights previous to the time of the formation of a State constitution for such State. He further believes that most if not all of the old States had bills of rights passed by their respective legislative assemblies prior to the time of the Revolution, and that those bills of rights remained with legislative sanction and authority only until the States respectively formed constitutions, and in or with them submitted to their people for their adoption their bills of rights. He therefore supposes that the majority of the committee in this instance reason from an analogy which does not exist, inasmuch as the State of Rhode Island has never yet formed a constitution, but remains in this respect as it was at the close of the Revolution, and with the same bill of rights and same form of government. But even if this argument should be allowed its full force it would

not seem to the undersigned to prove anything as to the question under discussion. This bill of rights contains nothing which conflicts with any provision of the charter, and it would be one thing to determine that the legislature of Rhode Island possesses the power to pass laws in their character fundamental in cases where no such laws exist, and an entirely different thing to determine that that body possesses the power to pass such laws in contravention of the provisions of the charter, that being, so far as its provisions extend, the fundamental law of the State.

The majority of the committee further say in an enumeration of what they consider legislative infringements upon the charter, "the right of suffrage has been extended to a class of citizens who did not enjoy it under the charter." The undersigned presumes the majority of the committee are right in the fact stated, though his acquaintance with the laws of the State does not enable him to speak other than from the statement in the report; but an examination of the charter will show that this subject is expressly put within the enumerated powers of the legislature, and that therefore any extension of the right of suffrage by that body cannot be an infringement upon their chartered rights. The incorporating clause of the charter, after naming certain individuals, is in the following language: "And all such others as now are or hereafter shall be admitted and made free of the company and society of our colony of Providence Plantations, in the Narragansett Bay, in New England, shall be from time to time and forever hereafter a body corporate and politic in fact and name by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America." (See Charter, page 5, Digest of 1822.)

Among the enumerated powers of the legislature is the following: "And to choose, nominate, and appoint such, and so many, other persons as they shall think fit, and shall be willing to accept the same, to be free of the said company and body politic, and them into the said company to admit." No extension, therefore, by the legislature of the right of suffrage to classes of citizens who did not possess that right at the time of the adoption of the charter could be an infringement upon that instrument, as it grants to the legislature this power, in express terms, to be used as it "shall think fit."

This closes the notice which the undersigned proposes to take of the legislative infringements upon the charter mentioned and relied upon by the majority of the committee to show that the legislature of Rhode Island does not, and has not for a long time, considered it as fundamental law binding its action; but there is one consideration equally applicable to all these alleged legislative encroachments, which ought not to be withheld. It is that the previous review, as well as the statements made by the majority of the committee, show that they all took place before the American Revolution, and while the State was a British colony. The charter, therefore, was then strictly and legally binding, for it was a grant by deed from the sovereign to his subjects, and they could take no rights under the charter which it did not grant, and exercise no powers derived from it in a manner different from that which it pointed out. The authorities and people of the colony were then one party to the charter and the sovereign was the other; and holding their authority, as they all did, by virtue of the charter, any act of those authorities which was in violation of it must have been legally void. It surely would not have been permitted to the colonists, while British subjects, to say, we have disobeyed and violated the charter; we have legislated above and beyond it; we have established a government not at all in conformity to its provisions; we have introduced a mode of elections which it does not authorize; we have organized a legislature upon principles contrary to its requirements, and which does not acknowledge its binding force, but sets up its acts as paramount to your charter; therefore we do not hold it to be the fundamental law of the colony. Still the most material of the legislative acts mentioned and relied upon to show that the charter has not been held to control the action of the legislative body organized under it were passed within three years after the date of the charter, and more than a century before those to whom it was granted ceased to be the subjects of the crown from which the grant was made. Can stronger evidence be required to show that these acts were never considered as violations of the spirit and meaning of the charter, either by the sovereign who granted or by the people who accepted and adopted it as their system of civil government? It would seem to the undersigned that this view of the subject must be conclusive against the interpretation given to these acts by the majority of the committee. He cannot, therefore, in any light in which he has been able to view the question, believe there is evidence to authorize the assumption that this charter of Charles II has not ever been, and is not now, considered by the people of Rhode Island as their constitution of government to the full extent of its provisions in their true spirit and meaning, with the single exception of those portions of it which were made obsolete by the American Revolution. On the contrary, the evidences are clear and strong to his mind to show that it has ever been held to be the fundamental law of that State by its people, its government, and its legislature (the act of January, 1832, alone forming a material exception).

and he refers to the present basis of representation in the popular branch of the legislature, and to the present mode of conducting the elections for general officers, as conclusive of the question.

This brings the undersigned to his second inquiry, to wit: Does the charter fix and prescribe the term of office of the governor, lieutenant-governor, and senators of the State?

The language of the charter itself must settle this point. The whole of the paragraph has been quoted in the statement of facts given in the early part of this report, and a reference to that extract will show its requirement to be, "that yearly, *once in the year, for ever hereafter*, namely, the aforesaid Wednesday in May," "the governor, deputy governor, and assistants of the said company," "shall be" "*newly chosen for the year ensuing.*" It is respectfully submitted that this language is definite and clear; that the term of one year is fixed by it as the period of service, or official term, of the governor, lieutenant-governor, and senators of Rhode Island, by virtue of an election by the people to those offices, and that it does not admit of extension by any fair construction of the terms used or the meaning conveyed. Is there, then, anything in the charter to modify this construction of this provision? The majority of the committee seem to suppose there is, as in reference to this subject they use the following language: "It seems, on the contrary, to have been the intention of the crown to perpetuate the existence of the legislative power in the colony by an express provision that the authority, office, and power of the governor, deputy governor, and assistants shall cease and determine when their successors shall be elected and engaged, and not at the expiration of the term for which they were respectively chosen." The undersigned believes, had the majority of the committee extracted the passage of the charter to which they must have referred for the above opinion that they would have seen its want of applicability to the question they were discussing. The passage is considered as solely applicable to cases of removal from these offices by death or for cause, and not to vacancies occasioned in any other manner. As, however, the majority of the committee have seemed to consider it as susceptible of a different construction, the undersigned feels bound to give it to the Senate, that it may form its own opinion of its extent and application. It is in the following words: "And if it shall happen that the present governor, deputy governor, and assistants, by these presents appointed, or any such as shall hereafter be newly chosen into their rooms, or any of them, or any other the officers of the said company shall die, or be removed from his or their several offices or places before the said general day of election (whom we do hereby declare, for any misdemeanor or default, to be removable by the governor, assistants, and company, or such greater part of them, in any of the said public courts to be assembled as aforesaid), that then, and in every *such* case, it shall and may be lawful to and for the said governor, deputy governor, assistants, and company aforesaid, or such greater part of them, so to be assembled as is aforesaid, in any of their assemblies, to proceed to a new election of one or more of their company, in the room or place, rooms or places, of such officer or officers, *so dying or removed*, according to their discretions; and immediately upon and after such election or elections made of such governor, deputy governor, assistant, or assistants, or any other officer of the said company, in manner and form aforesaid, the authority, office, and power before given to the former governor, deputy governor, and other officer or officers *so removed*, in whose stead and place new shall be chosen, shall, as to him and them, and every of them respectively, cease and determine."

A careful examination of this clause of the charter will show that it first contemplates a vacancy in the office of governor, deputy governor, or an assistant by death, or, second, by removal from office, which, "for any misdemeanor or default," it authorizes; and, in either case, it empowers the legislature to make an election to fill the vacancy so occasioned; and then declares that, after such election is made, "the authority, office, and power" of the officer "removed" shall "cease and determine." This is the whole scope of the provision, and the majority of the committee must, therefore, have been mistaken in supposing that it was applicable to a case of vacancy in any of these offices occasioned by a failure of the people to elect. It applies solely to elections made by the legislature; and there is no authority given by the charter to the legislature to fill a vacancy in the office of governor, deputy governor, or an assistant, occasioned in any other manner than by the death of the incumbent, or his removal from office for some "misdemeanor or default."

The undersigned finds no other provision in the charter which can, to his understanding, be possibly supposed to have any application to the official terms of the governor, lieutenant-governor, and senators; and as he cannot suppose the clause last above quoted and referred to can be understood as reaching any cases other than the two classes of cases he has mentioned, to wit, the death of the incumbent, and his removal from office for cause, he is forced to the conclusion that the charter does limit the term of office of the governor, lieutenant-governor, and senators to one year, "the year ensuing" the

pronunciation of their election in the general assembly convened at Newport; and that there is nothing in the other provisions of that instrument to qualify this limitation.

Can, then, the legislature of the State, consistently with the powers granted to that body by the charter, extend the official terms of those officers beyond the limits fixed by the charter?

This inquiry would seem to have been already answered; for, if it be admitted that the charter is the fundamental law of the State, and, as such, binding upon its legislature, and that it does fix the official terms of the governor, lieutenant-governor, and senators at one year, it must follow that an extension of those terms beyond the period fixed by the charter would be an act of legislation above and beyond the charter in a case where it makes express provision, and, therefore, an act of legislation not authorized by the charter, but in direct violation of it. Such are the impressions fully entertained by the undersigned; but it is his duty to notice some of the positions by which the majority of the committee sustain themselves in an opposite conclusion.

It will at once be seen that this discussion involves the constitutionality and validity of so much of the act of January, 1832, as extends the terms of office of the governor, lieutenant-governor, and senators in case of a failure to elect by the people, and therefore has direct reference to the arguments by which the majority of the committee sustain that act.

The first position, in order, taken by the majority of the committee, which it is proposed to notice, is laid down in the following words: "Your committee hold it to be an undeniable principle, applicable to all forms of government, that there must exist in the supreme legislative power of the State a capacity to preserve itself from annihilation."

This is a position to the soundness of which the undersigned cannot subscribe as applicable to any of the forms of government adopted by any of the States of this Union, or by the Federal Government. He supposes Congress to be "the supreme legislative power" of this Government, but Congress has by the Constitution of the United States no capacity to preserve itself from annihilation. If the people should fail to elect members to the House of Representatives, or if the legislatures of the States should fail to elect members to the Senate, there would be no Congress, nor could Congress itself continue itself beyond the terms for which its members have been elected, or in any other way, by its action, bring a new Congress into existence. Congress, therefore, which is the supreme legislative power of the United States, has not the capacity to preserve its continued existence, or to prevent its own annihilation.

The undersigned, from the time allowed him to prepare this report, has not been able to examine very extensively the constitutions of the several States, nor have his former researches made him familiar with the minute provisions of those instruments; but from the examinations he has been enabled to make he entertains the opinion that no such power is conferred upon any one of the legislative bodies organized by those instruments as that of continuing itself in official existence, by its own act, beyond the term for which its members were elected. He believes that the members of the legislatures of all the States are elective by the freemen of the respective States, and in the constitutions of some no provision is made for a failure by the people to elect, and no mode of remedying such failure but that of a resubmission to the people has ever been attempted by the legislatures of those States. The constitutions of other States provide for filling the vacancies which may exist from failures to elect by the choice of such of the members of one or both branches of the new legislature as may have been elected, generally confining that choice to a certain number of the candidates voted for by the people for the office to be filled. Other States, where legal quorums are elected, suffer the vacancies occasioned by a failure to elect to remain unfilled until another regular election. There may be cases where the constitution of a State provides that the members of the old legislature shall continue to act until others are elected and qualified to fill their places, but the undersigned has been able to find no such case, nor does he believe that one exists. He believes that the constitution of every State fixes definitely the length of the official term of the members of its legislature, and that without a re-election by the people, or some other re-election or reappointment prescribed by the constitution of the State, the official powers of every member of the State legislatures cease with the close of the term for which he was elected, whether any other person be or be not qualified to discharge the same duties.

Surely, in the first class of the above cases, where the State constitution makes no provision for a failure to elect, and a new election is the only remedy within the power of the legislature, "the capacity to preserve itself from annihilation" does not exist in the legislature, the official terms of the members of which have expired. That capacity is in the people alone, and their election must determine the continuance or not of the legislative power.

In the second class of cases, where vacancies occasioned by a failure to elect are to be filled by such members of one or both branches of the new legislature as may have been

elected, the capacity may exist in each legislature to preserve itself but not its succession; and even this must depend upon the success of the people in electing a portion of the members; for if there should be a failure to elect the whole, or if the people should hold no election, there would be no one authorized to fill vacancies, and annihilation would follow. Such a legislature, therefore, has only *sub modo* the "capacity to preserve itself from annihilation," and has not at all that capacity in the sense in which the majority of the committee are understood to use it, to preserve its succession.

The third class, where the constitution of the State authorizes the members of the existing legislature to hold their offices and exercise their powers until others are elected or appointed and duly qualified to take their places, if indeed such a provision exists in the constitution of any one of the States, is still not a capacity which exists in the legislative power to preserve itself from annihilation, but a provision which exists in the constitution of the State to preserve its legislature from annihilation. The power or capacity is constitutional and not legislative, and, therefore, even in this class of cases does not bear out the majority of the committee in the position they have laid down.

The undersigned may have misapprehended the meaning which the majority of the committee intended to give to the position itself, as they may have attached to the terms "supreme legislative power of the State" ideas which, as used, they have not conveyed to his mind. He has considered them as used in reference to the legislative bodies of the United States, and to legislative bodies acting in subjection to fundamental law paramount to the powers of the legislative authority—indeed, from which the legislature derives its authority. If the position has not been taken in this sense, then the undersigned must admit that his replies to it may be a departure from the intention of the proposition; but he must at the same time say that he thinks, in any other sense, the proposition is a departure from the argument it is used to support.

The next position assumed by the majority of the committee to sustain this act of January, 1832, is that neither in the charter nor in the bill of rights, "nor in any other act or instrument now in force, is there to be found any prohibition of the power to continue over an existing legislature until their successors shall be duly chosen and engaged." The reasoning to support this position is that the constitutions of the several States are in the broadest sense popular, and that the legislative power granted by them embraces every object not expressly prohibited by some provision in the instrument itself, or by a bill of rights. In reference to powers legislative in their nature and character, and not enumerated or particularly granted, this reasoning and the deduction from it may be generally sound as applicable to the State constitutions. It is respectfully submitted, however, that the establishment and organization of the legislative bodies, and as a necessary part of that establishment and organization the limitation of the terms of the members is, under our system, a constitutional and not a legislative power, and therefore, not coming within the scope of the reasoning of the committee, cannot be controlled by the conclusion drawn from that reasoning. But in the present case this point is not left to reasoning and inference. We have already seen that the terms of the members of the senate of Rhode Island are specifically fixed by the charter to one year. The constitution has provided for the case in terms, and its grant is positive, definite, and clear. It surely then will not be contended that this term may be extended without a violation of the grant, because the granting clause does not contain a prohibition against its violation. It is a settled rule of construction that an affirmative and positive grant, clear and intelligible in its terms, is itself a negative of what is not granted. The Constitution of the United States fixes the term of a Senator at six years; and it surely would have been considered surplusage in that instrument to have added that the term of a Senator should be no more than six years; nor will it be supposed that Congress can prolong that term because that negative is not affixed to the grant. This position, therefore, cannot sustain the action of the legislature of Rhode Island in attempting by a legislative act to prolong the term of the senators of that State beyond the period limited and prescribed by the fundamental law of the State.

The majority of the committee further contend that the people of the State of Rhode Island sanctioned the act of January, 1832, by holding elections pursuant to its provisions. The undersigned believes that in using this argument the majority of the committee have not taken the proper distinction between the different provisions of that act. It has not been contended, to the knowledge of the undersigned, that those parts of the act which directed new elections in cases of failure to elect at the annual elections were unconstitutional or invalid. On the contrary, he understands that those provisions of the law are insisted upon as valid and binding, and that it is complained that the house of representatives did not carry them into effect according to their plain intent and meaning. It will be found to have been made a distinct point by Mr. Potter in his argument that even supposing all parts of the law of January, 1832, were constitutional and valid, the election of Mr. Robbins to the Senate was improperly made, because if that law had been properly carried into effect there would have been two or three sessions of

the legislature of the State between January, 1833, when that election was made, and the 3d of March, 1833, when his former term expired; while the law of the State regulating the election of United States Senators requires that election to be made "at the session of the general assembly next preceding the expiration of the term of service of the Senator for the time being, and not before."

His reasoning upon the subject is that it was the intention of that law that elections should be held as frequently as that could be done, the returns made, and the results ascertained, until a choice of governor, lieutenant-governor and senators should be effected; that the law fixed the period of thirty days as the longest notice which should be given of a special election to be held under it; that several of those elections were held upon a much shorter notice, and proved that elections might be held once in thirty days without difficulty; that these elections were continued at intervals differing not very widely from this until the October session of the legislature in 1832; that after that period but one election was held under the law; that at the session in January, 1833, the legislature, instead of adjourning to such a day as would give time for another trial to elect a senate, and so continuing to do from time to time until the law made it imperative upon them to elect a Senator, at any time before or even on the 3d day of March, 1833, then proceeded to make that election, the house of representatives having first resolved that they would order no more elections under the law; that by this proceeding the persons acting as the governor, lieutenant-governor, and senate, under the law of January, 1832, who were elected in April, 1831, without any reference to the election of a Senator, were made actors in that election, and actually gave their votes for Mr. Robbins, by which votes he was elected, when, if new elections had been ordered, as they should have been, other sessions of the legislature would have intervened between January and March, and the people would have had an opportunity to elect a governor, lieutenant-governor, and senate, with a view to the election of a Senator; that the fact that an election was effected at the first trial after November, 1832, proves very clearly that had elections been ordered some choice would have been effected before March, 1833, and before the expiration of the then term of Mr. Robbins; while the total change produced by the election in the governor, lieutenant-governor, and senate proves conclusively that the public will was not represented by the former incumbents of those offices.

These suggestions are given here in as condensed a form as possible, that the Senate may allow them such weight in the decision of this important controversy as this body may think they deserve. They must in any event satisfy the Senate that these elections, held in obedience to the law of January, 1832, furnish no evidence of the acquiescence of the people of that State in any of the provisions of that law other than those applicable to the special elections, the validity of which provisions have not been and are not now disputed. Indeed, from the fact that that law charged the house of representatives alone with the execution of this portion of it, an argument has been drawn that it was not the intention of the legislature which passed the act that any business of an official or legislative character should be performed by the senate after the expiration of their constitutional terms, and that the provisions in the law for the official continuance of the governor, lieutenant-governor, and senators was designed as a mere formal continuance of the legislative body until an election by the people should be effected. The terms of the act, however, as will be seen by a reference to it, go very strongly to contradict this construction of it.

Another position taken by the majority of the committee to sustain the validity of the act of January, 1832, is based upon the action of the supreme judicial court of the State of Rhode Island. The paper annexed, marked O, contains the evidence of the proceedings referred to. The facts seem to be that a person by the name of Miner was indicted in September, 1832, for murder; that he was tried in March, 1833, before this court, convicted, and sentenced to be hung in July, 1833. He presented to the court an application for a habeas corpus, upon the ground that the judges had not been appointed by a competent legislature, and were not, therefore, empowered to try and sentence him. The court refused the application, but the grounds of the decision are not stated. It is contended that this decision was a pronunciation of the judgment of that court in favor of the validity of the law of January, 1832. Mr. Potter makes two answers to this point. The first is that the statute of the State expressly denies to this court the authority to grant a habeas corpus on the application of persons "committed for a capital crime," "or persons convict" (see the Revised Laws of Rhode Island of 1822, page 181). To this it is replied, as it would seem to the undersigned, with much force, that notwithstanding the prohibition of the statute it would be competent for the court to examine such an application where the allegation was that the whole proceedings had been *coram non judice*, and, if such should, in their judgments, be the fact, that the case would not come within the prohibition of the statute and the writ might be granted. The second answer is that the judges of this court were the same persons from the first Wednesday in May, 1831, until the first Wednesday in May, 1833; that it is admitted on all hands

that their appointments and terms of service were within the power of the legislature, though the practice has been to make the appointments annually; that these judges were properly appointed and commissioned in 1831; that a resolution having the force of a law is always passed by every legislature of Rhode Island declaring that all officers in whose places no others have been appointed by the legislature or who have not been themselves reappointed shall continue to hold their respective offices until others shall be duly appointed and qualified to take their places; that a similar resolution was passed by the legislature in office from May, 1831, to May, 1832; that these judges did hold their offices and continue to discharge their duties as judges by virtue of their appointment in 1831, and of the resolution above described until August, 1832, although their year expired in the month of May, 1832; that the body acting as the legislature in August, 1832, but whose right so to act is now disputed, did in that month assume to reappoint these judges, but it is said that if it shall be determined that this body was not the legislature of the State authorized to perform the constitutional duties of the legislature of the State, then their assuming to reappoint these judges would neither add to nor take from the powers they possessed before that act was performed; that they were continuing in office at the time by virtue of the resolution before mentioned; that they would so continue until removed from office or reappointed by a constitutional legislature; and that therefore their decision in the case referred to does not necessarily carry with it the decision of that court in favor of the validity of the act of January, 1832, because if they had decided expressly that that law was invalid and their purported reappointment in August, 1832, void, they would still have been compelled to decide that they were in office by virtue of the resolution of the previous competent legislature as well after as before August, and, being so in office, were a competent court to try and sentence the criminal in question. This reasoning seems to the undersigned to follow necessarily from the facts, and to render wholly inconclusive this action of the court as a decision in favor of the validity of the law under consideration.

The legislature which declared void the election of Mr. Robbins and elected Mr. Potter, in the preamble to the act making that declaration denominate the body which made the election of Mr. Robbins "the general assembly," and assign as the ground upon which they declare void their proceedings in that particular the non-compliance with the act of January, 1832. The majority of the committee consider this an admission sustaining the validity of that act. This same legislature also, at their first session, repealed the act of January, 1832, without expressing any opinion in the repealing act that the act to be repealed was not valid. This the majority of the committee also consider an admission to the same effect. How far admissions by this subsequent legislature, if made, would render valid an unconstitutional law passed by a preceding legislature, or how far such admissions are to be considered evidence of the constitutionality of such a law, when that is the point in issue, are questions which the undersigned leaves to the determination of the Senate. These admissions, however, appear to him to have been made, so far as they can be considered admissions at all, under circumstances which should be considered. The Legislature of Rhode Island, at its October session, in the year 1833, pass an act in which they declare the election of Mr. Robbins to the Senate "to be null and void, and of no effect," and that the office of Senator is vacant; not that the office is thereby vacated, but that it is "vacant." To that act they affix a preamble, in which they term the body of men which made the election that they are about to declare void "the general assembly," and accuse them of a non-compliance with the law by virtue of which they held their offices; and this preamble is followed by the law which declares null and void the act referred to. Now, it would not do to assume that anything contained in this preamble was designed as an admission of the validity of the election of Mr. Robbins, because it was the sole object of it, and of the law to which it is the preamble, to declare that election void; and it will not be contended that the preamble to any legislative act is to be so construed as to contradict, defeat, and overrule the act itself, which is the only part of the proceeding having validity. This legislature, then, did not intend to admit that Mr. Robbins had been validly elected to the Senate of the United States, but to deny that fact, and to declare not *voidable* but *void* the proceeding by which he purported to have been so elected; and the preamble to the act must be so understood and construed as to be consistent with this intention. Two grounds were assumed upon which that election was void: 1st. That the law of January, 1832, so far as it purported to continue the terms of office of the governor, lieutenant-governor, and senators, was in direct violation of the constitution of the State, and therefore void, and that the persons assuming to act as a governor and senate in the election of Mr. Robbins were not constitutionally a governor and senate, and were not authorized so to act. 2d. That the governor and senate for the time being held their offices, not by virtue of an election by the people, but by virtue of the act of January, 1832, and that a failure to comply strictly with the provisions of that act had put an end to the powers they derived from it, and therefore

that they had no power to act in the election of a Senator. The subsequent legislature appear from this preamble to their act to have assumed the latter ground as the foundation of their action, and anything in the shape of an admission in the preamble would seem to be properly referable to the views they entertained, and upon which they were acting, and not to connect itself with a view of the subject which does not appear from their proceedings to have influenced their action. If, therefore, the ground assumed by this legislature should be held to be untenable, and the ground first above mentioned, to wit, that the act of January, 1832, so far as it purports to extend the official terms of the governor, lieutenant-governor, and senators, is in direct violation of the constitution of the State, and therefore void, be well taken, the undersigned is unable to discover that anything in the admissions supposed to be contained in this preamble can weaken or overturn it. In reference to the admission supposed to be drawn from the silence of the act repealing the act of January, 1832, the undersigned will simply remark that this was an act to repeal a law parts of which were held to be unconstitutional and void, and other parts of which were admitted on all hands to be valid and binding as law; and under these circumstances he cannot consider the absence of a declaration pointing out those parts which were held to be unconstitutional, inasmuch as it was the object of the legislature to repeal the whole act, as going very far to sanction the whole act.

The majority of the committee mention the action of the legislature of Rhode Island in relation to the election of members of Congress and the introduction of the plurality instead of the majority of votes to elect in the choice of those officers as going to show the extent to which the legislature have gone in regulating elections, contrary to the long-established customs of the State. Two remarks may be made in relation to this argument. The first is, that the charter could not necessarily have contained any provision in relation to the election of these officers, inasmuch as it was granted for the government of a British colony, and not of the State of Rhode Island as a member of the confederacy of States composing this Government, and was granted more than a century before such a thing as a Congress of the United States of America was known or had existence; whence, from necessity, the legislature must have full power over that whole subject. The second is, that the fact that the legislature of Rhode Island extended, by law, the plurality mode of election to the choice of members of Congress where the charter does not interfere, and did not extend it to the election of officers of the State government where the charter prescribes the majority principle, affords at least as strong an inference in favor of their sense of the binding and paramount influence of the charter, where it does direct, as of any disposition to treat it lightly by disregarding the mere analogy when acting upon a case not known to the charter.

So much for the arguments which have been adduced by the majority of the committee to sustain the validity of the act of January, 1832.

In corroboration of the point now under discussion, however, to wit, that the terms of the governor and senate can be continued beyond the year, the majority of the committee assume that these officers always have held over until the election was completed and their successors qualified. A perfect understanding of the facts, it is believed, will make this point plain. From the statments of the parties annexed, and before referred to, it is to be seen that the practice of the legislature of Rhode Island has ever been to adjourn to meet on the day previous to that fixed in the charter for the annual election, and that pursuant to such adjournment, a quorum of both houses assemble on that day always at Newport, the place named in the charter for holding the annual elections. It is undoubtedly true, as the majority of the committee remark, that when the people all assembled and voted at that place they might remain together until an election was effected, and that the governor and senate of the former year might remain until that result was ascertained, but there is not found any provision in the charter making them at that time presiding officers of the election or imposing upon them any other official duties after the opening of the election. The new house of representatives always assembled on the day fixed for the election, and took the oaths of office on that day. They always acted as the canvassers of the votes, and the result of the election was declared by that body. Since the system of voting by proxy, as before described, has been adopted, the proxies have always been returned to Newport and canvassed by the new house of representatives, as the votes given by the people there assembled formerly were. They declare the result as they formerly did, and the election is closed. If a governor, lieutenant-governor, and senate are found to be elected, the persons elected are sworn, and the legislature is organized; and as an election of a governor, lieutenant-govenor, and a quroum of the senate has never failed to be made until the first Wednesday in May, 1832, the history of the government of the colony and State furnishes no precedent for such a case as that under consideration, where the former governor, lieutenant-governor, and senators, or any of those officers, have held over and attempted to perform official acts because successors were not elected. That history does, however, present several instances where the whole number of senators have not been elected and no attempt has been made to fill the vacancies by a new election, or in any other

manner, nor have the former incumbents of the vacant seats ever claimed to hold over the terms for which they were elected, but the vacancies have in all such cases been suffered to remain for the year. It should be further remarked that no evidence is found to show that any election has occupied more than the day fixed in the charter, so that any presumption of a holding over of these officers in consequence of a failure to elect on that day is unsupported by evidence.

From these facts it would seem to the undersigned to follow necessarily that the old governor and senate are brought together by the adjournment of the legislature to the day previous to the election; that subsequent to that day, unless re-elected, they have never had any official duty to perform, and have never performed any; that the right to hold over, in case of a failure to elect, had not been admitted in the practice of the government under the charter, because repeated instances have happened where failures to fill places in the senate have occurred and the incumbents have not continued to occupy them, but they have remained vacant for the whole year; that the holding over referred to by the majority of the committee has relation only to the day of election, and then these officers, unless re-elected, have no official duties to perform; and that, therefore, the holding over of the governor, lieutenant-governor, and senators of that State from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, in consequence of a failure of the people to elect, was not sanctioned by any former practice of the government under the charter, and must be held to have been done by virtue of and in obedience to the act of January, 1832, and not by virtue of any provision in the charter or in conformity with any former precedent.

The opinion of the undersigned as to the validity of such of the provisions of that law as assumed to extend the official terms of these officers has been given in his remarks under the two first heads of this report, where it will be seen that he has come to the conclusion that the charter is to be regarded as to this question as the fundamental law of the State, binding upon its legislature, and that it does limit specifically their official terms to one year.

As it has been intimated in some one of the statements of fact that the duty of swearing the new governor, lieutenant-governor, and senators devolved upon the old officers as an official act to be performed by them after the election had been effected, it may be proper to refer here to the paper annexed, marked P, to show that, for a long term of years at least, this duty has been performed by the secretary of state, and not by them.

This brings the undersigned to his fourth inquiry, which is: Can the Senate of the United States, when these questions are presented to it by the action of the legislature of the State of Rhode Island, in the purported election of a member for this body, look into and pronounce its opinion upon them by way of inquiry into the right of a sitting member to the seat he occupies?

Two bodies of men, calling themselves the senate and house of representatives of the State of Rhode Island, and together acting as the legislature of that State from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, did, in January, 1833, assume to elect Asher Robbins to the Senate of the United States for the term of six years from and after the 3d day of March then next, to fill a vacancy to be produced by the expiration of his then term of office on the last-mentioned day. Mr. Robbins received a majority of the votes given by these two bodies of men for the office, and the election was conducted according to the forms pursued by the legislature of Rhode Island in the election of Senators. The result of the election was pronounced in the usual manner, and the person acting as governor of the State at the time issued to Mr. Robbins a commission in the usual form, and authenticated in the usual manner, for the office. This commission was presented to and read in the Senate of the United States on the 4th day of February, 1833, and placed upon the files of that body.

This election of Mr. Robbins was protested against by several members of the house of representatives of that State soon after it was made (see protest annexed, marked Q), and has ever since been alleged to have been void, on the ground that the persons acting as the governor, lieutenant-governor, and senators of the State at the time of the election, and aiding in making it, were not constitutionally the governor, lieutenant-governor, and senators of the State, nor authorized to perform that act, and, of consequence, that the person acting as the governor of the State, and as such signing Mr. Robbins's commission, was not constitutionally the governor of the State, nor authorized to perform that act. In the month of October, 1833, two other bodies of men, admitted to be the senate and house of representatives of the State of Rhode Island, were assembled and constituted the legislature of that State, and while so assembled this legislature passed the law to be found annexed to the report of the majority of the committee, and marked A, declaring the election of Mr. Robbins "null and void, and of no effect," and the office to be "vacant." This same legislature then proceeded to elect a Senator to fill the vacancy which they alleged existed by the expiration of Mr. Robbins's former term in March previous, and, upon counting the votes given, Elisha R. Potter was found to have

received a majority of the whole, and was declared to have been duly elected. The election was conducted in the usual manner, and the person admitted to be the governor of the State issued to Mr. Potter a commission for the office in the usual form, and with the proper authentications. This commission was presented to the Senate of the United States and read in that body on the first day of its present session, and at the same time Mr. Robbins and Mr. Potter both presented themseves at the bar, and each offered to take the oath of office as a Senator of the United States from the State of Rhode Island.

This is believed to be a sufficient summary of the facts to present this point intelligibly to the Senate. It will be seen from them that the question is raised upon the action of a body admitted on all hands to have been a constitutionally organized legislature of the State of Rhode Island, declaring "null and void, and of no effect," an important act of a preceding body claiming to be the legislature of that State, but the organization of which was peculiar, and the constitutionality and legality of whose acts are questioned.

The Senate, by the Constitution, is made "the judge of the *elections*, returns, and qualifications of its own members," and can it, under this power, look into these facts to determine which of the persons claiming the seat as a Senator from Rhode Island is entitled to represent that State in this body?

No question appears to the undersigned to be raised as to the "returns" or "qualifications" of either of the claimants, and he therefore considers that the question of "election" is the only one presented for decision. This question the Senate has the power to determine, because it is made "the judge of the elections" of its own members. The facts in this case show that the legislature of the State of Rhode Island declare, in the solemn form of a law of the State, that Mr. Robbins has not been elected to the Senate; that the proceedings from which his commisson proceeded were "null and void, and of no effect," because the body taking them were not authorized to elect a Senator; and that the place was "vacant" at the time when this declaration was made. Still, notwithstanding this solemn declaration by a body conceded to be the legislature of the State, Mr. Robbins produces to the Senate, and there is referred to the committee, a commission in due form, according to the laws and the practice of the government of Rhode Island, to show that Mr. Robbins had been duly elected a Senator to represent that State in the Senate of the United States. Will the Senate look behind this commission to determine whether or not it was properly granted? The undersigned believes that it is not only the right but the duty of the Senate to do so. The commission is only the evidence of the election of a Senator, and if the Senate were to limit its inquiries to the proper form and authentication of the commission it would only make itself the judge of the evidence of an election, not the judge of the election itself. The undersigned supposes that the evidence of an election to an office is, in all cases, *prima facie* only, and is susceptible of being controverted and contradicted before a tribunal competent to judge of the election; he therefore supposes that the regularity of the *evidence* of an election may be one thing and that the *election* may be a very different thing; and he concludes that, as the Senate is constituted not the judge of the evidence of the elections of its members only, but "the judge of the elections" of its members, it may and, in all cases of a contested election where the contest does not arise as to the regularity of the evidence simply, should look behind the evidence and into the election itself, that it may determine what it is constituted the judge to determine, the fact of election, or, in other words, that it may determine whether the *prima facie* evidence laid before it is the real evidence of facts or is subject to contradiction by the facts.

The terms of the Constitution would seem to confirm this construction of the powers of the Senate. It is "the judge of the elections, returns, and qualifications of its own members." The "returns" must refer to the commissions or other evidences of election of the members of this body as separate from the "elections" or "qualifications," and of the "returns" the Senate is the judge. Again, the "qualifications" must relate to the age, citizenship, residence, and other personal qualifications of the person elected, and of these "qualifications" the Senate is also the judge, and these are matters to be determined separate from the "elections" and "returns." So also the Senate is the judge of the "elections" of its members as separate from the "returns and qualifications." The three enumerations would seem to be separate subjects, upon each of which the Senate is to judge in the performance of its constitutional duty; and as a judgment upon the returns is made a separate matter from a judgment upon the election, the inference would seem to be irresistible that an examination behind the returns was contemplated, that a judgment upon the election, independent of the return, might be formed.

Against this construction of the constitutional powers and duties of the Senate the majority of the committee interpose objections which are of a consequential character mostly, but which will be considered. The committee say "it would be a dangerous exertion of power to look behind the commission for defects in the component parts of the legislature, or into the peculiar organization of the body for reasons to justify the

Senate in declaring its acts absolutely null and void. Such a power, if carried to its legitimate extent, would subject the entire scope of State legislation to be overruled by our decision, and even the right of suffrage of individual members of the legislature whose elections were contested might be set aside. It would also lead to investigation into the motives of members in casting their votes for the purpose of establishing a charge of bribery or corruption in particular cases."

Reserving for the present the consideration of the extent to which the consequences of adjudging any act unconstitutional, or illegal, or invalid may be properly used as an argument against such an adjudication, the undersigned respectfully suggests that in his judgment the consequences here mentioned do not necessarily follow the decision apprehended. He understands it to be a necessary rule of all legislative bodies empowered to judge of the "elections, returns, and qualifications" of their own members that the person presenting the *prima facie* evidence of membership is allowed to take his seat, and is fully authorized to act until such *prima facie* evidence of right is overruled by the judgment of the body; and he never heard it doubted or questioned that the votes of a member so sitting were as valid for all purposes as the votes of a member whose seat was not contested, and whose right to a seat was not questioned. Indeed, if it were not so the admission of a member to a seat in a legislative body until his election, return, and qualifications had been definitely adjudged would be an absurdity. It would be the admission into the body of a voter who might, by the adjudication of the body itself, vitiate its whole proceedings.

So also in the case supposed by the majority of the committee of alleged bribery and corruption. The undersigned has always supposed that a member of a legislative body who should accept a bribe was punishable for the crime; but he has never understood, nor does he now understand, that the vote of the member given under the corrupt influence vitiated the proceeding voted upon or rendered either void or voidable by legal adjudication such proceeding. The member bribed is still constitutionally and legally a member of the body notwithstanding his corruption, and retains all his rights and all his powers as a member until conviction for the crime ousts him from his seat.

Hence it is concluded that the consequences above enumerated cannot follow the decision involved in the present controversy, whatever that decision may be, as the question presented is not whether the persons who did act as the governor and senate of Rhode Island, or some other persons claiming the right so to act, were the proper persons to discharge the duties of those offices; but the question is, were the persons who did so act constitutionally and legally, even by any *prima facie* claim, the governor and senate of that State, and as such authorized to vote upon the election of a Senator?

Again, the majority of the committee say "such a power does not belong to the Federal Government, and would, if claimed and carried out to its full extent, annihilate all the reserved rights of the States. It is a general principle of national law applicable to all distinct and independent governments, that if there arise any disputes in a state on the fundamental laws and administration, or on the prerogatives of the different powers of which it is composed, it is the business of the state alone to judge and determine them in conformity to its political constitution. No government has a right to intrude into the domestic affairs of another state, and attempt to influence its deliberations, or to control its action."

These principles may be perfectly sound when applied to nations wholly disconnected with and independent of each other; but the undersigned respectfully submits that they cannot be applicable to governments related to and connected with each other, as are the governments of the States of this Confederacy and the Federal Government, of which the States are component parts, and especially when the question is the proper representation of the State in that branch of the Federal Legislature where its sovereignty is represented in the particular manner pointed out by the Federal Constitution. Upon such a question, that instrument, and not the general principles of international law, must govern the decision. We have already seen that the Constitution makes it the duty of the Senate to judge of the "elections" of its members. Another provision of that instrument says "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof;" and the question now directly presented is, was Mr. Robbins chosen by the legislature of the State of Rhode Island? It would seem to the undersigned, with all deference to the opinion expressed by the majority of the committee, that the Senate cannot judge of the election of that individual unless it can look into and decide this question, and that to determine this to be an unauthorized interference on the part of the Federal Government in the domestic affairs of the government of the State of Rhode Island would be to determine that the Senate cannot, in the most important point always involved, "judge of the elections" of its own members; that it cannot judge whether or not they were chosen by the legislatures of the States, when the Constitution expressly requires that they should be so chosen.

In this connection, the majority of the committee seem to place much stress upon another argument, entirely consequential in its character, which is, that a decision by the Senate that the body of men who elected Mr. Robbins was not the legislature of Rhode Island will be in effect a decision that all the laws passed by that body, acting as the legislature of that State, and all its other acts performed in that capacity, are null and void. Inasmuch as the State has now, and has had since the first Wednesday in May, 1833, a legislature admitted on all hands to be constitutionally chosen and organized, it would appear to the undersigned that the majority of the committee give an unnecessary importance to this consequence of such a decision in case the consequence must follow; because the evils apprehended, to a very great extent, if not to the entire extent, might be remedied by the action of the competent legislature in affirmance of the acts to be affected. But, however this may be, he cannot but consider it a plain proposition, and not requiring argument to support it, that when the constitutional organization of a body of men claiming to be the legislature of a State is the question in issue, the acts of that body whose constitutional powers are disputed are not to be adduced as evidence of the constitutional power of the body to perform them. When the constitutionality of a legislative act is questioned, he cannot believe that the act itself is to be relied upon as evidence of its own validity. Equally clear is it to his mind that when such a question is to be determined the consequences of pronouncing the act invalid are not considerations which should legitimately control the decision. The act is either constitutional or unconstitutional. If constitutional, the dispute is settled; if unconstitutional, no consequences to follow from a pronunciation of that fact can make it valid. So with the body claiming to be the legislature of a State. If the legislature of the State according to the provisions of its constitution, the controversy is at an end; if not the legislature of the State, no acts of theirs in their assumed character, and no consequences to follow from the invalidity of those acts, can give them the powers which they had not when the acts were performed, or make them, what they were not, the legislature of the State. But if consequences can be legitimately considered in the argument, the undersigned feels compelled to say that to his mind a decision that the State of Rhode Island has no fundamental law or constitution of government but the will of its legislature will be a consequence to its people much more serious than any which can be apprehended from pronouncing void the acts of the body of men assuming to be the legislature of the State from May, 1832, to May, 1833.

The undersigned then concludes that the charter of Charles II granted to the colony of Rhode Island and the Providence Plantations (now the State of Rhode Island) in the year 1663, and submitted to and adopted by the people of the colony in the year 1663 and 1664, is now to be considered the fundamental law of the State of Rhode Island, and binding upon its legislature as a constitution of government, except so far as the provisions of that charter were rendered obsolete by the American Revolution; that that charter does fix, and specifically limit, the official terms of the governor, lieutenant-governor, and senators of the State to one year; that the legislature of the State have not the power to extend those official terms beyond that limit; and that the Senate, upon a question as to the election of a Senator, has the right to inquire whether he was chosen by the legislature of his State, and, consequently, whether any body of men assuming to choose a Senator were authorized, as members of the legislature of their State, to make the choice under the provisions of the constitution of such State.

It being conceded that the official terms of one year of the governor, lieutenant-governor, and senators of Rhode Island had expired in May, 1832, and that they continued from that period until May, 1833, to act in those offices, respectively, without any new election by the people, the undersigned is compelled to conclude that they acted during that period without constitutional authority, and that they were not, after May, 1832, members of the legislature of that State, and were not, therefore, in January, 1833, when they did so act, empowered to vote in the choice of a senator to represent that State in the Senate of the United States. And inasmuch as the Constitution requires either a governor, or lieutenant-governor, and at least six senators to constitute, with the house of representatives, a legislature; and as there were no such officers in constitutional existence in the State of Rhode Island in January, 1833, when Mr. Robbins purports to have been chosen a Senator, he is brought to the further conclusion that that choice was not made by the legislature of the State.

Has, then, Mr. Potter been validly elected a Senator from that State? That the body by which he was chosen was the legislature of the State has not been questioned; but in speaking upon that point the majority of the committee express the opinion that that legislature had no "authority to proceed to the election of another Senator until the seat of the Senator-elect had been vacated by a solemn decision of the Senate of the United States." If, speaking legally and constitutionally, there was a Senator-elect, then this opinion is unquestionably sound, as it will not be contended that any legislature of a State has the power to vacate a seat in the Senate. To be more explicit and intelligi-

ble, if Mr. Robbins's election was *voidable* only, and not *void*, a subsequent legislature could not act until the vacancy was produced by the decision of the Senate. But if, as the undersigned has expressed his opinion, the election of Mr. Robbins was not made by the legislature of the State, then it was not *voidable*, but *absolutely void;* it was not an election within the requirement of the Constitution of the United States, and the vacancy existed from the expiration of his former term in March, 1833. If the Senate shall come to this conclusion, then the undersigned is not aware of any ground upon which it can be contended that any constitutionally organized legislature of the State had not the power to fill that vacancy, or that the election of Mr. Potter made by such a legislature in October, 1833, is not valid.

All which is respectfully submitted.

SILAS WRIGHT, Jr.

[The documents annexed to the minority report are here omitted.]

[Twenty-eighth Congress—First session.]

JOHN M. NILES,

Senator from Connecticut from December 21, 1835, till March 3, 1839, and from May 16, 1844, till March 3, 1849.

Mr. Niles was elected to the Senate for the term beginning March 4, 1843. His credentials were not presented until April 30, 1844, when the Senate resolved that they be referred "to a select committee, consisting of five members, who shall be instructed to inquire into the election, return, and qualification of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution of the United States." Some members of the Senate doubted the constitutional power of the Senate to make such an inquiry. May 16, 1844, the committee reported that he had been duly elected, and that they "are satisfied that Mr. Niles is at this time laboring under mental and physical debility, but is not of 'unsound mind' in the technical sense of that phrase; that the faculties of his mind are subject to the control of his will, and there is no sufficient reason why he be not qualified and permitted to take his seat as a member of the Senate." They reported the following resolution: "*Resolved*, That the Hon. John M. Niles be permitted to take the oath of a Senator in the Congress of the United States, and to take his seat as a member of the Senate." The resolution was adopted.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 1st sess. 28th Cong., and the report of the committee copied from the original on file at the office of the Secretary of the Senate.

The debates are found on pages 564, 565, 602, 603 of the Congressional Globe, 1st sess. 28th Cong., vol. 13, part 1.

TUESDAY, *April* 30, 1844.

Mr. Fairfield presented the credentials of the Hon. John M. Niles, elected a Senator by the general assembly of the State of Connecticut for the term of six years commencing the 4th day of March, 1843; which were read.

Mr. Jarnagin submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials presented to the Senate of the election of John M. Niles to be a Senator of the United States from the State of Connecticut be referred to a select committee, consisting of five members, who shall be instructed to inquire into the election, return, and qualification of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution of the United States."

On motion by Mr. Jarnagin,

Ordered, That the said committee be appointed by the President *pro tempore;*

And Mr. Jarnagin, Mr. Benton, Mr. Berrien, Mr. Wright, and Mr. McDuffie were appointed.

THURSDAY, *May* 16, 1844.

Mr. Jarnagin, from the select committee to whom the credentials of the Hon. John M. Niles were referred, submitted a report, accompanied by the following resolution:

"*Resolved*, That the Hon. John M. Niles be permitted to take the oath of a Senator in the Congress of the United States, and to take his seat as a member of the Senate."

The Senate proceeded to consider the resolution; and having agreed thereto,

The oath prescribed by law was administered to the Hon. John M. Niles, and he took his seat in the Senate.

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES, MAY 16, 1844.

Mr. Jarnagin made the following report:

The select committee, to whom was referred the credentials of the Hon. John M. Niles, to be a Senator of the United States from the State of Connecticut, with instructions to inquire into the election, return, and qualifications of the said John M. Niles, and into his capacity at this time to take the oath prescribed by the Constitution, have performed the duty assigned and present the following report:

In the month of May, 1842, the Hon. John M. Niles was duly elected a Senator from the State of Connecticut in the Congress of the United States for the term of six years from the 4th of March, 1843. The committee are satisfied his election, return, and qualifications are legal and sufficient, and that it remains to inquire into his capacity at this time to take the oath prescribed by the Constitution. In prosecuting this inquiry the committee addressed a note to Mr. Niles requesting an interview with him, which was

promptly given. Between him and the committee there have been full, free, and frank conversations. Mr. Niles gave so satisfactory an account of his afflictions and present condition as to render a resort to other evidence unnecessary in the opinion of the committee. He has long been laboring under severe bodily afflictions, which, as was natural, impaired the energies of his mind to such an extent that it was deemed proper to remove him to a retreat at Utica, in the State of New York, of which he remained an inmate till about the 1st of April, 1844. His visitations were greatly alleviated, but he felt he had not physical ability to discharge the duties of a Senator for some time after the commencement of the present session of Congress, and a strong aversion to being an obstacle in the way of a full representation of his State in the Senate, but his inclinations were yielded to what was thought the better judgment of his friends, in obedience to which he repaired to Washington to take his seat in the Senate about the 1st of April last, but felt unable to do so till the 30th of that month, when he presented himself to be qualified as Senator. As evidence of the propriety of the course pursued, Mr. Niles presented to the committee the following letter of Dr. A. Bingham:

"ASYLUM, UTICA, *April* 24, 1844.

"Hon. JOHN M. NILES:

"MY DEAR SIR: Your letter has been received and read with much satisfaction. I perceive you are improving, and that it requires but a little more time, warm weather, and exertion on your part, with some urgency of friends, to restore you to health. Though you have been greatly afflicted with sickness, I trust you will call to mind that you have been no more so than thousands of others who have perfectly recovered. To effect your restoration now, my dear sir, requires that you engage in some active duties. You are in the condition that the distinguished Robert Hall was for a while, and to whom his friend Sir James McIntosh, who was educated a physician, gave the following advice, the advice that I give to you now, and urge you to follow it: 'The remedy,' says he, 'in your case is prescribed by the plainest maxims of duty—*you must act*. Inactive contemplation, or lamentation, is a dangerous condition for minds of profound moral sensibility.' Let me therefore urge you to resume your seat in the Senate as an act of duty and a resource against disease. Such exercise is necessary for your health, and by it you may also serve others.

"Please show this letter to your brother, and perhaps to other friends, to whom I wish to say that a peculiarity of your nature is, even when well (so great is your caution), to require a little urging. I hope, therefore, they will not fail to discharge their duty now in urging you to this course. I hope in a few days to hear you are daily engaged for an hour or two in the Senate"

The committee are satisfied Mr. Niles is at this time laboring under mental and physical debility, but is not of "unsound mind," in the technical sense of that phrase; that the faculties of his mind are under the control of his will; and they see no sufficient reason why he be not qualified and permitted to take his seat as a member of the Senate, and they most cordially unite with Dr. Bingham in the hope that such a course will be the means of usefulness and a resource against disease.

Resolved, That the Hon. John M. Niles be permitted to take the oath of a Senator in the Congress of the United States, and to take his seat as a member of the Senate.

[Special session of Senate, March, 1849.]

JAMES SHIELDS,

Senator from Illinois from March 6, 1849, *till March* 15, 1849, *and from December* 3, 1849, *till March* 3, 1855.

Mr. Shields, an alien by birth, was elected to the Senate January 13, 1849, for the term of six years from the 3d of March following. March 6 the oath was administered to him, and his credentials referred to a select committee. The committee reported that it appeared that he was naturalized on the 21st day October, 1840, and reported the resolution "that the election of James Shields to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States." The resolution was amended by adding to it the words "*at the commencement of the term for which he was elected*," and passed March 15. Mr. Shields was afterward elected for the same term.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 2d sess. 30th Cong., 1848–'49. The debates on the case are found in the Appendix to the Congressional Globe, 2d sess. 30th Cong., vol. 20, 1848–'49, pages 326–351, special references to which are inserted below.

FRIDAY, *March* 2, 1849.

Mr. Douglas presented the credentials of the Hon. James Shields, chosen a Senator by the general assembly of the State of Illinois for and during the term of six years from and after the 4th day of March, A. D. 1849; which were read.

MONDAY, *March* 5, 1849.

The Hon. James Shields, whose credentials were read the 2d of March, appearing for the purpose of being qualified,

Mr. Walker submitted the following resolution; which was read:

"*Resolved*, That the certificate of election of the Hon. James Shields to a seat in this body be referred to the Committee on the Judiciary, with instructions to inquire into the eligibility of the said James Shields to a seat in the Senate of the United States as a member thereof."

The Senate proceeded to consider the resolution by unanimous consent.

Ordered, That the further consideration thereof be postponed until to-morrow.

TUESDAY, *March* 6, 1849.

On motion by Mr. Douglas, the oath prescribed by law was administered to Mr. Shields.

[On Mr. Douglas's motion a debate ensued on the question whether Mr. Shields's credentials were such *prima facie* evidence of the necessary qualifications to a seat in the Senate as entitled him to be at once sworn, or whether they should be first referred to a committee; which debate is found on pages 327–329 of the Congressional Globe referred to in the head-note.]

The Senate proceeded to consider the resolution submitted yesterday by Mr. Walker in relation to the credentials of the Hon. James Shields; and, having been amended, it was agreed to, as follows:

"*Resolved*, That the certificate of the election of the Hon. James Shields to a seat in this body be referred to a select committee, consisting of five members, with instructions to inquire into the eligibility of the said James Shields to a seat in the Senate of the United States as a member thereof."

[On this amended resolution, offered by Mr. Butler, some remarks were made on the question whether the case should more properly go to the Committee on the Judiciary or to a select committee, which remarks are found on page 330 of the Congressional Globe before referred to.]

WEDNESDAY, *March* 7, 1849.

Resolved, That the standing and select committees for the present special session of the Senate be constituted and appointed as follows, viz:

* * * * * * *

Select committee on the eligibility of the Hon. James Shields as a Senator—Mr. Benton, Mr. Felch, Mr. Webster, Mr. Mason, and Mr. Pearce.

THURSDAY, *March* 8, 1849.

Mr. Walker submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the select committee to inquire into the eligibility of the Hon. James Shields to a seat in the Senate of the United States as a member thereof be authorized to send for persons and papers, and to call to their aid a person authorized to administer oaths, and to take the testimony of such persons as the committee may deem proper, and to procure the proper authentication of any papers or records which the committee may at any time have before it relating to the subject-matter under its consideration."

Mr. Walker presented a copy of the record of naturalization in the case of the Hon. James Shields; which was referred to the said select committee.

REPORT OF COMMITTEE.

TUESDAY, *March* 13, 1849.

Mr. Mason submitted the following report:

The select committee to whom was referred the certificate of election of the Hon. James Shields to a seat in this body, with instructions to inquire into the eligibility of the said James Shields to such seat, report—

That having given due notice to the said James Shields, he appeared before them, and they took the subject into consideration.

They further report that the said certificate of election declares that the said James Shields was chosen a Senator of the United States by the legislature of the State of Illinois on the 13th day of January last; that it further appears, and is admitted by the said James Shields, that he is an alien by birth, and the only proof before the committee of the naturalization of the said James Shields in the United States is contained in the copy of a certificate of naturalization in the circuit court of Effingham County, in the said State of Illinois, which is annexed to and made part of this report; by which certificate it appears that the said James Shields was admitted by said court a citizen of the United States on the 21st day of October, 1840.

The committee therefore report the following resolution:

"*Resolved*, That the election of James Shields to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States."

Ex parte James Shields.

This day personally appeared in open court James Shields, and made and filed the following declaration:

James Shields, being duly sworn in open court, declares on oath that he was born in the county of Tyrone, in the kingdom of Ireland, on the 17th day of May, about the year 1810; that he emigrated to the United States of America while a minor, and continued to reside in the United States three years next preceding his arriving at the age of twenty-one years, and has continued to reside therein since to the present time; he is now upwards of twenty-one years of age, and has resided upwards of five years within the State of Illinois aforesaid, one of the United States; that it is his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the Sovereign of Great Britain and Ireland; and he further declares that for three years next preceding the present application it has been his *bona fide* intention to become a citizen of the United States.

JAMES SHIELDS.

Subscribed and sworn to in open court, this 21st day of October, 1840.

WILLIAM H. BLAKELY,
Clerk of said Court.

This day personally appeared in open court James Shields, a free white person, upwards of twenty-one years of age, and applied to be admitted to become a citizen of the United States, and who, being duly sworn, declares on oath, in open court, that he will support the Constitution of the United States, and doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatsoever, and particularly of the Sovereign of Great Britain and Ireland, whereof he was born a subject; and the court being satisfied that he has fully complied with the requirements of the laws of the United States on the subject of naturalization, and that he has resided within the United States upwards of five years and within the State of Illinois upwards of one year next preceding this application, and that during the whole of the time of his residence in the United States he has behaved as a man of good moral

character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, it is therefore ordered and adjudged that the said James Shields be admitted a citizen of the United States, and that he is hereby admitted as such.

STATE OF ILLINOIS,
Effingham County, ss:

I, John S. Kelly, clerk of the circuit court in and for said county, certify that the foregoing is a true copy of the record of naturalization in the case of James Shields, entered, as appears upon the record, on the 21st day of October, A. D. 1840.

Given under my hand and private seal (there being no official seal yet provided for said court at Effington) this 31st day of January, A. D. 1841.

[SEAL.] JOHN S. KELLY, *Clerk.*

[Mr. Mason, when he presented the report, made a statement that a communication in writing to the committee from General Shields had, owing to some inadvertence, never reached them, but that he had since seen it, and that it might be seen by Senators; which statement is found on page 332 of the Congressional Globe referred to.]

The Senate, by unanimous consent, proceeded to consider the resolution reported by the committee.

Mr. Foote moved that the further consideration of the resolution be postponed until the first Monday in December next.*

[The debates on the adoption of the resolution and on Mr. Foote's motion are found on pages 333–336 of the Congressional Globe.]

After debate,

Ordered, That the further consideration of the resolution be postponed until to-morrow.

WEDNESDAY, *March* 14, 1849.

The Senate having before it the motion made yesterday, to postpone until the first Monday in December next the resolution in relation to the election of James Shields, a debate ensued, after which Mr. Foote withdrew the motion.†

[The debate on this motion is found on pages 337, 338 of the Congressional Globe.]

The Senate resumed the consideration of the resolution reported by the select committee in relation to the election of James Shields; and,

After debate,

On motion by Mr. Cass that the resolution lie on the table, it was determined in the negative—yeas 15, nays 34.

On motion by Mr. Cass, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bradbury, Cass, Dickinson, Douglas, Downs, Fitzpatrick, Foote, Hale, Hamlin, Jones, Rusk, Soulé, Sturgeon, Turney, and Yulee.

Those who voted in the negative are Messrs. Atchison, Badger, Baldwin, Bell, Berrien, Borland, Bright, Butler, Calhoun, Chase, Clarke, Corwin, Davis of Massachusetts, Davis of Mississippi, Dawson, Felch, Greene, Hunter, Mangum, Mason, Miller, Morton, Norris, Pearce, Phelps, Seward, Smith, Spruance, Underwood, Upham, Wales, Walker, Webster, and Whitcomb.

On motion by Mr. Calhoun to amend the resolution by adding thereto "at the commencement of the term for which he was elected,"

After debate,

On motion by Mr. Hale that the further consideration of the resolution be postponed until to-morrow, it was decided in the affirmative—yeas 24, nays 23.

[The debates on the last two motions are found on pages 338–342 of the Congressional Globe. They include a discussion of the question whether the election of General Shields was *void* or *voidable*, and whether, in case the resolution as amended should pass the Senate, the governor of Illinois would have power to fill the vacancy by appointment.]

On motion by Mr. Douglas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Atchison, Bell, Borland, Bradbury, Butler, Cass, Chase, Douglas, Downs, Felch, Fitzpatrick, Foote, Hale, Hunter, Jones, Mason, Norris, Rusk, Seward, Soulé, Sturgeon, Turney, Underwood, and Yulee.

Those who voted in the negative are Messrs. Badger, Berrien, Bright, Calhoun, Clarke, Cooper, Corwin, Davis of Massachusetts, Davis of Mississippi, Dawson, Dickinson, Greene, Mangum, Miller, Morton, Pearce, Smith, Spruance, Upham, Wales, Walker, Webster, and Whitcomb.

*This motion is taken from the Congressional Globe. It does not appear in the Journal.
†This proceeding is taken from the Congressional Globe. It does not appear in the Journal.

The Hon. James Shields having handed to the Vice-President a letter tendering his resignation,

Mr. Hale called for the reading of the letter, and, no objection being made, the letter was read.

Mr. Hale submitted the following resolution for consideration:

"*Resolved*, That the Vice-President be requested to inform the executive of the State of Illinois that the Hon. James Shields has this day resigned his seat in the Senate of the United States."

On motion by Mr. Berrien,

Ordered, That the consideration of the resolution be postponed until to-morrow.

THURSDAY, *March* 15, 1849.

On motion by Mr. Turney that the Senate proceed to the consideration of the resolution submitted by Mr. Hale the 14th instant, requesting the Vice-President to inform the executive of the State of Illinois that James Shields has this day resigned his seat in the Senate of the United States,

After debate [a debate on the question whether the resolution offered by Mr. Hale or the resolution reported by the committee should be first considered is found on pages 342–346 of the Congressional Globe],

On motion by Mr. Davis, of Mississippi, that the motion lie on the table, it was determined in the affirmative—yeas 33, nays 14.*

On motion by Mr. Douglas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Atchison, Badger, Baldwin, Bell, Berrien, Borland, Bright, Butler, Calhoun, Clark, Cooper, Corwin, Davis of Massachusetts, Davis of Mississippi, Dawson, Dickinson, Greene, Hamlin, Hunter, Mangum, Mason, Miller, Phelps, Seward, Smith, Spruance, Sturgeon, Upham, Wales, Walker, Webster, Whitcomb, and Yulee.

Those who voted in the negative are Messrs. Cass, Chase, Douglas, Downs, Felch, Fitzpatrick, Foot, Hale, Jones, Norris, Rusk, Soulé, Turney, and Underwood.

On motion by Mr. Mason, the Senate resumed the consideration of the resolution reported by the select committee in relation to the election of James Shields, and,

After debate [the debate is found on pages 346, 347 of the Globe],

On motion of Mr. Davis, of Mississippi, that it lie on the table, it was determined in the negative—yeas 16, nays 32.†

On motion by Mr. Turney, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cass, Chase, Davis of Mississippi, Douglas, Downs, Fitzpatrick, Foote, Hale, Jones, Norris, Rusk, Soulé, Sturgeon, Turney, Underwood, and Yulee.

Those who voted in the negative are Messrs. Badger, Baldwin, Bell, Berrien, Borland, Bradbury, Bright, Butler, Calhoun, Clarke, Cooper, Corwin, Davis of Massachusetts, Dawson, Dickinson, Felch, Greene, Hamlin, Hunter, Mangum, Mason, Miller, Morton, Phelps, Seward, Smith, Spruance, Upham, Wales, Walker, Webster, and Whitcomb.

[A further debate on the adoption of the resolution reported by the committee is found on pages 347–351 of the Globe.]

On the question to agree to the amendment proposed by Mr. Calhoun the 14th instant, it was determined in the affirmative.

On motion by Mr. Underwood further to amend the resolution, by striking out the words "was void," and inserting in lieu thereof the following: "does not entitle him to a seat as such in this body," it was determined in the negative—yeas 16, nays 28.

On motion by Mr. Underwood, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Atchison, Bradbury, Chase, Davis of Mississippi, Douglas, Downs, Felch, Fitzpatrick, Foote, Jones, Norris, Rusk, Soulé, Sturgeon, Underwood, and Yulee.

Those who voted in the negative are Messrs. Badger, Baldwin, Bell, Berrien, Borland, Bright, Butler, Calhoun, Clarke, Cooper, Corwin, Davis of Massachusetts, Dawson, Dickinson, Greene, Hamlin, Hunter, Mangum, Mason, Miller, Morton, Phelps, Seward, Smith, Spruance, Upham, Wales, and Webster.

On motion by Mr. Douglas to amend the resolution by striking out all after the word "resolved," and inserting the following in lieu thereof:

"That the Vice-President be requested to notify the executive of the State of Illinois that the Hon. James Shields has resigned his seat in this body,"

It was determined in the negative- yeas 12, nays 32.

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* The Congressional Globe gives this vote yeas 20, nays 15.

† The Congressional Globe gives this vote yeas 18, nays 32.

On motion by Mr. Douglas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cass, Chase, Douglas, Downs, Fitzpatrick, Foote, Jones, Rusk, Soulé, Sturgeon, Underwood, and Yulee.

Those who voted in the negative are Messrs. Atchison, Badger, Baldwin, Bell, Berrien, Borland, Bradbury, Bright, Butler, Calhoun, Clarke, Cooper, Corwin, Davis of Massachusetts, Davis of Mississippi, Dawson, Dickinson, Greene, Hamlin, Hunter, Mangum, Mason, Miller, Morton, Phelps, Seward, Smith, Spruance, Upham, Wales, Walker, and Webster.

No further amendment being proposed, the resolution was then agreed to, as follows:

"*Resolved*, That the election of James Shields to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States at the commencement of the term for which he was elected."

On motion by Mr. Webster,

Ordered, That the Vice-President be requested to transmit to the governor of the State of Illinois a copy of the said resolution, attested by the Secretary of the Senate.

[Thirty-second Congress—First session.]

YULEE vs. MALLORY,

of Florida.

January 13, 1851, the general assembly of Florida met in convention to elect a Senator for the term beginning March 4, 1851. A *viva voce* vote being taken pursuant to the requirements of the constitution of the State, 29 members responded David L. Yulee and 29 responded blank, whereupon the presiding officer declared that there had been no election. January 15 they again met in convention, when 31 members responded R. S. Mallory and 27 voted for Mr. Yulee and others, whereupon the presiding officer declared Mr. Mallory to be duly elected. Neither party appeared to take the seat during the special session of the Senate in March, 1851. March 8 a letter from Mr. Yulee was read stating that he should contest the seat of Mr. Mallory, declared to be elected. December 1, 1851, the credentials of Mr. Mallory were presented and he took the oath. On the same day the letter of Mr. Yulee with accompanying documents was referred to a select committee of five. August 21, 1852, the committee reported that there was in force in that State, at the time of the election, the following resolution: "*Resolved*, That a majority of all the members-elect composing the two houses of the general assembly shall be necessary to determine all elections devolving upon that body"; that this resolution was joint in fact, though not in form, and was sufficient, though without the forms of law usual in legislation, to regulate the "manner of holding elections"; that the whole number of members-elect in this general assembly was 59, and that Mr. Yulee receiving but 29 votes on the first ballot, did not obtain a sufficient number to elect him; that they recommend the adoption of the following resolution: "*Resolved*, That the Hon. Stephen R. Mallory was duly elected a member of the Senate of the United States from the 3d day of March, 1851." The resolution passed the Senate August 27, without a dissenting vote.

Mr. Yulee's claim to the seat was on the ground that the resolution of the legislature of Florida given above was not such legislation as is requisite in order to change the law of a State, and that the law in Florida had always been that the majority of a quroum of the members composing the legislature could elect, and was at that time the law; that the votes of the 29 voting blank should not be counted at all, and that he being the only qualified person voted for, and receiving 29 votes, had a majority of the legal votes, and more than a majority of a quorum, which majority was 16.

The history of the case here given consists of the report of the committee from Senate Reports, 1st sess. 32d Cong., vol. 2, 1851–'52, Report No. 349; a transcript of the proceedings of the Senate relating to the case on August 27, 1852 (being the day on which the case was discussed in the Senate), from the Senate Journal, 1st sess. 32d Cong., 1851–'52; and a transcript of the proceedings of the Senate relating to the payment of mileage and per diem to Mr. Yulee from Senate Journals, 1st and 2d sess. 32d Cong.

The debates in the case are found on pages 1170–1176 of the Appendix to Congressional Globe, vol. 25, 1st sess. 32d Cong., 1851–'52. A reference to the debates on the question of payment to Mr. Yulee is inserted below. The documents accompanying the case which were printed are found in Senate Miscellaneous, 1st sess. 32d Cong., 1851–'52, Nos. 109 and 110.

The minor proceedings of the Senate relating to the case previous to the day of its discussion in the Senate have been omitted in making up the history of this case.

REPORT OF COMMITTEE.

Committee appointed December 2, 1851.—Messrs. Berrien*, Bright, Davis, Mason, and Pearce.

IN THE SENATE OF THE UNITED STATES.

AUGUST 21, 1852.—Ordered to be printed.

Mr. Bright made the following report:

The select committee to whom was referred the memorial of the Hon. David L. Yulee, claiming the seat in the Senate held by the Hon. Stephen R. Mallory, from the State of Florida, together with sundry documents therewith, report:

That they have examined the law and the facts connected with this case, they have heard the contestant by able counsel, and the sitting member in person, and after giving to each that consideration which the importance of the questions embraced merits, find that on the 13th day of January, 1851, the general assembly of Florida met in convention of the two houses to choose a Senator of the United States to supply a vacancy which would occur before another constitutional session.

The president of the senate presided, and upon a call of the roll a poll *viva voce* was taken of the members pursuant to the requirements of the constitution of the State, and 29 responded David L. Yulee and 29 blank, whereupon the presiding officer declared that no choice had been made; they then proceeded to a second and third vote, with substantially the same result. On the 15th of January they again met in convention for the same purpose, and upon a call of the roll 31 members responded R. S. Mallory, and 27 votes for Mr. Yulee and others; whereupon the president declared Mr. Mallory to be duly elected.

* February 2, 1852, Mr. Berrien resigned and Mr. Badger was appointed in his place February 3.

Neither the record nor any other evidence in the case shows that objection was made to any of those proceedings, or that their legality was questioned in or out of the convention at the time.

The certificate of election was granted to Mr. Mallory, and he having been qualified, now holds the seat.

Mr. Yulee contests his right to the seat on the ground that he was himself elected at the first vote, because there was a quorum of each house present as appears by the journals, and he, being the only qualified person voted for, had a majority of the legal votes. Those who responded "blank," he contends, voted for no qualified person, and waived their electoral rights as effectually as if they had been silent.

Mr. Mallory opposes to this inference a resolution of the two houses adopted in 1845, by concurrent vote, which has never been rescinded, and is in the following words:

"*Resolved*, That a majority of all the members-elect composing the two houses of general assembly shall be necessary to determine all elections devolving upon that body."

The whole number of members-elect was 59, and Mr. Yulee, not having a majority of that number, was not elected. From the facts disclosed it is quite apparent that the convention took this view of the matter.

In deciding the questions which are raised out of the facts, the Constitution of the United States must, to the extent of its provisions, prevail over all other authority. That instrument gives to each State the right to elect two Senators. Article I, section 4, is in these words: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof."

The words of the third section in the same article are: "The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years."

The first question, then, which arises is, What constitutes the legislature of Florida? For that, and that only, has the right to make the choice. The Constitution of the United States, Article I, section 1, says: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The constitution of Florida declares that "the legislative power of the State shall be vested in two distinct branches, the one to be styled the senate, the other the house of representatives, both together the general assembly." These authorities leave no doubt that the two houses constitute the legislature of Florida, which holds the unqualified right under the Constitution of the United States to elect the Senators for the State.

Has this body executed the trust confided to it in such a manner as to satisfy the terms of the Constitution? The time, the place, and the manner of holding the election are all to be prescribed by it. To the time and place no objection is made, but the validity of the manner is questioned.

No mode of election is prescribed by the Constitution, but this duty is left to the discretion of the several legislatures of the States. In carrying out the power some elect by a concurrent vote of the two branches, the one having a negative upon the action of the other; others elect in a convention of the two houses, in which case (as far as your committee are advised) a majority prevails.

If numbers be regarded as a material element in such elections, it is manifest that in the same body of men different results may be produced according as one mode or the other is pursued. There may be in convention a majority in favor of a candidate, making his success by this mode certain, while with the same number in his favor he might be defeated in one of the houses if a concurrent vote is required; and such cases have occurred.

Again, it may be observed that the power given to the legislature to regulate the time, place, and manner applies as well to Representatives as to Senators; and here again are other diversities in the manner of exercising it. Some States elect by a plurality of votes, others by a majority, and others have required at the first trial a majority and a plurality afterward. Some again (until Congress made a law upon the subject) elected by general ticket; others, either by single districts or districts entitled to more than one, according to convenience. None of those modes of electing Senators or Representatives has been held unconstitutional, but members have uniformly been admitted to their seats whether elected in one or other of these modes.

These practices have at all times existed, and have uniformly been recognized as constitutional, proving clearly that the discretion reposed in the legislatures of the States may be exercised in a diversity of ways and yet be a sufficient compliance with the requirements of the Constitution.

The legislature of Florida adopted a course different from any of these by requiring a majority of all the members-elect in convention to make choice of a Senator. This rule is as unobjectionable and harmonizes as well with the Constitution as the modes pursued elsewhere. The right of the State to adopt such a rule has not been directly

questioned, but the legality of the means by which it was executed is denied. This point is the chief ground of controversy between the parties. On the one hand, the validity of the resolution above cited is denied; on the other, it is alleged that if the resolution was not in force a usage equivalent to it existed, which was equally obligatory upon the convention. This again is denied.

We will first consider the character, force, and effect of the resolution.

The first objection to it is that it contains no evidence on its face that it is a *joint act* of the two houses. This is true; but the journals place this matter in the clearest light. While there is an apparent defect in form there was none in fact. It was passed in one house, sent to the other, and there agreed to by a concurrent vote; it is a clear, unequivocal expression of the will of each house. No words added to it can make it a stronger or more complete expression of that will. It is also in substance joint, since it is the will of both houses expressed in the same words. Moreover it is permanent, being designed as a rule of action for both, by the united will of both, and it must stand as such until both concur in repealing or rescinding it.

The next objection is that it has not the forms of law usual in legislation, because it is not signed by the officers of each house or approved by the governor. It is a sufficient reply to state that the Constitution does not require the legislature to regulate the manner of election by *law;* it may be by resolution, either joint or several, or in any other method which commands the agreement of both houses of the legislature. The form of action being discretionary and the substance right, the objection becomes immaterial.

The will of the two houses, when ascertained by vote in their respective chambers, is for this purpose a sufficient law, because they alone are empowered to prescribe the manner of choosing in such mode or by such means as they please. On this point a State constitution can neither control nor modify that of the United States, for the latter is the supreme law.

This resolution being joint in fact, though not in the usual form, was a standing order of the two houses, in force until they by concurrent vote should rescind or modify it. It was consequently the rule prescribing the manner of election to the two houses when they met in convention on the 13th of January, 1851, and they were bound to proceed according to its requirements.

This being the view which the committee take of the case, there is no necessity for pursuing the subject further, since Mr. Yulee did not obtain votes sufficient to elect him. It may not, however, be out of place to observe that the facts disclosed render it evident that the two houses entered the convention with the full belief that no number short of a majority of all the members-elect could make a choice of a Senator, and conducted their proceedings under the conviction that they were bound to adhere to the established practice. There is also reason for believing that the members of the convention assembled and acted under the conviction that blank votes would be counted, inasmuch as the two houses on a former occasion and in another election had so decided. If blank votes are beyond doubt a nullity; if the resolution is to be regarded of no effect, and we are brought to the question, under these circumstances, whether Mr. Yulee is duly elected, it seems to us difficult to maintain the affirmative of that proposition upon the facts before us. If the members were misled on both of these material points by assuming that their previous doings afforded safe and certain rules of action, then they were misguided by what they had a right to consider as authority, and must have acted under a misconception of right which stood, as they supposed, unquestioned. If this be so they stand substantially in the condition of an elector who votes for a person disqualified, believing him to be qualified. The vote in such a case, though unavailing, is not rejected from the count.

The only remedy which we can see for an election carried on through misapprehension from such well-founded causes is to set it wholly aside and open the way to a new choice; but in our view of the case there is no occasion to consider what ought to be done upon such a state of facts.

The committee ought perhaps to notice one other fact which has been relied upon. Since the adoption of the resolution the journals show a case in which a person who was declared not to be elected in convention because he had not the number of votes required was afterward declared elected by a concurrent resolution of the two houses. All that need be said of this transaction is that it passed the senate through the misapprehension of one of its members, as the journal proves, and was manifestly a violation of the resolution. It is equally manifest that the members of both houses did not regard it as affecting in any way the standing order, for its provisions were at all times subsequently observed as obligatory in convention. No argument is necessary to prove that such an irregular proceeding could have no effect upon the order either to modify or rescind it.

With these views the committee recommend the adoption of the following resolution:

Resolved, That the Hon. Stephen R. Mallory was duly elected a member of the Senate of the United States from the 3d day of March, 1851.

[Extract from Senate Journal, August 27, 1852.]

On motion by Mr. Weller that the Senate proceed to the consideration of the resolution reported by the select committee to whom was referred the memorial of the Hon David L. Yulee, claiming the seat in the Senate held by the Hon. Stephen R. Mallory, it was determined in the affirmative—yeas 23, nays 21.

On motion by Mr. Weller, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Atchison, Bayard, Bradbury, Bright, Brooke, Charlton, Clemens, Dawson, Felch, Gwin, Hale, Houston, Hunter, James, Jones of Iowa, King, Seward, Stockton, Sumner, Wade, Walker, and Weller.

Those who voted in the negative are Messrs. Badger, Bell, Borland, Brodhead. Clarke, Davis, Dodge of Wisconsin, Dodge of Iowa, Douglas, Downs, Fish, Hamlin, Mangum, Miller, Morton, Pearce, Rusk, Smith, Spruance, Underwood, and Upham.

The Senate proceeded to consider the resolution submitted by Mr. Morton the 24th August, to give leave to the Hon. David L. Yulee to be heard in person at the bar of the Senate; and,

On motion by Mr. Weller that the resolution lie on the table, it was determined in the negative—yeas 17, nays 29.

On motion by Mr. Gwin, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Bayard, Bradbury, Clarke, Clemens, Downs, Fish, Gwin, Houston, James, Jones of Iowa, Norris, Pearce, Rusk, Spruance, Stockton, and Weller.

Those who voted in the negative are Messrs. Atchison, Badger, Bell, Borland, Brodhead, Brooke, Butler, Cass, Charlton, Dawson, De Saussure, Dodge of Wisconsin, Dodge of Iowa, Douglas, Felch, Geyer, Hamlin, Hunter, King, Mangum, Mason, Meriwether, Miller, Morton, Seward, Shields, Underwood, Upham, and Wade.

On motion by Mr. Pearce to amend the resolution by adding thereto "for two hours," it was determined in the affirmative—yeas 31, nays 21.

On motion by Mr. Badger, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Atchison, Bradbury, Bright, Butler, Cass, Clarke, Clemens, Davis, Dawson, Dodge of Wisconsin, Dodge of Iowa, Downs, Felch, Fish, Foote, Hale, Houston, Hunter, James, Jones of Iowa, King, Meriwether, Miller, Norris, Pearce, Pratt, Smith, Stockton, Sumner, and Weller.

Those who voted in the negative are Messrs. Badger, Bayard, Borland, Brodhead, Brooke, Charlton, Chase, Cooper, De Saussure, Douglas, Geyer, Gwin, Hamlin, Mangum, Mason, Morton, Rusk, Spruance, Underwood, Upham, and Wade.

The resolution submitted by Mr. Morton was then agreed to, as follows:

"*Resolved*, That the Hon. D. L. Yulee, who contests the seat of the Hon. S. R. Mallory, have leave to be heard in person at the bar of the Senate for two hours."

On the question to agree to the resolution reported by the select committee, as follows:

"*Resolved*, That the Hon. Stephen R. Mallory was duly elected a member of the Senate of the United States from the 3d day of March, 1851,"

A motion was made by Mr. Mangum that the further consideration thereof be postponed to the first Tuesday after the second Monday in December next; and it was determined in the negative—yeas 18, nays 37.

On motion by Mr. Bradbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Badger, Bayard, Bell, Borland, Brodhead, Cooper, De Saussure, Dodge of Wisconsin, Dodge of Iowa, Douglas, Downs, Fish, Hamlin, Mangum, Meriwether, Miller, Morton, and Upham.

Those who voted in the negative are Messrs. Adams, Atchison, Bradbury, Bright, Brooke, Butler, Cass, Charlton, Chase, Clarke, Clemens, Davis, Dawson, Felch, Foote, Geyer, Gwin, Hale, Houston, Hunter, James, Jones of Iowa, King, Mason, Norris, Pratt, Rusk, Seward, Smith, Spruance, Stockton, Sumner, Toucey, Underwood, Wade, Walker, and Weller.

Mr. Yulee having addressed the Senate,

On motion, Mr. Morton was excused from voting on the resolution.

On the question to agree to the resolution, it was determined in the affirmative—yeas 41.

On motion by Mr. Pratt, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Badger Bayard, Bell, Bradbury, Bright, Brooke, Butler, Cass, Charlton, Clemens, Cooper, Davis, Dawson, De Saussure, Dodge of

Wisconsin, Dodge of Iowa, Downs, Felch, Fish, Foote, Geyer, Gwin, Houston, Hunter, James, Jones of Iowa, King, Mason, Meriwether, Miller, Norris, Pratt, Rusk, Seward, Smith, Soulé, Spruance, Sumner, Toucey, Underwood, and Weller.

COMPENSATION OF MR. YULEE.

MONDAY, *August* 30, 1852.

Mr. Morton submitted the following resolution; which was read:

"*Resolved*, That there be paid out of the contingent fund of the Senate to the Hon. David L. Yulee a sum equal to the amount of mileage and per diem compensation of a Senator from the commencement of the present session to the 27th instant, the day on which the Senate decided that the Hon. Stephen R. Mallory, whose seat in the Senate was claimed by him, was duly elected a member of the Senate from the State of Florida."

TUESDAY, *August* 31, 1852.

The Senate proceeded to consider the resolution submitted by Mr. Morton the 30th instant, directing a payment to the Hon. David L. Yulee from the contingent fund; and,

After debate,

On motion by Mr. Morton,

Ordered, That it lie on the table.

[Some remarks against the passage of this resolution are found on page 2488 of the Congressional Globe, vol. 24, part 3, 1st sess. 32d Cong., 1851–'52.]

FRIDAY, *February* 25, 1853.

Mr. Morton submitted the following resolution; which was read. [Resolution given above.]

MONDAY, *March* 7, 1853.

Mr. Morton submitted the following resolution; which was read. [Resolution given above.]

THURSDAY, *March* 17, 1853.

The Senate proceeded to consider the resolution submitted by Mr. Morton the 7th instant, to allow per diem and mileage to the Hon. David L. Yulee during the time he contested the seat of the Hon. Mr. Mallory in the Senate, and on the question, "Shall the resolution pass?" it was determined in the affirmative—yeas 23, nays 19.

On motion by Mr. Houston, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Badger, Borland, Brodhead, Butler, Cooper, Dodge of Wisconsin, Dodge of Iowa, Douglas, Evans, Everett, Fitzpatrick, Gwin, Hunter, James, Jones of Iowa, Mason, Morton, Sebastian, Seward, Shields, Soulé, Sumner, and Walker.

Those who voted in the negative are Messrs. Adams, Atchison, Atherton, Bayard, Benjamin, Bright, Chase, Geyer, Hamlin, Houston, Norris, Pearce, Phelps, Rusk, Stuart, Thompson of Kentucky, Thompson of New Jersey, Weller, and Wright.

[A debate on the adoption of the resolution is found on pages 280–283 of the Appendix to Congressional Globe, vol. 26, 2d sess. 32d Cong.]

[Thirty-fourth Congress—First session.]

LYMAN TRUMBULL,

Senator from Illinois from March 4, 1855, *to March* 3, 1873.

June 7, 1852, Mr. Trumbull was elected a judge of the supreme court of Illinois for a term of nine years, and was duly commissioned June 24. May 19, 1853, he resigned this office, to take effect July 4, 1853. February 8, 1855, he was elected to the Senate of the United States for the term beginning March 4, 1855. The constitution of Illinois provided that the judges of the supreme court should not be eligible to any office of public trust or profit in the United States during the term for which they were elected, nor for one year thereafter; and that all votes for them, for any elective office, given by the general assembly, should be void. When Mr. Trumbull's credentials were presented in the Senate, a protest of members of the legislature was presented, protesting against the legality of the election on the ground that it was void by virtue of the provision of the constitution referred to. The subject was referred to the Committee on the Judiciary, who reported that there was such a division of opinion as to render it proper to refer the subject to the Senate, and asked to be excused, which report was accepted by the Senate. A resolution declaring Mr. Trumbull entitled to his seat was then introduced and passed the Senate by a vote of 35 yeas to 8 nays. The arguments show that the Senators voting in favor of the legality of the election did so from different grounds, some proceeding upon the ground that this case did not come within the meaning of the clause of the State constitution referred to, because Mr. Trumbull had resigned the office of judge more than a year before his election to the Senate; and others proceeding upon the ground that a State cannot superadd qualifications of a Senator to those required by the United States Constitution. Extracts from the debates given below will show the lines of the different arguments.

The history of the case here given consists of the report of the committee taken from Senate Reports, 34th Cong., 1st sess. vol. I, 1855–'56, report No. 15; the proceedings of the Senate relating to the case from the Senate Journal, 1st and 2d sess. 34th Cong., 1855–'56; and extracts from the debates found in the Congressional Globe, part 1, 1st sess. 34th Cong., 1855–'56.

Special references to the debates of each day are inserted below.

REPORT OF COMMITTEE, CONTAINING THE DOCUMENTS PRINTED IN THE CASE.

[The committee consisted of Messrs. Butler (chairman), Toucey, Bayard, Geyer, Toombs, and Pugh.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 27, 1856.—Submitted, agreed to, and ordered to be printed with the protest and other papers.

Mr. Butler made the following report:

The Committee on the Judiciary, to whom were referred the "Protest of certain senators and representatives of the legislature of the State of Illinois against the election of the Hon. Lyman Trumbull as a Senator of the United States," and other papers, report:

That it has been under consideration and discussion by the committee, and there being such a division of opinion as to render it proper, in their judgment, to refer the subject to the Senate, ask to be discharged from the further consideration thereof.

Certified copy of the resignation of Lyman Trumbull of the office of justice of the supreme court of the State of Illinois.

ALTON, *May* 19, 1853.

SIR: I am induced, by considerations of a personal and private character, to resign the office of justice of the supreme court; but to allow time for the election of a person to succeed me, so that no public inconvenience may result from a vacancy on the bench, I hereby tender my resignation of said office, to take effect on the 4th day of July next.

Yours, very respectfully,

LYMAN TRUMBULL.

His excellency JOEL A. MATTESON,
Governor of Illinois.

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Alexander Starne, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true and correct copy of Lyman Trumbull's resignation, filed in the secretary's office, May 20, 1853.

And I further certify that Walter B. Scates was elected to fill said vacancy, and entered upon the discharge of the duties of said office, July 13, 1853.

In testimony whereof, I have hereunto set my hand and affixed the seal of State, this 9th day of November, A. D. 1855.

[L. S.]

ALEXANDER STARNE,
Secretary of State.

Certificate of Joel A. Matteson, governor of the State of Illinois, relative to the election of Lyman Trumbull to be a Senator of the United States, and also to the office of justice of the supreme court of that State.

EXECUTIVE DEPARTMENT, STATE OF ILLINOIS,
November 1, 1855.

I, Joel A. Matteson, governor of the State of Illinois, do hereby certify that it appears of record that on the 8th day of February, A. D. 1855, the two houses of the legislature of the State of Illinois met in convention and proceeded to vote for the election of a Senator for said State to the Senate of the United States; that upon the final vote Lyman Trumbull received 51 votes, Joel A. Matteson received 47 votes, and Archibald Williams received 1 vote; and the Speaker of the House of Representatives thereupon declared Lyman Trumbull elected a Senator of the United States for the State of Illinois for six years from the 4th day of March, A. D. 1855.

That it further appears from record that the said Lyman Trumbull was elected, on the 7th day of June, A. D. 1852, a justice of the supreme court of the State of Illinois for a term of nine years; that on the 24th day of June, A. D. 1852, he was duly commissioned as justice for the term aforesaid, commencing on the first Monday of June, A. D. 1852, and ending on the first Monday of June, A. D. 1861; that he was sworn and entered upon the discharge of his duties appertaining to said office; that the constitution of the State of Illinois contains the following provision, to wit:

"The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit, in this State or the United States, during the term for which they are elected, nor for one year thereafter; all votes for either of them, for any elective office (except that of judge of the supreme or circuit court) given by the general assembly or people, shall be void."

All of which, together with the legality of said election, are respectfully submitted to the Senate of the United States.

J. A. MATTESON.

By the governor:
[L. S.]

ALEXANDER STARNE,
Secretary of State.

To the PRESIDENT OF THE SENATE
of the United States.

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Alexander Starne, secretary of state for the State of Illinois, do hereby certify that Lyman Trumbull was, on the seventh day of June, A. D. 1852, elected judge of the supreme court of the State of Illinois, and was duly commissioned as such for the term of nine years from the 24th day of June, 1852; that he took upon himself the oath of office, and entered upon the discharge of the duties of the same; that said term of office for which he was elected is unexpired, and will not expire until the 27th day of June, 1861.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State, this 24th day of February, A. D. 1855.

[L. S.]

ALEXANDER STARNE,
Secretary of State.

Protest of certain senators and representatives of the legislature of the State of Illinois against the election of Lyman Trumbull as a Senator of the United States.

To the honorable the Senate of the United States:

The undersigned, senators and representatives of the people of the State of Illinois in the legislature thereof, respectfully represent: That at a meeting of both houses of said legislature, in general assembly convened, on the 8th day of February, 1855, for the purpose of electing a Senator for said State to the Senate of the United States for six years from the 4th of March, 1855, 51 votes were cast for Lyman Trumbull, 47 votes for Joel A. Matteson, and 1 vote for Archibald Williams, and that one member of said legislature was absent.

They further represent that the constitution of the State of Illinois contains the following provision in the tenth section of the fourth article thereof:

"The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter; all votes for either of them, for any elective office, except that of judge of the supreme or circuit courts, given by the general assembly or the people, shall be void."

They further represent that said Lyman Trumbull was, on the 7th day of June, 1852, elected judge of the supreme court of the State of Illinois, and was duly commissioned as such, for the term of nine years, from the 24th day of June, 1852; that he took upon himself the oath of said office, and entered upon the discharge of the duties of the same; that his said term of office for which he was elected is unexpired, and will not expire until the 27th day of June, 1861; and that in and by virtue of the said provision of the constitution of the said State of Illinois, the votes cast by the members of the general assembly for said Trumbull for Senator of said State, as aforesaid, are null and void, and said Trumbull is not legally elected to the Senate of the United States, and is not entitled to his seat in said Senate; and against said pretended election the undersigned, in behalf of themselves and their constituents, do hereby protest.

SENATORS.

Hugh L. Sutphin.	A. J. Kuykendall.	James L. D. Morrison.
Joseph Morton.	M. O. Kean.	G. R. Jenngan.
James M. Campbell.	Ben. Graham.	A. P. Corder.
J. C. Davis.	John E. Detrich.	
W. H. Carlin.	Silas L. Bryan.	

REPRESENTATIVES.

F. D. Preston.	Eli Seehorn.	George H. Holliday.
C. L. Higbee.	James Bradford.	J. R. Bennett.
Tho. P. Richmond.	Jonathan Dearborn.	S. W. Moulton.
George Walker.	D. McClain.	W. N. Cline.
T. B. Sauner.	Frank M. Rawlings.	Presley Funkhouser.
Dr. H. A. Browne.	G. M. Gray.	James M. Pursley.
S. D. Masters.	Jona. McDaniel.	Hugh Gregg.
Saml. H. Martin.	Wm. R. Morrison.	C. C. Hopkins.
William J. Allen.	P. E. Hosmer.	Henry Richmond.
B. P. Hinch.	L. F. McCrillis.	

Credentials of the Hon. Lyman Trumbull, elected a Senator by the legislature of the State of Illinois.

It is hereby certified that, in pursuance of a joint resolution to that effect adopted, the two houses of the general assembly of the State of Illinois, now in session at Springfield in said State, did convene in joint session in the hall of the house of representatives on the eighth day of February, in the year of our Lord one thousand eight hundred and fifty-five, for the purpose of electing a Senator to the Congress of the United States for the term of six years from the fourth day of March, in the year aforesaid, and that Lyman Trumbull was then and there, by said joint session of the legislature of said State, duly elected Senator to represent the State of Illinois in the Senate of the United States for six years from the said fourth day of March next.

Dated at Springfield the ninth day of February, one thousand eight hundred and fifty-five.

Attest:

GEORGE T. BROWN,
Secretary of the Senate.

Attest:

EDWIN T. BRIDGES,
Clerk of the House of Representatives.

THOMAS G. TURNER,
Speaker of the House of Representatives and Presiding Officer of the said joint session.

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Alexander Starne, secretary of state for the State of Illinois, do hereby certify that the foregoing is a true and correct copy of a certificate of the election of Lyman Trumbull to the United States Senate, as filed in my office by the clerk of the house of representatives.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State, this 15th day of February, A. D. 1855.

[L. S.]

ALEXANDER STARNE,
Secretary of State.

MONDAY, *December* 3, 1855.

Mr. Crittenden presented the credentials of the Hon. Lyman Trumbull, elected a Senator by the general assembly of the State of Illinois for six years from the 4th day of March, 1855; which were read.

Mr. Cass presented the protest of certain senators and representatives of the legislature of the State of Illinois against the election of the Hon. Lyman Trumbull.

The oath prescribed by law was administered to Mr. Trumbull, and he took his seat in the Senate.

THURSDAY, *December* 20, 1855.

Mr. Trumbull presented a certified copy of a letter of Lyman Trumbull, addressed to the governor of Illinois, resigning the office of justice of the supreme court of that State; which was referred to the Committee on the Judiciary.

On motion by Mr. Cass,

Ordered, That the protest of certain senators and representatives of the legislature of Illinois against the election of the Hon. Lyman Trumbull as a Senator of the United States, on the files of the Senate, be referred to the Committee on the Judiciary.

[Some remarks on the question whether the subject should go to the Committee on the Judiciary or to a select committee are found on page 58 of the Congressional Globe referred to in the head-note.]

MONDAY, *February* 4, 1856.

The President *pro tempore* presented a certificate of the governor of Illinois of the election of the Hon. Lyman Trumbull by the legislature of that State as a Senator in Congress, and of his election and appointment as a justice of the supreme court of Illinois, with an extract from the constitution of Illinois respecting the eligibility of judges of the courts of that State to other offices during the term for which they are appointed; which was referred to the Committee on the Judiciary.

[Some remarks on the question of reference of the communication are found on page 343 of the Congressional Globe referred to in the head-note. Mr. Seward cited the admission of Hon. N. P. Tallmadge, of New York, as a precedent in favor of the right of Mr. Trumbull.]

WEDNESDAY, *February* 20, 1856.

[Some remarks made on Mr. Trumbull's eligibility are found on pages 466–468 of the Congressional Globe referred to.]

WEDNESDAY, *February* 27, 1856.

Mr. Butler, from the Committee on the Judiciary, to whom was referred the protest of certain senators and representatives of the legislature of Illinois against the election of the Hon. Lyman Trumbull as a Senator of the United States, with other papers, submitted a report (No. 15).

The Senate proceeded to consider the report; and, in concurrence therewith,

Ordered, That the committee be discharged from the further consideration of the subject.

Ordered, That the report, with the accompanying papers, be printed.

Mr. Crittenden submitted the following resolution for consideration:

"*Resolved*, That Lyman Trumbull is entitled to a seat in this body as a Senator elected by the legislature of the State of Illinois, for the term of six years, from the 4th of March, 1855."

The Senate proceeded, by unanimous consent, to consider the said resolution; and,

On motion by Mr. Stuart,

Ordered, That the further consideration thereof be postponed to and made the special order of the day for Monday, the 3d of March next.

[A short debate is found on pages 514–515 of the Congressional Globe referred to.]

MONDAY, *March* 3, 1856.

The Senate resumed the consideration of the resolution submitted by Mr. Crittenden, the 27th of February, declaring the Hon. Lyman Trumbull entitled to a seat as a Senator of the United States; and,

After debate,

On motion by Mr. Stuart,

Ordered, That the further consideration of the resolution be postponed until to-morrow.

[The subject is debated at length on pages 547–552 of the Congressional Globe referred to.]

TUESDAY, *March* 4, 1856.

The Senate resumed the consideration of the resolution submitted by Mr. Crittenden, the 27th of February, that the Hon. Lyman Trumbull is entitled to a seat in the Senate of the United States; and,

After debate,

On motion by Mr. Weller,

Ordered, That the further consideration thereof be postponed until to-morrow.

[The debate is continued on pages 562–567 of the Congressional Globe referred to.]

WEDNESDAY, *March* 5, 1856.

The Senate resumed the consideration of the resolution submitted by Mr. Crittenden, the 27th of February, in relation to the rights of the Hon. Lyman Trumbull to a seat in the Senate; and,

After debate,

On the question to agree to the resolution, it was determined in the affirmative—yeas 35, nays 8.

On motion by Mr. Toucey, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Allen, Bell of Tennessee, Bright, Brown, Butler, Cass, Collamer, Crittenden, Dodge, Durkee, Evans, Fessenden, Fish, Foot, Foster, Geyer, Hale, Hamlin, Harlan, Houston, Hunter, James, Mallory, Mason, Pearce, Reid, Rusk, Sebastian, Seward, Sumner, Toucey, Wade, Wilson, and Yulee.

Those who voted in the negative are Messrs. Clay, Iverson, Johnson, Jones of Iowa, Pugh, Slidell, Stuart, and Weller.

So it was

Resolved, That Lyman Trumbull is entitled to a seat in this body as a Senator elected by the legislature of the State of Illinois for the term of six years from the 4th of March, 1855.

[The debate is concluded on pages 579–584 of the Congressional Globe referred to.]

[Extracts from a speech of Mr. Crittenden, of Kentucky, delivered March 3, 1856, in support of the legality of Mr. Trumbull's election, taken from pages 547 and 548 of the Congressional Globe referred to in the head-note.]

"The facts of the case are few and undisputed. Mr. Trumbull was, in point of fact, chosen by the legislature of Illinois as a Senator in this body. It is true that some four years before that time he had been elected a judge of one of the circuit courts of that State, but it is also true that he had resigned that office about eighteen months before his election as a Senator. The first question, therefore, that presents itself is, whether upon these facts, and a proper construction of the constitution of the State of Illinois, he is entitled to his seat? No objection is made to any qualification required by the Constitution of the United States. The question is, whether there is anything in the constitution of Illinois which can invalidate his election. I will first consider the question as it arises upon the constitution of Illinois, and then as respects the Constitution of the United States. The provision of the constitution of Illinois I desire to read to the Senate. The tenth section of the fifth article of the constitution of that State reads in these words:

"'The judges of the supreme court shall receive a salary of $1,200 per annum, payable quarterly, and no more. The judges of the circuit courts shall receive a salary of $1,000 per annum, payable quarterly, and no more. The judges of the supreme and circuit courts shall not be eligible to any other office or public trust, of profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the supreme or circuit court) given by the general assembly, or the people, shall be void.'

"Mr. Trumbull was elected on the 7th of June, 1852, judge of the circuit court for the term of nine years. Having held that office less than one year, he resigned on the 19th of May, 1853, to take effect on the ensuing 4th of July. He was elected to the Senate of the United States on the 8th of February, 1855, more than eighteen months after his resignation, but before the expiration of the nine years for which he had been originally elected a judge.

"To these facts we are to apply the constitutional provision which I have read, which declares that no judge of the supreme court or circuit court should be eligible to any other office for the term for which he was elected, and for one year thereafter. Does this prohibition in the constitution of Illinois apply to such a case as this? I say that it does not. In order to ascertain the meaning of any instrument, we must endeavor to ascertain the intention of its framers. What was the intention of the framers of this provision? It was to preserve the independence of their judiciary, and to prevent the

possibility of one of the judges of the State using the influence of that office to obtain another. That is the reason and the sole reason for this prohibition; and to accomplish this object, the constitution of Illinois provides not only for ineligibility during the term of nine years, but for one year thereafter, lest he should, by anticipated contrivances, intrigues, and influence, provide for another office by the use of the influence which his present office affords. One year after the expiration of his office was supposed to be sufficient for that purpose.

* * * * * * *

"Now, sir, suppose I am wrong; suppose that, without any reason, without any motive, without any mischief to be suppressed, without any foundation for any of the objections applicable to the incumbent of office, this constitution shall, by the force of its mere letter, be applied to this case, and that it does create, so far as it can act, an impediment, an obstacle to the election of this gentleman, is such a provision valid, or can it affect his right, when we look to the Constitution of the United States under which the Senate has been created? I think clearly not. We are to look to the Constitution of the United States for the whole frame of this Government. It has created all the powers and all the instruments of this Government. It has created the Senate. Before this creation, neither the State of Illinois as such, nor any other State in the Union, had any power to elect a Senator. There was no such office to be filled by them as Senator of the United States. Their agency was simply employed by the Federal Constitution. The agency of the legislatures of the several States was employed to elect Senators who constitute this body. It is an all-important branch of the Government. The designation of the power that was to elect, the designation of the persons qualified to be elected, all entered into the very essence of the subject. All this was to have its influence on this Government. All and every single circumstance of this was to have its influence in connecting the State governments and the General Government, and in connecting them in such a way as to preserve that species of political relations between them which it was thought would operate most advantageously to all.

"This was the view of the framers of the Constitution of the United States. It was a subject for them whether the legislature should elect Senators, whether the people should elect them, or whether the governors of the several States should appoint them. All this was within the competency of the framers of the Constitution. Neither people, nor governors, nor legislatures had previously any power to elect or appoint a Senator. There was no such officer; there was no such power. The whole was a new creation. The Constitution determines that the power to choose Senators shall be in the legislatures of the several States. The power to elect Senators was committed to the legislatures. Who shall they be, was the next question. The question was, how to designate a Senator by some prescribed qualification, so as to fix the class from which he should come. Shall he be a man who is required to possess any particular amount of fortune? Shall he be a man who must be subjected to some religious test? Of what age shall he be?

"Were not all these points fairly presented to the framers of the Constitution of the United States? Were they not important questions to be acted upon and decided? They were framing the Government. The constitution of this body was an essential part of the Government. That was to depend on the parties, or the condition of the parties, out of whom they would make this great council of the nation. Should he be a citizen? Might they select him anywhere? Should he be an inhabitant of his State? Might he be of any age?

"All these subjects being considered, the Constitution of the United States decides upon the whole matter by providing that each Senator shall be of the age of thirty years, shall have been at least nine years a citizen of the United States, and shall be an inhabitant of the State from which he is chosen.

"Now, sir, does this not embrace the whole subject? Does it not regulate the whole subject? According to the plain meaning of the Federal Constitution every inhabitant of a State, thirty years of age, who has been nine years a citizen of the United States, is eligible to the office of Senator. What more can be said about it? It is now supposed by those who contend that Mr. Trumbull is not entitled to his seat, that it is competent for a State, by its constitution—and I suppose they would equally contend by any law which the legislature might from time to time pass—to superadd additional qualifications. The Constitution of the United States, they say, has only in part regulated the subject, and therefore it is no interference with that Constitution to make additional regulations. This, I think it will be plain to all, is a mere sophism, when you come to consider it. If it was a power within the regulation of, and proper to be regulated by, the Constitution of the United States, and if that Constitution has qualified it, as I have stated, prescribing the age, prescribing the residence, prescribing the citizenship, was there anything more intended? If so, the framers of the Constitution would have said so. The very enumeration of these qualifications excludes the idea that they intended

any other qualifications. That is the plain rule of ordinary construction; but, for a reason above all technical considerations, it is applicable here. The object of the Federal Constitution was to have a body framed by a uniform rule throughout the United States, coming here to constitute this great council of the country—coming here by the agency of the same elective power, the State legislatures—coming here under the same requirements, and with the same qualifications—and standing here upon a perfect and exact equality in all respects to represent the nation justly and equally, and with a sole regard to the common welfare of the Republic."

[Extract from a speech of Mr. Pugh, of Ohio, adverse to the right of Mr. Trumbull, delivered March 3, 1856, taken from pages 549, 550 of the Congressional Globe referred to in the head-note.]

"The Senator from Kentucky claims, in Mr. Trumbull's behalf, that the Constitution of the United States has prescribed the qualifications requisite for a Senator, and that no State can add to or subtract from those qualifications.

"I am not disposed to try the virtue of this conclusion by logical tests; I deny the truth of its premises. The Constitution of the United States does not prescribe the qualifications of a Senator in the sense here assumed. Its language is that of exclusion, and not of qualification:

"'No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.'

"In this instance, as in all others, the language of the Constitution was aptly selected with a view to the nature of our Federal Government. It was intended that each Senator should be thirty years of age, and should have been nine years a citizen of the United States, because the duties of his office were thought to require an experienced judgment and considerable familiarity with the course of public affairs. And to secure the election of Senators from all extraneous influence, such as might have been apprehended perhaps from the dictation of the large States or the patronage of the Federal Government, it was furthermore declared that each Senator should not merely be a citizen but an actual resident—'inhabitant'—of the State for which he is chosen.

"I agree that no State can dispense with or subtract from the requisites prescribed in the Federal Constitution; but I can see no pretense for asserting that the States may not superadd any qualification which is consistent with those requisites. A Senator is an officer of the Federal Government; he is also an officer of his own State. He is elected to represent the people of the State, in an aggregate and organized capacity, as one of the sovereign parties to our Federal compact. He is elected, to be sure, by the legislature; but the legislature is itself a body of representatives chosen by the people. His constituency is equal to that of all the members of the legislature taken together. It consists of the people at large acting through counties, districts, or other established subdivisions, and *thus* expressing the will of the State as a public corporation. While the Federal Constitution might prescribe certain requisites, therefore, in order to secure the interests of the Federal Government, the rights of the citizens of all the States, and the welfare of the whole Union; while it might well do this and bind each State to an observance of such requisites, no reason can be assigned why the people of a State—whose peculiar representative and officer in equal degree their Senator is—might not prescribe *other* qualifications, in addition, for the purpose of protecting their separate interests, rights, and welfare. I agree, of course, that such additional requisites must not only be consistent with those specified in the Constitution of the United States, but with the whole spirit and tenor of that instrument. No mischief can result to the Union or to other States from this course of decision; and it leaves to the States that degree of independence, that reservation of powers, which the tenth amendment to the Constitution so plainly inculcates.

"There is no conflict between the Constitution of the United States and the constitution of the State of Illinois. They are perfectly consistent. Now, so far as my learning extends there is no principle more firmly established in the law of England and of America than this: that whenever two enactments can stand together—whether they be called constitutions, statutes, or by what name soever—they *shall* stand together, and *both* shall be obeyed.

"It is suggested, however, that the legislatures of the States derive their power of electing Senators from the Constitution of the United States and not from their respective State constitutions. But this, if admitted to its full extent, will be found immaterial. It is not a power conferred on any legislature as matter of gift or permission from the Federal Government, but as a matter of right, and because the legislature represents the people and acts only as an agent for the people. Surely, I submit, the Constitution of the United States never designed to exalt the agent above the principal, the creature above the creator, the minister above the sovereign, as this proposition assumes."

[Thirty-fourth Congress—Third session.]

JAMES HARLAN,

Senator from Iowa from March 4, 1855, to January 12, 1857, and from January 29, 1857, till May 15, 1865, when he resigned.

December 13, 1854, the legislature of Iowa met in joint convention in the hall of the house of representatives for the purpose of electing a United States Senator for the term beginning March 4, 1855. After several ineffectual ballots and adjournments they met January 5, 1855, and adjourned to 10 o'clock of the next day. After this adjournment of the joint convention the senate returned to its own chamber and adjourned to the same hour. When the senate met January 6, it at once adjourned till 9 o'clock, January 8. The senate, therefore, not being in session after 10 o'clock on January 6, did not proceed to the hall of the house as a body, though certain members of the senate attended. The body thus assembled consisted of a majority of the house and a minority of the members of the senate, together constituting a majority of the members of the convention. They proceeded to ballot, and Mr. Harlan received 52 votes (52 being a majority of the members of the joint convention), and was declared duly elected. The senate of Iowa sent resolutions to the United States Senate protesting against the validity of the election. Mr. Harlan was admitted to the seat December 3, 1855, the first day that Congress met in the term for which he was elected. December 15, 1856, the subject was referred to the Committee on the Judiciary. January 5, 1857, the committee reported the proceedings of the Iowa legislature and the resolution "that the seat of the aforesaid gentleman be declared vacant," which resolution passed the Senate January 12, 1857, by a vote of 28 yeas to 18 nays. The question to be decided by the Senate, which was debated at great length, was whether the body electing Mr. Harlan was the *legislature* of Iowa within the meaning of the first clause of the third section of Article I of the Constitution; whether it was essential to the validity of the election that the senate as a body should be present, or whether a majority of the individual members of the convention constituted the *legislature* even if the senate as a body was not present, nor even a majority of the members composing the senate. Extracts from speeches, which are given below, give a full statement of the facts and points discussed by the Senate.

The history of the case here given consists of an extract from a speech of Mr. Bayard, of Delaware, in support of the resolution reported by the committee, taken from page 249 of the Congressional Globe, 3d sess. 34th Cong., 1856–'57; an extract from a speech of Mr. Seward, of New York, in opposition to the resolution, taken from pages 260, 261 of the same volume; a transcript of the proceedings of the Senate relating to the case from Senate Journals, 2d sess. 33d Cong., 1st and 2d sess. 34th Cong., and 3d sess. 34th Cong.; and the report of the committee from Senate Reports, 3d sess. 34th Cong., Report No. 300.

The debates in the case are found in the Congressional Globe, 3d sess., 34th Cong., 1856–'57. Special references to the debates of each day are inserted below.

[Extract from speech of Mr. Bayard delivered January 7, 1857.]

"The substantial facts of the case I understand to be these: A resolution was passed in the house of representatives of Iowa on the 13th of December, 1854, proposing to the senate of Iowa to meet in joint convention on the 15th of December for the purpose of electing a Senator of the United States. The resolution was amended by the senate by fixing 2 o'clock or 2.30 o'clock of the same day for the joint meeting. The house concurred in the amendment, and the bodies went into joint convention on that day, a quorum of each house being present when they met. They proceeded to ballot, and having balloted ineffectually they adjourned at various times—on one occasion, I think, from the 14th of December, 1854, to the 5th of January, 1855. On the 5th of January they met, and still failed to elect a Senator. They adjourned to 10 o'clock on Saturday morning, the 6th of January. The senate (as throughout the whole of these proceedings it appears each house did) after they separated returned to their own chamber and adjourned to the same hour on the next day. When the senate met at 10 o'clock on the 6th of January they, without doing any business whatever, adjourned to Monday at 9 o'clock. This adjournment was carried by a vote of the majority, on the yeas and nays—16 to 15—the whole body, consisting of thirty-one members, being present. The senate of Iowa was, therefore, not in session on Saturday after 10 o'clock.

"The house of representatives met—at what hour I do not know; but after transacting appropriate business as a house of representatives they proceeded to receive, not the senate of Iowa, which was not in session, but to receive members of the senate of Iowa as members of the joint convention; and when those members were assembled there, together with the members of the house, they constituted a majority of the two branches combined, that is, a majority of the whole number of persons in the convention. But there was present—I speak now of persons present in the sense of legal presence, as evidenced by the vote—only a majority of the house and a minority of the senate, a quorum of one body and not a quorum of the other. The speaker of the house assumed that the members thus assembled were a regularly-organized convention of the legislature with the power to elect a United States Senator. No vote was taken by the convention

on that point. An appeal was taken from the decision and it was contended that the house ought to decide whether it was organized. That appeal the speaker denied, and there was no vote taken by the convention on that question at all. The roll was called, and as a majority of the members of both branches (not a majority of each branch) answered to their names the speaker declared that the joint convention was regularly organized according to its adjournment, and they proceeded to vote for a United States Senator. After electing first a teller in lieu of the senate teller, who was absent, and also a president *pro tempore* of the convention, the members proceeded to vote *viva voce* for a Senator of the United States. A majority of the members of the house of representatives voted, but only fifteen senators voted on that occasion.

"These are the real facts of the case as they appear from the journals and papers. On the vote to which I have just alluded being taken, it was declared that the honorable gentleman who now holds the seat was regularly elected to the Senate of the United States; and he came here and was admitted. The senate of Iowa met on the Monday morning next after the adjournment of Saturday, and after this alleged election had taken place, and their first act was to protest against it as done without their authority as a co-ordinate branch of the legislature of Iowa.

"It will be observed also from the facts of this case that the journals show that on all occasions when the two houses met they met as houses; a message was sent from one house to the other. The record shows that the senate, preceded by its president, came to the hall of the house of representatives, and the members of the senate had seats assigned them as a co-ordinate branch of the legislature; and after that was done, at all previous meetings, they proceeded to vote. On this occasion there was no senate in session; but the record shows that several members of the senate, without saying how many, were present. The fact is conceded, I understand, that there were but fifteen members of the senate who voted on that occasion, the whole senate consisting of thirty-one; and hence less than a quorum of the senate participated in the election.

"On this state of facts the question which I suppose to arise is, whether 'the legislature' of a State, under the language of the Federal Constitution delegating to the legislature the right to elect Senators of the United States, is to be taken to mean the individual members of the legislature or the body or bodies of which the legislature is composed. I suppose the term as used in the Constitution means the bodies of which the legislature is composed. The honorable Senator from Georgia, if I appreciate his argument, insists that the power being delegated to the legislature is vested in the members of the legislature, and that whenever a majority of the members of the whole legislature under a law such as that existing in Iowa vote for a man he is elected, though one of the co-ordinate branches of that legislature may not vote for him, and may, as a body, refuse to go into an election. Sir, I hold it to be a principle of law which has, I think, no exception that where two integral bodies are authorized to do an act it cannot be done without the consent of those two integral bodies. They must both be present and act in the matter or there can be no validity in the act done. This is a universal law. I can call to mind no case where a contrary principle prevails, whether relating to legislative action or corporate action. Indeed, in reference to corporations it has been decided over and over again that where there are two integral bodies who must concur in an act they must both be present and act upon the matter as bodies, not as individuals."

[Extract from speech of Mr. Seward delivered January 9, 1857.]

"The objections rest on these grounds:

"First. That the legislature of Iowa consists of two co-ordinate branches.

"Second. That it can do no valid act without the co-ordination and co-operation of both of those branches, each acting, or at least appearing in the transaction distinctly by a majority of this branch, or a quorum of it.

"I think the objection is unsound. The legislature of Iowa sustains double relations—one a local one, as the law-making authority of Iowa; the other, Federal, an electoral college to choose Senators in Congress from Iowa. In the one relation, it acts exclusively under the constitution of Iowa; in the other, exclusively under the Constitution of the United States. I may concede that in the former relation it must act by independent co-operation or co-ordination of both houses in all cases.

"I admit that the regulations, which are under review, do require the two houses to resolve themselves into one common body, in which the separate identity or individuality of those separate branches is extinguished, for the purpose of choosing a Senator in Congress. And that, when the merger has been made, and the convention constituted, it is independent of each of the two branches, and as to that transaction supersedes them both, and cannot be terminated or arrested by its own act, or by the concurrent and co-ordinate action of the two houses, being a creation of both.

"In this view, the appearance of the senators in their collective capacity at the convention was merely formal, proper in itself, but of no essential value; and the failure of the

senators to practice the same form cannot vitiate the election, nor can the subsequent protest of the senate.

"It is alleged that such a complete extinguishing of the two houses of the legislature is unconstitutional.

"But it is too late to raise that question. Legislatures in the States are divided into two distinct houses, whose members differ generally in qualifications or in terms of service, to secure delay and deliberation and moderate collision in acts of legislation. But this very delay, deliberation, and collision practically disqualifies such bodies from acting as an electoral college.

"It was found necessary in the very beginning of the Government to provide for bringing the two branches of the legislature to an agreement in that case.

"The expedient adopted was the simple one, probably the only practicable one, of merging the two houses into one, for this purpose. The expedient has been adopted in nearly all the States, and is used either in the first instance, as in Iowa, or a last alternative, in case of disagreement, as in New York, Georgia, and Virginia. It has been acquiesced in by the Senate of the United States from the first, and is therefore settled and constitutional.

"Nor is it without reason. The legislature of a State is merely a college of suffragans interposed between the Senate of the United States and the people of the States. The choice of the legislature is the indirect choice of the people of the State.

"The function of choice is in no sense one of a legislative nature. It is an extra-legislative act, an executive transaction, an action, so to speak, *ex officio*. The Constitution of the United States gives supreme right to Congress to prescribe in what manner the legislature of a State shall perform that act independently of all State constitutions.

"The Congress of the United States has practically waived this right, and devolved that duty on the legislature of Iowa, as it was authorized to do by the Constitution of the United States.

"The manner prescribed by the legislature of Iowa does not conflict with any article of the Constitution of the United States. It would not be at all affected by any conflict with the constitution of Iowa, insomuch as no control over the subject whatever resides in the people of Iowa by whom the constitution was made.

"Mr. President, this transaction is a judicial one. I have approached it, I trust, free from partiality or prejudice. The question is an important one. The decision may be drawn into a precedent to affect hereafter the rights of sixty States, and the safety, welfare, and union of this confederate Republic hundreds of years hence, when this people shall number, not as now by tens, but by hundreds of millions.

"I therefore confine my judgment to this case as it stands on the facts. I do not prejudge other cases which shall present other facts, nor lay down principles for other and extreme cases. I can foresee possible abuses to come from a misapplication of the principles I have adopted. But abuses will attach themselves to all principles as barnacles will to the smoothest and strongest bottoms.

"I repose on my conclusion with the more confidence because it is one which tends to secure the Senate, and through it the Federal Government, against the efforts of faction and of ambition to disorganize the Union and subvert the republican Government here, which is the chief guarantee of civilization everywhere."

SATURDAY, *March* 3, 1855.

The President *pro tempore* laid before the Senate a letter of the president of the senate of Iowa, accompanied by resolutions of the senate of that State, relative to the joint convention alleged to have been held by the general assembly of Iowa for the election of an associate judge and a United States Senator; which was read.

Ordered, That it lie on the table.

MONDAY, *December* 3, 1855.

Mr. Jones, of Iowa, presented the credentials of the Hon. James Harlan, chosen a Senator by the general assembly of the State of Iowa "to represent" the said State "in the Senate of the United States;" which were read.

On motion by Mr. Mason, the resolutions of the senate of the State of Iowa, communicated March 3, 1855, were read.

The oath prescribed by law was administered to Mr. Harlan, and he took his seat in the Senate.

[These resolutions are found in the report of the committee given below.]

THURSDAY, *August* 14, 1856.

On motion by Mr. Jones, of Iowa, that the credentials of the Hon. James Harlan, of Iowa, with the resolutions of the senate of Iowa relative to his election as a Senator from that State, on the files of the Senate, be referred to the Committee on the Judiciary.

Ordered, That the further consideration of the motion be postponed to and made the special order of the day for to-morrow at 12 o'clock.

[Remarks in regard to the reference of the subject to a committee are found on page 2098 of the Congressional Globe, part 3, 1st sess. 34th Cong., 1855–'56.]

FRIDAY, *August* 15, 1856.

On motion by Mr. Hunter that the special order of the day be postponed, and that the Senate proceed to the consideration of the bill (H. R. 201) making appropriations for certain civil expenses of the Government for the year ending the 30th of June, 1857, it was determined in the affirmative—yeas 27, nays 19.

[The vote may be found on page 593 of Senate Journal, 1st and 2d sess. 34th Cong., 1855–'56.]

[A debate on the subject of postponement is found on pages 2129 and 2130 of the Congressional Globe, part 3, 1st sess. 34th Cong., 1855–'56.]

MONDAY, *December* 15, 1856.

The Senate resumed the consideration of the motion made by Mr. Jones, of Iowa, the 14th of August last, to refer the credentials of the Hon. James Harlan to the Committee on the Judiciary.

On motion by Mr. Bayard to amend the motion by striking out "to the Committee on the Judiciary" and inserting "a select committee,"

The question was put on referring the same to the Committee on the Judiciary, and it was determined in the affirmative—yeas 31, nays 13.

[The vote is found on page 42 of the Senate Journal, 3d sess. 34th Cong., 1856–'57.]

So it was

Ordered, That the credentials of the Hon. James Harlan, of the State of Iowa, be referred to the Committee on the Judiciary.

[A statement of the facts of the case by Mr. Harlan, also a debate on the question whether the subject should more properly go to the Committee on the Judiciary or to a select committee, are found on pages 112–117 of the Congressional Globe, 3d sess. 34th Cong., 1856–'57.]

MONDAY, *January* 5, 1857.

Mr. Butler, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. James Harlan, a Senator from the State of Iowa, reported the following resolution:

"*Resolved*, That the seat of the aforesaid gentleman be declared vacant."

Ordered, That the report be printed.

REPORT OF COMMITTEE.

[The Committee on the Judiciary consisted of Messrs. Butler (chairman), Toucey, Bayard, Geyer, Toombs, and Pugh.

IN THE SENATE OF THE UNITED STATES.

JANUARY 5, 1857.—Ordered to be printed.

Mr. Butler made the following report:

The Committee on the Judiciary, to whom were referred the credentials of the Hon. James Harlan and the protest of the senate of Iowa, have had the same under consideration, and submit the following statement:

The following proceedings were had in the legislature of the State of Iowa in the election of a United States Senator:

SATURDAY, *December* 9, 1854.

"*Resolved* (*the senate concurring*), That the house of representatives will meet the senate in the hall of the house on Tuesday next at 2 o'clock p. m., for the purpose of electing a Senator of the United States and judges of the supreme court.

"On motion,

"The resolution was laid on the table."

DECEMBER 12, 1854.

Resolution fixing the time for the election of a United States Senator was taken up and amended so as to fix Friday, the 15th instant, as the day for an election.

"Message from the senate, by Mr. Rankin, their secretary:

"Mr. SPEAKER: I am instructed by the senate to inform the house that the senate has concurred in the house resolution to go into joint ballot on Friday, the 15th instant,

for the purpose of electing a United States Senator and supreme judges, with the following amendment, viz: To strike out the words 'Friday, the 15th instant, at 2 o'clock,' and insert this: 'Wednesday evening, at 2.30 o'clock.'

"Agreed to.

"Joint convention of the two houses; the president of the senate acting as president of the convention, and the clerk of the house acting as secretary."

On motion, the convention proceeded to the election of a United States Senator for six years, from and after the 4th day of March next.

"The president appointed Mr. Workman teller on the part of the senate. The speaker appointed Mr. Kinert teller on the part of the house."

The convention proceeded to a vote, which resulted in no choice.

The convention proceeded to a second ballot, which resulted in no choice.

The convention adjourned until to-morrow at 10 o'clock.

DECEMBER 14, 1854.

By order of the president the roll of the convention was called.

Same tellers as yesterday.

Motion to adjourn until Thursday next at 10 o'clock.

Motion prevailed.

"The president announced the convention adjourned until 10 o'clock a. m. Thursday, December 21."

THURSDAY, *December* 21, 1854.

Joint convention of the two houses; the president of the senate acting as president of the convention, and the clerk of the house acting as secretary.

Same tellers acting.

The president having announced the purposes of the convention, and directed the roll to be called—

"The convention proceeded to vote for a United States Senator for the term of six years, from and after the 4th day of March next."

After several ballots without making a choice, the convention adjourned until the 5th day of January, 1855.

FRIDAY, *January* 5, 1855.

Convention met.

The president announced the purposes of the convention.

After several ineffectual ballots, on motion, the convention adjourned until to-morrow morning 10 o'clock.

SATURDAY, *January* 6, 1855.

"It being the hour of 10 o'clock a. m., the speaker of the house announced the same, and the special order to be a joint convention of the senate and house of representatives, pursuant to adjournment, for the purposes of electing a United States Senator and judge of the supreme court.

"A committee of three was appointed to wait upon the senate, and inform that body that the house of representatives was now ready to receive the senate in joint convention," &c.

"The committee appointed to wait on the senate reported that they had discharged that duty, by proceeding to the senate chamber and delivering their message, and informing the secretary of the senate thereof; that the secretary informed the committee that the senate had adjourned over to Monday next.

"A number of the members of the senate entered the hall of the house without their president and took their seats.

"The speaker announced that the joint convention of the senate and house of representatives was now in session, pursuant to adjournment, for the purposes of electing a judge of the supreme court and a United States Senator.

"Mr. Samuels rose to a question of order, to wit: Was the joint convention properly convened? The speaker announced that the convention had now convened.

"Mr. Samuels appealed from the decision of the speaker, and asked for the yeas and nays, and insisted on his appeal being decided only by the house of representatives.

"The roll of the joint convention was called, and the following members of the convention answered to their names, being a majority of both branches of the general assembly.

[Here follow the names of fifty-seven members.]

"Those members of the convention and members of the house of representatives, except Mr. Franklin, excused, who did not answer to their names refused to answer, or retired from the hall during the call of the roll.

"The speaker announced that a majority of the members of the general assembly being present, that there was a quorum of the joint convention now convened, pursuant to ad-

journment, and that the appeal of Mr. Samuels could not be taken to the members of the house of representatives only.

"On motion of Senator Anderson, William W. Hamilton, a senator from Dubuque County, was elected president *pro tempore* of the convention.

"The president of the senate still being absent,

"The speaker of the house of representatives in his chair, and the clerk of the house of representatives acting as secretary of the joint convention,

"The roll of the convention was called, and the following members of the convention did not answer to their names, to wit.

[Here follow the names of forty-four members.]

"On motion of Mr. Russell,

"The sergeant-at-arms was directed to notify members of the convention who had not answered to their names that the convention was now convened, and to request their attendance.

"Senators Ramsay and Thurston appeared on the floor of the convention and desired to be considered as not acting in the convention.

"The sergeant-at-arms reported that he had performed his duty, as required by the convention; that a few of the members he could not find.

"On motion of Mr. Conkey,

"Further proceedings under the call were dispensed with.

"Mr. Workman, teller on the part of the senate, being absent,

"Mr. Needham was appointed in his stead,

"Mr. Kinert acting as teller on the part of the house.

"The convention proceeded to the election of a second associate judge of the supreme court;" after which "the convention proceeded to the election of a United States Senator for the State of Iowa for the term of six years from and after the 4th of March next. * * *

"Mr. Anderson nominated James Harlan, of Henry County.

"The convention proceeded to vote for a United States Senator, being the ninth vote, which resulted as follows:

"Those voting for James Harlan were—

[Here follow the names of fifty-two members.]

"Messrs Clark, of Marion, and Neely voted for Bernhart Henn; Mr. McAchran voted for Wm. McKay; Mr. Witter voted for James Grant. James Harlan having received a majority of all the votes cast and a majority of the whole number of the members of the general assembly, was declared duly elected a Senator of the United States for the State of Iowa for the term of six years from and after the 4th day of March next.

"The certificate of election was made out and duly attested in the presence of the convention," &c. * * *

HALL OF THE HOUSE OF REPRESENTATIVES,
January 6, 1855.

This will certify that, at an election by the general assembly of the State of Iowa, in joint convention, on Saturday, the 6th day of January, A. D. 1855, James Harlan was duly elected a Senator to represent this State in the Senate of the United States for the term of six years from and after the 4th day of March next.

WILLIAM W. HAMILTON,
President pro tempore.
REUBEN NOBLE,
Speaker of the House of Representatives.

Attest:

JOHN R. NEEDHAM,
DAVID KINERT,
Tellers.

On motion of Mr. Hills, the joint convention adjourned *sine die*, and the members of the senate retired.—*Journal of the House of Representatives of the State of Iowa.*

MONDAY MORNING, *January* 8, 1855.

Mr. Coolbaugh offered the following:

"Whereas it is reported that the journal of the house of representatives, as read this morning in the presence of the house, alleges that a joint convention of the general assembly of this State was held in the hall of the house on Saturday, the 6th instant; and,

"Whereas it is alleged in said journal that said joint convention proceeded to elect one Norman W. Isbell as an associate judge of the supreme court of this State and one James

Harlan as a Senator of the United States for the term of six years from the 4th day of March next: Therefore,

"*Resolved*, That inasmuch as the senate has no knowledge of any such joint convention, and did not participate in the proceedings, therefore it hereby protests against the action of the said so-called joint convention, and declares the same to be void and of no effect.

"*Resolved*, That a copy of this preamble and resolution be signed by the president and certified to by the secretary of the senate, be presented to the governor of this State, and also a copy forwarded to the presiding officer of the Senate of the United States, with the request to lay the same before that body."

Upon the adoption of which, the yeas and nays, being demanded, were ordered, and were as follows—yeas 17, nays 14.

The preamble and resolutions were adopted.—*Journal of the senate of the State of Iowa*, 1854–'55.

—

AN ACT to provide for the election of United States Senators and other officers.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa*, That at each and every regular session of the general assembly of this State next preceding the expiration of the constitutional term of service of a United States Senator, or at any session when a vacancy shall exist, at an hour to be designated by a resolution of either branch, with the concurrence of the other branch of the general assembly, the members of both houses thereof shall meet in convention in the hall of the house of representatives, for the purpose of electing a Senator or Senators by joint vote, in pursuance of the Constitution of the United States, to represent this State in the Senate of the United States.

SEC. 2. The president of the senate, or in his absence the speaker of the house of representatives, shall preside over the deliberations of the convention; and in the absence of both a president *pro tempore* shall be appointed by joint vote.

SEC. 3. At any time prior to meeting in convention as aforesaid, after the time for meeting has been designated as aforesaid, each branch of the general assembly shall appoint one teller, and the two tellers thus appointed shall act as judges of the election.

SEC. 4. The secretary of the senate and the chief clerk of the house of representatives shall each keep a fair and correct record of the proceedings of the convention, which shall be entered upon the journals of each branch of the general assembly. The chief clerk of the house of representatives shall act as secretary to the convention.

SEC. 5. The names of the members of the general assembly shall be arranged by the secretary in alphabetical order, and each member shall vote in the order in which his name stands when thus arranged.

SEC. 6. When the convention shall be organized as aforesaid the members present shall proceed to choose *viva voce* a Senator or Senators, as the case may be, to represent this State in the Senate of the United States. The name of the person voted for and of the members voting shall be entered in writing by the tellers, who shall, after the secretary shall have called the names of the members a second time, and the name of the person for which each member has voted, report to the president of the convention the number of votes given for each candidate.

SEC. 7. If neither of the candidates shall receive the votes of a majority of the members present a second poll may be taken, and so from time to time until some one of the candidates shall receive a majority of the votes of the members present.

SEC. 8. If the election shall not be completed at the first meeting the president shall adjourn the convention whenever and to such time as a majority of the members then present shall determine; and so from time to time, until some one of the candidates shall receive a majority as aforesaid.

SEC. 9. When any person shall have received a majority of the votes aforesaid the president of the convention shall declare him to be duly elected a Senator to represent this State in the Senate of the United States; and he shall in the presence of the members of both houses sign two certificates of election, attested by the tellers, one of which he shall transmit to the governor, and the remaining one shall be preserved among the records of the convention and entered at length on the journals of each house of the general assembly.

SEC. 10. Upon the reception of said certificate the governor shall cause a credential to be made out, with the great seal of the State affixed thereto, and cause it to be delivered to such Senator-elect, which credential shall be in form following.

[Here follows the form of the credential.]—*Laws of Iowa, 1847, pp. 92, 93.*

The Constitution of the United States contains the following provision in reference to the election of United States Senators:

"SEC. 4. The times, places, and manner of holding elections for Senators and Represent-

atives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

And the clause under which the committee are acting as to the qualification of the gentleman is as follows:

"SEC. 5. Each House shall be the judge of the elections, returns, and qualifications of its own members." * * *

STATE OF IOWA, *to wit:*

The general assembly of this State, on the sixth day of January, one thousand eight hundred and fifty-five, having, in pursuance of the Constitution of the United States of America, chosen James Harlan a Senator to represent this State in the Senate of the United States, I, James W. Grimes, governor of the State of Iowa, do by these presents certify the same to the Senate of the United States.

Given under my hand and the great seal of the State of Iowa, this twentieth day of January, one thousand eight hundred and fifty-five.

[L. S.] JAMES W. GRIMES.

By the governor:

GEORGE W. McCLEARY,
Secretary of State.

The foregoing statement of facts and recital of clauses of laws and the Constitution present all the questions involved in the controversy growing out of the contested election under consideration. From the view which a majority of the committee have taken of these questions, they have come to the conclusion that the sitting member (Mr. Harlan) has not been duly elected a Senator of the United States by the *legislature* of Iowa.

Resolved, That the seat of the aforesaid gentleman be declared vacant.

A. P. BUTLER,
Chairman.

TUESDAY, *January* 6, 1857.

The Senate proceeded to consider the resolution reported by the Committee on the Judiciary on the credentials of the Hon. James Harlan, a Senator from the State of Iowa; and,

On motion by Mr. Bayard that the further consideration of the resolution be postponed until half-past 12 o'clock to-morrow, it was determined in the negative.

After debate,

An amendment being proposed by Mr. Toombs,

On motion by Mr. Weller,

Ordered, That the further consideration of the resolution be postponed until to-morrow.

[The debate is found on pages 238–247 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *January* 7, 1857.

The Senate resumed the consideration of the resolution reported from the Committee on the Judiciary on the credentials of the Hon. James Harlan, a Senator from the State of Iowa; and,

After debate and the consideration of executive business, the Senate adjourned.

[The debate is continued on pages 248–257 of the Congressional Globe referred to in the head-note.]

FRIDAY, *January* 9, 1857.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the credentials of the Hon. James Harlan, a Senator from the State of Iowa; and,

After debate,

On motion by Mr. Mallory, the Senate adjourned.

[The debate is continued on pages 260–270 of the Congressional Globe referred to in the head-note.]

MONDAY, *January* 12, 1857.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the credentials of the Hon. James Harlan, a Senator from the State of Iowa.

On motion by Mr. Toombs to amend the resolution by striking out all after the word "resolved" and inserting:

"That James Harlan is entitled to his seat as a Senator from Iowa,"

It was determined in the negative—yeas 18, nays 27.

On motion by Mr. Butler, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bell of New Hampshire, Bell of Tennessee, Brown, Collamer, Durkee, Fessenden, Fish, Foot, Foster, Hale, Houston, Pugh, Seward, Slidell, Toombs, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Allen, Bayard, Benjamin, Biggs, Bigler, Butler, Cass, Clay, Comegys, Crittenden, Dodge, Evans, Fitzpatrick, Geyer, Hunter, Iverson, Jones of Iowa, Mallory, Mason, Pratt, Reid, Rusk, Sebastian, Stuart, Toucey, Weller, and Wright.

On motion by Mr. Butler, the resolution was amended to read:

"*Resolved*, That the seat of the Hon. James Harlan be declared vacant."

On the question to agree to the resolution it was determined in the affirmative—yeas 28, nays 18.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Bayard, Benjamin, Biggs, Bigler, Butler, Cass, Clay, Comegys, Crittenden, Dodge, Evans, Fitzpatrick, Geyer, Hunter, Iverson, Jones of Iowa, Mallory, Mason, Pearce, Pratt, Reid, Rusk, Sebastian, Stuart, Toucey, Weller, and Wright.

Those who voted in the negative are Messrs. Bell of New Hampshire, Bell of Tennessee, Brown, Collamer, Durkee, Fessenden, Fish, Foot, Foster, Hale, Houston, Pugh, Seward, Slidell, Toombs, Trumbull, Wade, and Wilson.

[The debate is concluded on pages 287–299 of the Congressional Globe referred to in the head-note.]

[Thirty-fourth and Thirty-fifth Congresses.]

GRAHAM N. FITCH AND JESSE D. BRIGHT, LANE AND McCARTY VS. FITCH AND BRIGHT, *of Indiana.*

February 4, 1857, Graham N. Fitch was elected Senator by the legislature of Indiana for the term ending March 3, 1861, and Jesse D. Bright for the term ending March 3, 1863. February 9, 1857, Mr. Fitch's credentials were presented, and at the same time a protest of members of the legislature against the legality of the election. After debate on the *prima facie* right of Mr. Fitch to the seat, he was admitted, and his credentials and the protest were referred to the Committee on the Judiciary. The ground of the protest was that these Senators were "not elected by the legislature of Indiana, but by a convocation of a portion of the members thereof, not authorized by any law of the State, by resolution adopted by the legislature, or by any provision of the Constitution of the United States." It appears that there was no law in Indiana providing for the time, place, or manner of electing Senators. There was a clause in the State constitution making it the duty of the speaker of the house of representatives to open and publish the votes for governor and lieutenant-governor in the presence of both houses of the general assembly. January 12, 1857, the two houses met for this purpose, a majority of both houses being present. At the close of this business the presiding officer adjourned the convention (so called) until February 2. Meantime the senate passed a resolution protesting against this proceeding and disclaiming all connection with the so-called convention. A minority of the senate, but a majority of the members composing the two houses, attended the adjourned meeting, and after a subsequent adjournment elected Messrs. Fitch and Bright as Senators. February 26 and March 13, 1857, the committee reported resolutions that Mr. Fitch and the persons protesting against his election be permitted to take testimony on disputed facts. December 17, 1857, the credentials of Mr. Bright, who had taken his seat March 4, were referred, together with the credentials of Mr. Fitch, to the same committee. January 21, 1858, the committee again reported a resolution that the sitting members and the persons protesting be permitted to take testimony. January 25 the minority of the committee reported against the adoption of the resolution on the ground that the election was "obviously illegal." The resolution passed the Senate February 16, 1858. May 24, 1858, the committee reported the testimony and the resolution that the sitting members were entitled to their seats. The resolution was agreed to June 12, 1858.

January 24, 1859, a memorial of the State of Indiana was presented representing that it was the wish of the State that Henry S. Lane and William Monroe McCarty be admitted to seats in the Senate as the only legally chosen Senators. February 3, 1859, the Committee on the Judiciary, to whom were referred the memorial, reported that there was no vacancy in the Senate from the State of Indiana, and that the election of Messrs. Lane and McCarty was void; that the legislature of Indiana possessed no authority to revise the decision of the Senate of the United States on the right of Messrs Fitch and Bright to the seats, a decision which was final and made by an authority having exclusive jurisdiction, and asked to be excused from the further consideration of the subject. February 3, 1859, the minority reported that the former decision of the Senate was not necessarily final; that under the circumstances the subject should be re-examined; and that if the Senate should find that Messrs Lane and McCarty were legally elected, they should be admitted to the seats. February 14, 1859, the Senate agreed to the report of the committee and resolved that the decision of June 12, 1858, affirming the right of Messrs Fitch and Bright to their seats, "was a final decision of all the premises then in controversy, and conclusive, as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journals, 3d sess. 34th Cong., 1st sess. 35th Cong., and 2d sess. 35th Cong., together with certain of the reports made in the case.

Special references to the debates found in the Congressional Globe of the 3d sess. of 34th Cong. and the 35th Cong., are inserted below, and special references to all the reports are given in footnotes.

[Third session of the Thirty-fourth Congress.]

MONDAY, *February* 9, 1857.

Mr. Bright presented the credentials of the Hon. Graham N. Fitch, elected a Senator by the legislature of Indiana, to serve in the Congress of the United States until the 4th day of March, 1861; which were read.

Mr. Bright submitted the following resolution for consideration:

"*Resolved*, That the President do administer the oath required by the laws to Graham N. Fitch as a Senator from the State of Indiana."

Mr. Trumbull presented resolutions of the senate of the State of Indiana respecting the recent election of Senators by the legislature of that State, and a protest of members of the house of representatives of the State of Indiana against the legality of the election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators in the Congress of the United States; which were read; and,

After debate,

On motion by Mr. Trumbull that the credentials, the resolution submitted by Mr. Bright, and the resolutions of the senate of Indiana, with the protest of members of the house of representatives of the general assembly of Indiana, presented by Mr. Trumbull, be referred to the Committee on the Judiciary, it was determined in the negative—yeas 12, nays 33.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Collamer, Crittenden, Fessenden, Foot, Foster, Hale, Harlan, Nourse, Seward, Thompson of Kentucky, Wade, and Wilson.

Those who voted in the negative are Messrs. Adams, Allen, Bayard, Bell of Tennessee, Biggs, Bigler, Bright, Brown, Butler, Cass, Clay, Dodge, Evans, Fitzpatrick, Geyer, Green, Hunter, James, Johnson, Jones of Iowa, Mallory, Mason, Pratt, Pugh, Reid, Rusk, Sebastian, Slidell, Stuart, Toombs, Toucey, Weller, and Yulee.

The Senate proceeded, by unanimous consent, to consider the resolution submitted by Mr. Bright, and the resolution was agreed to; and

The oath prescribed by law was administered to Mr. Fitch, and he took his seat in the Senate.

* * * * * * *

On motion by Mr. Rusk that the credentials of the Hon. Graham N. Fitch, the resolutions of the senate of Indiana, and the protest of members of the house of representatives of Indiana respecting the recent election of Senators by the legislature of that State, be referred to the Committee on the Judiciary,

On motion by Mr. Stuart, the Senate adjourned.

[The debate is found on pages 193–210 of the Appendix to the Congressional Globe, 3d sess., 34th Cong., 1856–'57 It is largely on the *prima facie* right of Mr. Fitch to the seat.]

TUESDAY, *February* 10, 1857.

The Senate resumed the consideration of the motion of Mr. Rusk to refer the credentials of the Hon. Graham N. Fitch, with the resolutions of the senate of Indiana and the protest of members of the house of representatives of that State in relation to the recent election of Senators by the legislature of Indiana, to the Committee on the Judiciary; and the motion was agreed to.

[The debate is found on pages 210–215 of the Appendix to the Congressional Globe, 3d sess., 34th Cong., 1856–'57. It is mainly on the question whether the credentials should be referred to the Committee on the Judiciary or to a select committee.]

THURSDAY, *February* 12, 1857.

Mr. Trumbull presented a protest, signed by members of the house of representatives of Indiana, against the legality of the election by the legislature of that State of Jesse D. Bright and Graham N. Fitch as Senators in the Congress of the United States; which was referred to the Committee on the Judiciary.

FRIDAY, *February* 20, 1857.

Mr. Trumbull presented copies of the proceedings of the legislature of Indiana, and other papers, in relation to the recent election of Senators to represent that State in the Congress of the United States; which were referred to the Committee on the Judiciary.

THURSDAY, *February* 26, 1857.

Mr. Trumbull presented a petition of senators and representatives of the legislature of Indiana, protesting against the election of Graham N. Fitch as a Senator to represent that State in the Congress of the United States; which was referred to the Committee on the Judiciary.

Mr. Toombs, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. Graham N. Fitch as a Senator in Congress from the State of Indiana, the proceedings of the senate of Indiana, and the protest of members of the house of representatives of the said State against the election of the Hon. Graham N. Fitch, submitted a report (No. 427), accompanied by the following resolution:

"*Resolved*, That in the case of the contested election of the Hon. Graham N. Fitch, a Senator returned and admitted to his seat from the State of Indiana, that the sitting member and all persons protesting against his election be permitted to take testimony on the allegations of the protestants and the sitting member, touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis."*

[A short debate as to whether the resolution is a privileged question or not is found on pages 907, 908 of the Congressional Globe, 3d sess. 34th Cong., 1856–'57.]

* This report is found in Senate Reports, 3d sess. 34th Cong., Report No. 427. It is not printed here, as it is substantially the same as the report made March 13, 1857, on the same subject, which is printed.

MONDAY, *March* 2, 1857.

The Senate proceeded to consider the resolution reported by the Committee on the Judiciary on the credentials of the Hon. Graham N. Fitch, a Senator from the State of Indiana; and

After debate,

On motion by Mr. Weller that it lie on the table, it was determined in the affirmative—yeas 28, nays 23.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Allen, Bayard, Benjamin Biggs, Brown, Butler, Clay, Crittenden, Douglas, Fitzpatrick, Gwin, Hunter, Iverson, James, Johnson, Mason, Pearce, Pratt, Pugh, Reid, Rusk, Sebastian, Slidell, Stuart, Toombs, Toucey, and Weller.

Those who voted in the negative are Messrs. Bell of New Hampshire, Bright, Brodhead, Cass, Collamer, Dodge, Durkee, Fessenden, Fish, Foot, Foster, Hale, Harlan, Jones of Iowa, Jones of Tennessee, Nourse, Seward, Sumner, Thomson of New Jersey, Trumbull, Wade, Wilson, and Wright.

So it was

Ordered, That the resolution lie on the table.

[A debate on the adoption of the resolution is found on pages 1034-1040 of the Congressional Globe, 3d sess. 34th Cong., 1856-'57.]

MR. BRIGHT'S CREDENTIALS.

Mr. Cass presented the credentials of the Hon. Jesse D. Bright, elected a Senator by the legislature of the State of Indiana, to serve as such until the 4th day of March, A. D. 1863; which were read.

[Special session of Senate, March, 1857.]

WEDNESDAY, *March* 4, 1857.

The credentials of Mr. Bright having been heretofore presented to the Senate, the oath prescribed by law was administered to him by the President *pro tempore*, and he took his seat in the Senate.

MONDAY, *March* 9, 1857.

On motion by Mr. Trumbull,

Ordered, That the papers on file relating to the election of the Hon. Graham N. Fitch by the legislature of Indiana be referred to the Committee on the Judiciary.

[A brief debate took place, which is found on pages 385, 386 of the Appendix to the Congressional Globe, 3d sess. 34th Cong., 1856-'57.]

FRIDAY, *March* 13, 1857.

Mr. Toombs, from the Committee on the Judiciary, to whom were referred the papers relating to the election of the Hon. Graham N. Fitch, by the legislature of the State of Indiana, as a Senator in the Congress of the United States, submitted a report (No. 2), accompanied by the following resolution:

"*Resolved*, That in the case of the contested election of the Hon. Graham N. Fitch, a Senator returned and admitted to his seat from the State of Indiana, that the sitting member and all persons protesting against his election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting member touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis."

The Senate proceeded, by unanimous consent, to reconsider the said resolution; and,

A motion having been made by Mr. Trumbull to amend the resolution,

After debate,

On motion by Mr. Mason,

Ordered, That it lie on the table

On motion by Mr. Toombs,

Ordered, That the report and all the accompanying papers be printed.

[The debate which took place this day on the adoption of the resolution is found on pages 392–396 of the Appendix to the Congressional Globe, 3d sess., 34th Cong., 1856-'57.]

REPORT OF COMMITTEE. *

[The committee consisted of Messrs. Butler (chairman), Bayard, Toombs, Pugh, Benjamin, Collamer, and Trumbull.]

The committee have had the same under consideration, and find that important matters of fact alleged by the protestants in connection with the manner in which the election of the sitting member was had are denied by him, and that it becomes necessary, in the opinion of the committee, to take the testimony of persons residing in the State of Indiana, for the better ascertainment of these disputed facts. For instance, it is, among other things, alleged by a portion of the protestants that "there was no joint convention of the two houses of said general assembly on said day" on which the election in dispute took place, and that a minority only of the legally sitting senators of Indiana participated in said election, which statements are denied by the sitting member; and he affirms, on the contrary, that "he was elected to said office by a majority of all the members composing the legislature of the State, they being then and for that purpose assembled in joint convention," and that he was elected whilst in such joint convention by a majority of the legally qualified members of the senate of the State and of the legally qualified members of the house of representatives, respectively. For the proper ascertainment of these contested facts, and the better elucidation of the matters in dispute contained in the several protests herewith submitted, and the reply of the Hon. Graham N. Fitch, your committee recommend that leave be given to take testimony in the city of Indianapolis and State of Indiana, and recommend the adoption of the following resolution:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch, a Senator returned and admitted to his seat from the State of Indiana, that the sitting member, and all persons protesting against his election, or any of them, by themselves, or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting member touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis.

To the Senate of the United States:

The undersigned, duly elected and qualified members of the house of representatives of the general assembly of the State of Indiana, hereby protest against the pretended election of Jesse D. Bright and Graham N. Fitch, on the 4th day of February, A. D. 1857, as Senators of the State of Indiana in the Congress of the United States, the former for the six years from the 4th day of March next, and the latter for the six years from the 4th day of March, 1855, by a portion of the senators and representatives of said general assembly, for the following reasons:

First. There was no agreement of the two houses of the general assembly, by resolutions or otherwise, to proceed to the appointment or election of Senators in Congress on said day, or any other day of the present session of the general assembly.

Second. There was no joint convention of the two houses of the said general assembly on said day; nor was there any law of the State authorizing a joint convention on that or any other day for the appointment or election of United States Senators; nor was there any resolution, or joint resolution, approved or adopted by the two houses of the said general assembly, or either of them, authorizing such joint convention.

Third. Said pretended joint convention was a mere assembly of a portion of the senators and representatives of the said general assembly, not in a legislative capacity, but as individuals, without any authority of law, without precedent in the history of legislature of the State, and having no legislative sanction; and said senators and representatives, when so convened, had no more constitutional right to appoint or elect Senators than any equal number of private citizens of the State.

Fourth. There was not a constitutional quorum of either house of the general assembly present in said pretended joint convention, there being only twenty-three senators and sixty-one representatives, when, by the eleventh section of the fourth article of the constitution of this State, it requires two-thirds of each house to constitute a quorum to do business, and when, by the law of the State, the number of senators is fixed at fifty, and the number of representatives at one hundred, in said general assembly.

Fifth. Because the undersigned, as legally elected and qualified representatives in said general assembly, have been deprived of their constitutional right to assist in the legal election of the Senators in the Congress of the United States by said illegal, revolutionary, and unauthorized election.

* This report, which was the second one made on the credentials of Mr. Fitch, is found in Senate Reports, 3d sess. 34th Cong., Report No. 2. Pages 5-39 of the report are here omitted. They contain certain proceedings of the legislature and additional protests of members thereof.

Sixth. Because the legislature of Indiana, as such legislature, either by separate action of the two houses, or otherwise, as such legislature, had no part or voice in such pretended elections, and the same were in direct violation of the third section of the first article of the Constitution of the United States and the fourth section of the said article.

Seventh. Because said pretended elections are wholly void.

Eighth. Because if said elections are held valid, such decision will destroy the legal existence of the general assembly of this State, and install in its place any mob which may see proper to take forcible possession of the house as a joint convention of the general assembly, without the concurrence of either body, the sanction of the Constitution, or authority of law.

For these and other reasons which might be named, the undersigned protest against the validity of said pretended elections, and ask that the Senate of the United States may declare them null and void.

Given under our hands this 4th day of February, at Indianapolis, A. D. 1857.

S. P. Williams.	Wm. C. Jefferis.	D. C. Branham.
Geo. Crawford.	S. B. Ward.	J. W. Hutchings.
James M. Austin.	J. D. Conner.	Robert Boyd.
J. N. Gordon.	Wm. Grose.	John M. La Rue, Tippecanoe County.
C. M. Stone.	A. B. Price.	
H. W. Sherman.	John Davis.	Marcus C. Smith.
G. D. Wagner.	N. H. Ballinger.	Elijah Vansandt.
Thomas J. Neal.	Geo. C. Merrifield.	Smith Vawter.
G. K. Steele.	Silas Colgrove.	Wm. M. Clapp.
D. Batterton.	Geo. Moon.	R. N. Todd.
Alex. H. Conner.	William Hawkins.	Milton Mercer.
M. P. Evans.	John Whitcomb.	

The undersigned, a Senator of the United States from the State of Indiana, and now acting as a duly qualified Senator of the United States, submits to the honorable the Judiciary Committee of the body to whom the validity of his election has been referred, the following, as points upon which he believes and is advised that his own rights and the rights of his State require that evidence be taken and be before the committee in order to enable them to decide understandingly and justly in the premises:

First. That he was elected to said office by a majority of all the members composing the legislature of the State, they being then and for that purpose assembled in joint convention.

Second. That he was elected, whilst in such joint convention, by a majority of the legally qualified members of the senate of the State and of the legally qualified members of the house of representatives, respectively.

Third. That in order to ascertain the facts stated in the preceding point, he will be able, by evidence, to show that three of the persons who are contesting his election were not then, and are not now, legally members of the said State senate, and had no right whatever, under the laws and constitution of the State, to be considered, or, in any particular, to act as members of that body; and that this was at the time, and still is, well known to the other contestants.

Fourth. That in the organization of the State senate, according to the constitution, laws, and usage of the State, the lieutenant-governor presides and superintends the admission of the members, and the taking the required oaths of office. That upon this occasion, in violation of such constitution, laws, and usage, the said three members, who were without the expressly required credentials of election, the certificate of the proper and only returning officer, and whose seats were also known to be contested, and on grounds of fraud, also known to be true, were, by a presiding officer, chosen for the purpose by the members of the senate, designated as Republicans, contrary to all law, and by naked wrong, directed, notwithstanding, to be sworn in, and for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Fifth. That the said convention by whom, as hereinbefore alleged, the undersigned was elected a Senator of the United States, was assembled in accordance with an express provision of the constitution of the State, and that, in accordance with the long and uniform usage of the State in that particular, the same was adjourned from day to day by the proper presiding officer thereof, and vested with the authority so to adjourn, and that each adjournment was made without objection by a majority of the senate, even considering the three persons aforesaid to have been members of that body being present.

Sixth That there is not now, in said State, as the undersigned is advised, any law for

the regulation of the election of Senators of the United States, or in any way providing for the same; and that according to the best professional and judicial opinions in the State, the election is to be made by the convention of the legislature assembled under the constitution of the State, to count the votes and decide upon the election of governor and lieutenant-governor, as a power necessarily existing in the legislature, and from the obligations of the State to elect Senators.

Seventh. That before the adoption of the present State constitution there was a law regulating such election, and that although the same was no longer in force, the said convention did, as far as it was possible, conduct the present election according to the provisions thereof.

The undersigned, in conclusion, submits what, indeed, must be obvious to the committee, that as the witnesses and proofs to the matters above stated are only to be had in the State of Indiana, and can only properly be obtained by careful examination, and under the superintendence of himself, that it cannot be in his power to procure it at this or the approaching extra session of the United States Senate, even were he to abandon his duty as a Senator, which he has no right to do, and proceed at once to the place where the testimony is to be had. He further submits, therefore, that the committee will so dispose of the matter now as will enable him and the contestants at a future period to present the entire case fairly and fully before them.

GRAHAM N. FITCH.

FEBRUARY 25, 1857.

True copy. Attest:

THOS. P. MORGAN,
Clerk to the Committee.

SATURDAY, *March* 14, 1857.

[A short debate in reference to correcting a mistake in the Senate Journal took place. The Journal showed that on Monday, March 9, 1857, Mr. Bright's credentials were referred to the Committee on the Judiciary. This was an error, and the Journal was corrected so that it read for that day as given above. The debate is found on pages 396, 397 of the Appendix to the Congressional Globe, 3d sess. 34th Cong., 1856–'57.]

[First session of the Thirty-fifth Congress.]

THURSDAY, *December* 17, 1857.

Mr. Trumbull submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials of the sitting members of this body from the State of Indiana, together with all the papers on file protesting against their rights to seats, or relating to their election as Senators in Congress by the legislature of Indiana, be referred to the Committee on the Judiciary."

THURSDAY, *January* 21, 1858.

Mr. Bayard, from the Committee on the Judiciary, to whom were referred, by a resolution of the Senate of the 17th of December, the credentials of the sitting members of this body from the State of Indiana, with all the papers on file protesting against their rights to seats, or relating to their election as Senators in Congress by the legislature of Indiana, submitted a report (No. 19), accompanied by the following resolution. [Resolution found at end of report.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Bayard (chairman), Green, Toombs, Pugh, Benjamin, Collamer, and Trumbull.]

The Committee on the Judiciary, to whom was referred the protest against the election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright as Senators in Congress from the State of Indiana, report:

The committee find that the protests against the election of the Hon. Graham N. Fitch as a Senator in Congress from the State of Indiana were referred to the Committee on the Judiciary on the 10th of February, 1857, and on the 26th of the same month a resolution was reported by the committee authorizing testimony to be taken both by

* This report, taken from Senate Reports, 1st sess. 35th Cong., Report No. 19, is the third report made by the Committee on the Judiciary on the credentials of Mr. Fitch and the first one on the credentials of Mr. Bright.

the protestants and the sitting member. The resolution not being acted upon by the Senate at that session, from the pressure of other business, the protests were again referred to the committee on the 9th of March last, at the special session of the Senate, and the same resolution, with a slight amendment, reported by the committee on the 13th of the same month, which being taken up on the day it was reported, a debate ensued upon an amendment offered by the Hon. Mr. Trumbull, of Illinois, and the Senate having on the previous day resolved to adjourn *sine die* on the 14th of March, at 1 o'clock, the resolution reported by the committee was ordered to lie on the table.

The protests against the election of the Hon. Jesse D. Bright, as well as against the election of the Hon. Graham N. Fitch, having been referred at the present session, and the objections of the protestants and allegations of the sitting members being identical in both cases, the committee have adopted and recommend the passage of the resolution reported to the Senate by the committee at the special session on the 13th day of March last, with such variation as is requisite to make it apply to the cases of both the sitting members, as follows:

"*Resolved*, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves, or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis."

MONDAY, *January* 25, 1858.

Mr. Trumbull submitted the views of the minority of the Committee on the Judiciary, to whom were referred the credentials of the Senators from Indiana, and other papers on file relating to their election as Senators in Congress; which were ordered to be printed.

VIEWS OF THE MINORITY.*

The Committee on the Judiciary, to whom were referred the protests against the right of Graham N. Fitch and Jesse D. Bright to seats as Senators from the State of Indiana, report:

The legislature of Indiana called the general assembly, is composed of a senate of fifty members and a house of representatives of one hundred members, and two-thirds of each house is, by the constitution, required to constitute a quorum thereof. Each house is declared to be judge of the election and qualification of its members, and required to keep a journal of its proceedings. No regulation exists by law in Indiana as to the manner in which members of the State senate are to be inducted into office. No law or regulation is there existing providing the time, place, or manner of electing United States Senators.

It appears by the journal of the senate of Indiana that on the opening of the senate at the meeting of the legislature, January 8, 1857, forty-nine of the senators were present, and that all the newly elected members were duly sworn, took their seats, and continued thereafter to act with the other senators till the close of the session. The only absentee senator took his seat January 13, 1857. Protests were filed contesting the seats of three of the newly elected members, which were afterwards examined and considered by the senate, and they were each found and declared to be entitled to seats, respectively, by majorities more or less numerous, all which is entered upon and appears by the journal of said senate.

The State constitution makes it the duty of the speaker of the house of representatives to open and publish the votes for governor and lieutenant-governor in the presence of both houses of the general assembly. No provision exists by the constitution making such meeting or presence of the two houses a convention, or providing any officers there for, or authorizing or empowering the same to transact any business whatever, except by joint vote forthwith to proceed to elect a governor or lieutenant-governor in case of a tie vote.

Both houses being in session, the speaker notified them that he should proceed to open and publish the votes for governor and lieutenant-governor on Monday the 12th day of January, at 2.30 o'clock p. m., in the hall of the house. Shortly before the hour arrived the president of the senate announced that he would proceed immediately to the hall of the house of representatives; and thereupon, together with such senators as chose to go, being a minority of the whole number thereof, he repaired to the hall of the house of

*From Senate Reports, 1st sess. 35th Cong., vol. 1, Report No. 19, part 2.

representatives, and there, in their presence, and in the presence of the members of the house, the votes for governor and lieutenant-governor were duly counted and published by the speaker, and A. P. Willard, the then president of the senate, was declared duly elected governor and A. A. Hammon lieutenant-governor of said State.

At the close of this business, a senator present, without any vote for that purpose, declared the meeting (by him then called a convention) adjourned to the 2d day of February, 1857, at 2 o'clock.

The senate hearing of this proceeding, on the 29th day of January, 1857 as appears by its journal, passed a resolution protesting against the proceedings of said so-called convention, disclaiming all connection therewith or recognizance thereof, and protesting against any election of United States Senators or any other officer thereby. On the 2d of February, 1857, the president of the senate, with a minority of its members, again attended in the hall of the house, and without proceeding to any business, and without any vote, declared the meeting (by him called a convention) adjourned until the 4th day of February, 1857, at which time the president of the senate, with twenty-four of its members, went to the hall of the house of representatives, and there they, together with sixty-two members of the house, proceeded to elect two Senators of the United States, to wit, Graham N. Fitch, and Jesse D. Bright, they each receiving eighty-three votes, and no more, at their respective elections, twenty-three of which votes were by members of the senate.

Against these elections so made protests by twenty-seven members of the senate of Indiana and thirty-five members of the house of representatives of said State have been duly presented, alleging that, in the absence of any law, joint resolution, or regulation of any kind by the two houses composing the legislature of Indiana providing for holding a joint convention, it is not competent for a minority of the members of the senate and a majority, but less than a quorum, of the members of the house of representatives of said State to assemble together and make an election of United States Senators.

Of the facts as herein stated there is no dispute, as we understand.

It is now alleged by the sitting Senators, respectively, as we understand the substance of their allegations, in contradiction of the senate journal, that the three State senators whose seats were contested were not legally elected and qualified; that they were without the expressly required credentials, the certificate of the proper and only returning officer, and that they were, notwithstanding, directed to be sworn in by a presiding officer chosen for the purpose by the members of the senate designated as Republicans, for the clear purpose, illegal and fraudulent in fact, of defeating an election of Senators of the United States.

Under these circumstances we object to the adoption of the resolution for the taking of testimony to sustain these allegations, because the said election of United States Senators, so conducted, is obviously illegal and insufficient, and cannot be cured by any proof of these allegations; and we insist that the Senate should now proceed to a definitive decision of the question.

WEDNESDAY, *February* 3, 1858.

[A short debate took place on the propriety of considering the report at that time. It is found on pages 543–545 of the Congressional Globe, part 1, 1st sess. 35th Cong.]

THURSDAY, *February* 4, 1858.

The Senate proceeded to consider the resolution reported by the Committee on the Judiciary, to whom was referred the protest against the election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators in Congress from the State of Indiana; and

An amendment being proposed by Mr. Trumbull,

After debate,

On motion by Mr. Bayard that the resolution lie on the table, it was determined in the affirmative—yeas 29, nays 18.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Bayard, Benjamin, Biggs, Bigler, Broderick, Brown, Cameron, Clay, Davis, Douglas, Evans, Green, Gwin, Houston, Hunter, Iverson, Johnson of Tennessee, Jones, Kennedy, Mason, Polk, Pugh, Sebastian, Slidell, Stuart, Toombs, Wright, and Yulee.

Those who voted in the negative are Messrs. Chandler, Collamer, Crittenden, Dixon, Doolittle, Durkee, Fessenden, Foot, Foster, Hale, Hamlin, Harlan, King, Seward, Simmons, Trumbull, Wade, and Wilson.

So it was

Ordered, That the resolution lie on the table.

[A debate on the adoption of the resolution is found on pages 567–570 of the Congressional Globe, part 1, 1st sess. 35th Cong.]

MONDAY, *February* 15, 1858.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, to whom were referred the credentials of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, and the protest against their election as Senators in Congress from the State of Indiana; and

The amendment proposed by Mr. Trumbull being under consideration,

After debate,

On motion by Mr. Hunter,

Ordered, That the further consideration of the resolution be postponed until to-morrow at 1 o'clock.

[The subject is debated on pages 698–710 of the Congressional Globe, part 1, 1st sess. 35th Cong.]

TUESDAY, *February* 16, 1858.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright; and

On the question to agree to the following amendment, proposed by Mr. Trumbull: Strike out all after the word "resolved" and insert:

"That the Senate will now proceed to a final determination of the right to seats in this body of Graham N. Fitch and Jesse D. Bright, claiming to have been elected Senators by the legislature of Indiana,"

It was determined in the negative—yeas 16, nays 28.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Chandler, Clark, Collamer, Dixon, Doolittle, Durkee, Fessenden, Foster, Hamlin, Harlan, King, Seward, Simmons, Sumner, Trumbull, and Wade.

Those who voted in the negative are Messrs. Allen, Biggs, Bigler, Broderick, Brown, Cameron, Clay, Evans, Green, Gwin, Hammond, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Mallory, Mason, Polk, Pugh, Sebastian, Slidell, Stuart, Thompson of Kentucky, Thomson of New Jersey, Toombs, Wright, and Yulee.

On motion by Mr. Seward to amend the resolution by adding thereto the following:

"*Provided*, That the proofs to be taken shall be limited to the swearing in of the members of the legislature of Indiana, the organization of the said legislature, and the proceedings thereof connected with the election of the sitting members for said State in the Senate of the United States, and shall be returned to the Senate of the United States within sixty days from the passage of this resolution,"

A division was called for by Mr. Hale; and, the question being taken on the first clause, relating to the proofs to be taken, it was determined in the negative—yeas 19, nays 25.

On motion by Mr. Mallory, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Broderick, Cameron, Chandler, Clark, Collamer, Dixon, Doolittle, Durkee, Fessenden, Foster, Hamlin, Harlan, King, Seward, Simmons, Stuart, Sumner, Trumbull, and Wade.

Those who voted in the negative are Messrs. Allen, Biggs, Bigler, Brown, Clay, Evans, Green, Gwin, Hammond, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Mallory, Mason, Polk, Pugh, Sebastian, Slidell, Thompson of Kentucky, Toombs, and Yulee.

On the question to agree to the second clause, as follows: "And shall be returned to the Senate of the United States within sixty days from the passage of this resolution,"

A motion was made by Mr. Pugh to amend the same by striking out the word "sixty" and inserting "ninety;" and it was determined in the affirmative—yeas 27, nays 18.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Biggs, Bigler, Broderick, Brown, Clay, Evans, Green, Gwin, Hammond, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Mallory, Mason, Polk, Pugh, Sebastian, Slidell, Thomson of New Jersey, Toombs, Wright, and Yulee.

Those who voted in the negative are Messrs. Chandler, Clark, Collamer, Dixon, Doolittle, Durkee, Fessenden, Foster, Hamlin, Harlan, King, Seward, Simmons, Stuart, Sumner, Thompson of Kentucky, Trumbull, and Wade.

On motion by Mr. Toombs to amend the amendment by adding thereto—

"*And provided*, That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature,"

It was determined in the affirmative.

The amendment as amended was then agreed to.

On motion by Mr. Wilson further to amend the resolution by striking out the words "any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana" and inserting:

"The Hon. Oliver H. Smith, the Hon. John Pettit, and the Hon. John D. Defrees, who are hereby appointed commissioners for that purpose,"

It was determined in the negative.

On motion by Mr. Fessenden to amend the resolution by striking out the words "the supreme or circuit courts" and inserting "any court of record," it was determined in the negative.

The resolution as amended was then agreed to, as follows:

"*Resolved*, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis: *Provided*, That the proofs to be taken shall be returned to the Senate of the United States within ninety days from the passage of this resolution: *And provided*, That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature."

[The debate is found on pages 720–724 of the Congressional Globe, part 1, 1st sess. 35th Cong.]

MONDAY, *April* 19, 1858.

Mr. Trumbull submitted the following motion; which was considered by unanimous consent, and agreed to:

Ordered, That the Secretary of the Senate furnish, on application by any individual desiring to possess the same, an authenticated copy of the resolution agreed to on the 16th of February, 1858, authorizing testimony to be taken in reference to the election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators from the State of Indiana.

[Brief remarks on the resolution are found on pages 1658, 1659 of the Congressional Globe, part 2, 1st sess. 35th Cong.]

SATURDAY, *May* 15, 1858.

The Vice-President laid before the Senate testimony in the case of the contested election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators of the United States from the State of Indiana, which was referred to the Committee on the Judiciary.

TUESDAY, *May* 18, 1858.

Mr. Bright presented affidavits of C. K. Drew, R. D. Slater, and W. J. Cullen, evidence in the case of the contested election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators from the State of Indiana, which were referred to the Committee on the Judiciary.

MONDAY, *May* 24, 1858.

Mr. Pugh, from the Committee on the Judiciary, to whom were referred the credentials of Graham N. Fitch and Jesse D. Bright, Senators from the State of Indiana, together with the documents and testimony relative to that subject, submitted a report (No. 275), accompanied by the following resolution. [For resolution see report.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Bayard (chairman), Sebastian, Pugh, Benjamin, Green, Collamer, and Trumbull.]

The Committee on the Judiciary, to whom were referred the credentials of Graham N. Fitch and Jesse D. Bright, Senators from the State of Indiana, together with the documents and testimony relative to that subject, have had the same under consideration, and report, by resolution, as follows:

Resolved, That Graham N. Fitch and Jesse D. Bright, Senators returned and admitted

* The testimony accompanying this report may be found in Senate Reports, 1st sess. 35th Cong., vol. 2, Report No. 275. This is the fourth report made by the Committee on the Judiciary on the credentials of Mr. Fitch, and the second one to include the credentials of Mr. Bright.

from the State of Indiana, are entitled to the seats which they now hold in the Senate as such Senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials.

[Some remarks by members of the committee, asking for an opportunity to examine the report before it is printed, are found on pages 2353, 2354 of the Congressional Globe, part 3, 1st sess. 35th Cong.]

MONDAY, *June* 7, 1858.

Mr. Pugh presented an affidavit of John W. Blake, relative to the election of the Hon. Jesse D. Bright and the Hon. Graham N. Fitch as Senators in Congress from the State of Indiana.

Ordered, That it lie on the table.

THURSDAY, *June* 10, 1858.

On motion by Mr. Bright, the Senate proceeded to consider the resolution reported by the Committee on the Judiciary, declaring the Hon. Jesse D. Bright and the Hon. Graham N. Fitch, Senators from the State of Indiana, entitled to their seats in the Senate; and,

On motion by Mr. Bright,

Ordered, That the further consideration thereof be postponed to, and made the special order of the day for, to-morrow at 12 o'clock.

[A brief debate on the postponement of the consideration of the resolution is found on page 2876 of the Congressional Globe, part 3, 1st sess. 35th Cong.]

FRIDAY, *June* 11, 1858.

The Senate resumed the consideration of the resolution reported from the Committee on the Judiciary, declaring the Hon. Jesse D. Bright and the Hon. Graham N. Fitch, Senators in Congress from the State of Indiana, entitled to their seats in the Senate; and,

An amendment being proposed by Mr. Hamlin,

On motion by Mr. Trumbull to amend the proposed amendment,

After debate,

Ordered, That the further consideration thereof be postponed to, and made the special order of the day for, to-morrow at 12 o'clock.

[An extended debate on the adoption of the resolution is found on pages 2923–2949 of the Congressional Globe, part 3, 1st sess. 35th Cong.]

SATURDAY, *June* 12, 1858.

The Senate resumed the consideration of the resolution reported from the Committee on the Judiciary, declaring the Hon. Jesse D. Bright and the Hon. Graham N. Fitch, Senators in Congress from the State of Indiana, entitled to their seats in the Senate.

A motion was made by Mr. Hamlin to amend the resolution by striking out all after the word "resolved," and inserting:

"That the case of Jesse D. Bright and Graham N. Fitch be recommitted to the Committee on the Judiciary, with instructions to report specially the grounds on which the resolution is based declaring said Bright and Fitch elected."

On motion by Mr. Trumbull to amend the proposed amendment by striking out all after the word "that" and inserting "in the opinion of the Senate, no election of a member of this body made by the legislature of a State consisting of two branches is valid, when made in a meeting of individual members of both, unless such meeting for that purpose was prescribed by law, or had been previously agreed to by each house acting separately in its organized capacity, or is participated in by a majority of the members of each house, or is subsequently ratified in some form by each house in its organized capacity," it was determined in the negative—yeas 17, nays 26.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Broderick, Chandler, Clark, Dixon, Doolittle, Durkee, Fessenden, Foot, Foster, Hamlin, Harlan, King, Seward, Simmons, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Allen, Benjamin, Bigler, Brown, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Hammond, Hayne, Iverson, Jones, Mallory, Mason, Polk, Pugh, Reid, Rice, Sebastian, Slidell, Thomson of New Jersey, Toombs, Wright, and Yulee.

On the question to agree to the amendment proposed by Mr. Hamlin, it was determined in the negative—yeas 16, nays 34.

On motion by Mr. Fessenden, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Chandler, Clark, Dixon, Doolittle, Durkee, Fessenden, Foot, Foster, Hamlin, Harlan, King, Seward, Simmons, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Allen, Benjamin, Bigler, Broderick, Brown, Clay, Clingman, Collamer, Fitzpatrick, Green, Gwin, Hammond, Hayne, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Mallory, Mason, Pearce, Polk, Pugh, Reid, Rice, Sebastian, Slidell, Thompson of Kentucky, Thomson of New Jersey, Toombs, Wright, and Yulee.

So the amendment was not agreed to.

On motion by Mr. Trumbull to amend the resolution by inserting after the word "are" and before the word "entitled" the word "not," it was determined in the negative—yeas 23, nays 30.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Broderick, Chandler, Clark, Collamer, Dixon, Doolittle, Douglas, Durkee, Fessenden, Foot, Foster, Hale, Hamlin, Harlan, Houston, King, Mason, Pearce, Seward, Simmons, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Allen, Benjamin, Bigler, Brown, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Hammond, Hayne, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Mallory, Polk, Pugh, Reid, Rice, Sebastian, Sildell, Thompson of Kentucky, Thomson of New Jersey, Toombs, Wright, and Yulee.

No further amendment being proposed, the resolution reported by the Committee on the Judiciary was then agreed to, as follows:

"*Resolved*, That Graham N. Fitch and Jesse D. Bright, Senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate as such Senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials."

[No debate took place this day.]

[Second session of the Thirty-fifth Congress.]

Credentials of Henry S. Lane and William Monroe McCarty.

MONDAY, *January* 24, 1859.

The Vice-President presented a memorial of the State of Indiana, by its senators and representatives in general convention assembled, representing that it is the wish and desire of the State that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen Senators of the State of Indiana; which was read.

On motion by Mr. Trumbull,

Ordered, That it be referred to the Committee on the Judiciary and be printed.

[The memorial is printed on pages 534, 535 of the Congressional Globe, part 1, 2d sess. 35th Cong.]

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Mr. Seward submitted the following resolution for consideration:

"*Resolved*, That the Hon. Henry S. Lane and the Hon. William M. McCarty, who claim to have been elected Senators from the State of Indiana, be entitled to the privileges of admission on the floor of the Senate until their claims shall have been decided."

WEDNESDAY, *January* 26, 1859.

On motion by Mr. Seward, the Senate proceeded to consider the resolution, submitted by him the 24th instant, to admit the Hon. Henry S. Lane and the Hon. W. M. McCarty, claiming to have been elected Senators by the legislature of Indiana, on the floor of the Senate; and

After debate,

On motion by Mr. Iverson that the resolution lie on the table, it was determined in the affirmative—yeas 31, nays 22.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Bates, Bayard, Benjamin, Bigler, Brown, Chesnut, Clingman, Davis, Fitzpatrick, Green, Gwin, Hammond, Houston, Hunter, Iverson, Johnson of Tennessee, Kennedy, Mallory, Mason, Polk, Pugh, Reid, Rice, Sebastian, Shields, Slidell, Stuart, Thomson of New Jersey, Toombs, and Ward.

Those who voted in the negative are Messrs. Bell, Broderick, Cameron, Chandler, Clark, Collamer, Crittenden, Dixon, Doolittle, Durkee, Fessenden, Foot, Foster, Hale, Hamlin, Harlan, King, Seward, Simmons, Trumbull Wade, and Wilson.

So it was

Ordered, That the resolution lie on the table.

[A debate on the adoption of the resolution is found on pages 599–602 of the Congressional Globe, part 1, 2d sess. 35th Cong.]

FRIDAY, *January* 28, 1858.

Mr. Douglas presented a certified copy of that portion of the journal of the senate of the State of Indiana of the 22d of December, 1858, also a certified copy of that portion of the journal of the house of representatives of the State of Indiana of the 22d of December, 1858, relating to the election of United States Senators; which were referred to the Committee on the Judiciary.

THURSDAY, *February* 3, 1859.

Mr. Bayard, from the Committee on the Judiciary, to whom was referred a memorial of the State of Indiana, by her senators and representatives in general convention assembled, requesting that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen Senators of that State; also certified copies of the proceedings of the senate and house of representatives of the State of Indiana of the 22d of December, 1858, relative to the election of United States Senators, submitted a report, asking that the committee be discharged from the further consideration of the memorial of the legislature of Indiana.

On motion by Mr. Bayard,

Ordered, That the report lie on the table and be printed.

Mr. Collamer submitted the views of the minority of the Committee on the Judiciary on the subject; which were ordered to be printed.

* * * * * * *

Mr. Seward submitted the following resolution for consideration:

"*Resolved*, That Henry S. Lane and William M. McCarty have leave to occupy seats on the floor of the Senate pending the discussion of the report of the Committee on the Judiciary on the memorial of the legislature of Indiana declaring them her duly elected Senators, and that they have leave to speak to the merits of their right to seats and the report of the committee."

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Bayard (chairman), Pugh, Benjamin, Green, Clingman, Collamer, and Trumbull.]

Mr. Bayard submitted the following report:

The Committee on the Judiciary, to whom was referred the memorial of the State of Indiana, by her representatives and senators in general convention assembled, representing that it is her wish and desire that the Hon. Henry S. Lane and the Hon. William Monroe McCarty be admitted to seats in the Senate of the United States as the only legally elected and constitutionally chosen Senators of that State, submit the following report:

That the Hon. Graham N. Fitch, on the 9th day of February, 1857, was admitted by the Senate on the customary *prima facie* evidence of his election as a Senator from the State of Indiana, to serve as such until the 4th day of March, A. D. 1861; was qualified and took his seat as a Senator. On the same day resolutions of the senate of Indiana adverse to the legality of his election and a protest of certain members of the house of representatives of the same State against the validity of the election were presented to the Senate; and the credentials of Mr. Fitch, the resolutions of the senate of Indiana, and the protest of the members of the house of representatives against the validity of the election were referred to the Committee on the Judiciary.

The committee on the 26th of February reported a resolution authorizing testimony to be taken both by the sitting members and the protestants in relation to all matters of fact contained in their respective allegations. This report was ordered to lie upon the table on the 2d of March, 1857, and no further action was had upon the subject during that session. At the called session of the Senate the papers on file relating to the election of Mr. Fitch, were on the 9th of March 1857, on motion of Mr. Trumbull referred to the Committee on the Judiciary, and on the 14th of March the committee reported a resolution authorizing testimony to be taken—slightly variant from the resolution reported at the preceding session. The resolution was on the same day ordered to lie on the table. The credentials of the Hon. Jesse D. Bright, elected a Senator from the State of Indiana, to serve as such until the 4th day of March, 1863, were presented to the Senate and read on the 2d day of March, 1857; and at the called session of the Senate, on the 4th day of March, A. D. 1857, Mr. Bright was qualified and took his

* Annexed to the report, which is taken from Senate Reports, 2d sess. 35th Cong., Report No. 368, are the reports made January 21 and 25, 1858, which are printed above.

seat. At the first session of the present Congress, on the 17th of December, 1858, on motion of Mr. Trumbull, the credentials of the sitting members from Indiana, together with all papers on file protesting against their right to seats, or relating to their election as Senators in Congress by the legislature of Indiana, were referred by the Senate to the Committee on the Judiciary. On the 21st of January, 1858, the committee made a report, concluding with a resolution similar to the resolution which had previously been reported in relation to the case of Mr. Fitch, authorizing testimony to be taken; and on the 25th of the same month Mr. Trumbull submitted the views of the minority of the committee.

Both the report of the committee and the views of the minority were printed and are appended as part of this report, with a view to the illustration of the questions presented to the Senate, upon which its decision was subsequently made.

On the 16th of February, 1858, the consideration of the resolution reported by the committee was resumed, and, after the rejection of some proposed amendments and the adoption of others, the following resolution was passed by the Senate:

"*Resolved*, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, Senators returned and admitted to their seats from the State of Indiana, the sitting members and all persons protesting against their election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact therein contained before any judge of the district court of the United States or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis: *Provided*, That the proofs to be taken shall be returned to the Senate of the United States within ninety days from the passage of this resolution: *And provided*, That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature."

Testimony was subsequently taken by the protestants, which was, together with certain affidavits presented on behalf of the sitting members and documentary evidence referred to the Committee on the Judiciary, and on the 24th day of May, 1858, Mr. Pugh from that committee reported the following resolution:

"*Resolved*, That Graham N. Fitch and Jesse D. Bright, Senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate as such Senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials."

This resolution and the accompanying documents were on the same day ordered to be printed.

The resolution was under consideration in the Senate, and fully debated at several subsequent times, and was finally, after the rejection of several proposed amendments, passed by the Senate without amendment or alteration. In the opinion of the committee, this resolution (no motion having been made to reconsider it) finally disposed of all questions presented to the Senate involving the respective rights of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright to their seats in the Senate, as Senators from the State of Indiana for the terms stated in the resolution. It appears by the memorial that the legislature of Indiana, at its recent session in December last, assumed the power of revising the final decision thus made by the Senate of the United States under its unquestioned and undoubted constitutional authority to "be the judge of the qualifications of its own members." Under this assumption, it also appears by the journals of the senate and house of representatives of the State of Indiana, the legislature of Indiana, treating the seats of the Senators from that State as vacant, proceeded, subsequently, by a concurrent vote of the senate and house of representatives of the State, to elect the Hon. Henry S. Lane as a Senator of the United States for the State of Indiana, to serve as such until the 4th of March, 1863, and the Hon. William Monroe McCarty as a Senator for the same State, to serve as such until the 4th of March, A. D. 1861. Under this action of the legislature of Indiana those gentlemen now claim their seats in the Senate of the United States.

It may be conceded that the election would have been valid, and the claimants entitled to their seats, had the legislature of Indiana possessed the authority to revise the decision of the Senate of the United States that Messrs. Fitch and Bright had been duly elected Senators from Indiana, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863.

In the opinion of the committee, however, no such authority existed in the legislature of Indiana. There was no vacancy in the representation of that State in the Senate; and the decision of the Senate, made on the 12th of June, 1858, established finally and (in the absence of a motion to reconsider) irreversibly the right of the Hon. Graham N. Fitch as a Senator of the State of Indiana until the 4th of March, 1861, and the right of the Hon. Jesse D. Bright as a Senator from the same State until the 4th of March, A. D. 1863

The decision was made by an authority having exclusive jurisdiction of the subject; was judicial in its nature; and, being made on a contest in which all the facts and questions of law involving the validity of the election of Messrs. Fitch and Bright, and their respective rights to their seats, were as fully known and presented to the Senate as they are now in the memorial of the legislature of Indiana, the judgment of the Senate then rendered is final, and precludes further inquiry into the subject to which it relates.

There being, by the decision of the Senate, no vacancy from the State of Indiana in the Senate of the United States, the election held by the legislature of that State at its recent session is, in the opinion of the committee, a nullity, and merely void, and confers no rights upon the persons it assumed to elect as Senators of the United States.

The committee ask to be discharged from the further consideration of the memorial of the legislature of Indiana.

VIEWS OF THE MINORITY.*

Mr. Collamer submitted the following views of the minority:

The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of re-examination and the correction of error or mistake incident to all judicial tribunals and proceedings remains with the Senate in this respect, as well to do justice to itself as to the States represented or to the persons claiming or holding seats. Such an abiding power must exist, to purge the body from intruders, otherwise any one might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud or falsehood, or even by papers forged or fabricated.

In what cases and at whose application a rehearing will at all times be granted is not now necessary to inquire; but when new parties, with apparently legal claim, apply, and especially when a sovereign State, by its legislature, makes respectful application to be represented by persons in the Senate legally elected, and insists that the sitting members from that State were never legally chosen, we consider that the subject should be fully re-examined, and that neither the State, the legislature, or the persons now claiming seats can legally or justly be estopped, or even prejudiced, by any former proceedings of the Senate to which they were not parties.

At the first session of the legislature of Indiana after the present sitting members were declared by the Senate as entitled to their seats, and at the earliest time it could take action, it declared their pretended election as inoperative and void, and that the State was infact unrepresented; and they proceeded to elect H. S. Lane and William M. McCarty as Senators of the United States for said State, according to the Constitution of the United States; and they send here their memorial, alleging that the present sitting members were never legally elected; and they show facts, in addition to what was heretofore presented to the Senate, tending, as they consider, to sustain this allegation. The said Lane and McCarty present their certificates and claim their seats. We consider the matters stated in said memorial as true. The said Lane and McCarty have presented their brief sustaining their claim to seats, which is in the words following:

Brief of W. M. McCarty and Henry S. Lane, submitted to the Judiciary Committee of the Senate.

The State is entitled to the office. The legislature is her supreme instrument and donee of the power to elect Senators. It is the creature of the constitution, which is the chart of its power, vested only in two co-ordinate branches; a quorum of two-thirds of the members is requisite to give either a legal entity; each is equivalent in power, with an absolute veto on the power of the other.

The legislature is a corporation aggregate, with only such power as its creator has seen fit to endow it with, to be exercised in conformity to the laws of its birth.

To the joint wisdom and counsel of these colleges is the legislative *power* intrusted. It is not parceled out to its component elements in integrals, neither is it vested in an amalgamated body of the two. The one is erected as a barrier to the other. The ordeal of both must be passed. This guaranty against abuse cannot be broken down without destroying one of the safeguards of our Government. The sovereign voice is an unit. The power that utters it is an entirety—an invisible, intangible, artificial person. The power is in the organism called "the general assembly," and not in the individual members. It is not the rights or powers of the members, but the delegated trust powers of the State that are wielded in senatorial elections or other exercises of legislative powers. Without a quorum of either house it did not exist—without either, the legislature did not exist, and without a legislature no election would be had.

Now, the facts are that a quorum of neither house was present at the pretended elec-

* Taken from Senate Reports, 2d sess. 35th Cong., Report No. 368, part 2.

tion of Messrs. Bright and Fitch, nor even a majority of the senate, nor did either house prescribe the time, place, or manner of electing.

It is of the essence of legislative power that its exercise shall be free from all restraint; each body free to deliberate and act in its duties; each entitled to its full powers. The facts are that *the senate, upon eight occasions, refused to go into joint convention with the house, and at no time consented.* She could not be *compelled* to merge her individuality, or surrender her veto power, or adopt the joint-vote mode of electing Senators; or, in other words, dilute or annihilate her power, upon the mandate of the house, as that would degrade her from an equal to an inferior. On the contrary she had the right to determine the time, place, and manner, and did do it by resolution, to elect by *separate* vote, at a proper time, in which the house never concurred. Where diverse duties are imposed, she must determine which are most imperative and shall have priority.

The constitution of Indiana only provides for a joint convention upon the contingency of a tie vote for governor and lieutenant-governor. That contingency did not exist; therefore the convention did not. To say that a duty to form a joint convention creates it is as absurd as to say that the subpœna of a witness works his presence, or the commands of the decalogue their observance.

Failing to get the senate into a joint convention, a false record of that pretended fact was made, to be used as evidence, and which has been used as veritable and true, and the absolute verity and the unimpeachable quality of a record claimed for the fabrication.

The resolves of the senate are those of the whole body. The mutinous senators who usurped the name and power of the senate in said pretended convention were subject to arrest by order of that body for absence, and the attempt to nullify the will of the majority by attempting a business at a time, place, and in a manner vetoed by that body by a resolve, then unvacated and unrescinded. Said convention, if it existed, expired with the duty that called it into life. The president of the senate, when inaugurated governor, his office as president of the senate expired, and with it that of his deputy president. The president not only usurped the power to appoint a clerk—an office not known to the law and void—who only authenticated this pretended election by interpolating it into the journal of the house. This president, whose power expired with that of his creator, arrogated that of adjourning it to a fixed day; in other words, commanding it to obey his arbitrary rescript; and, at a subsequent one, the more imperious mandate commanded them to elect Senators, no agreement whatever having been had by the house therefor as to time, place, and manner.

We aver that not only did no usage exist in Indiana, but that in no solitary instance was an election had without the consent of both houses, fixing time, place, &c., by law or resolution. While said pretended convention was in existence, but adjourned to a fixed day, numerous attempts were made in both houses to create one by the members who voted for Messrs. Bright and Fitch; thus offering evidence that they did not consider that one *had* been formed and was in existence. No forced convention could be had. Mutual consent was necessary, and it was never had by a vote, which is the only mode of altering the will of a legislative body.

The history of joint conventions in Indiana will also show that no other business was ever transacted than that for which it was specially convened. And we insist that the validity of the acts of a joint convention is due to the separate action of the two houses as the general assembly. It is also necessary to the validity of all elections by corporate bodies that notice be given of the time, &c., and the journals of neither house show any such notice or any conventional agreement for the same.

Upon the facts and law above no legal election could have been had.

To sustain the title of Messrs. Bright and Fitch, the constitution of Indiana, depositing her legislative power in two co-ordinate houses, must be broken down—that which requires two-thirds of the members to exercise any of her attributes of sovereignty, and that one house cannot coerce the other. Not only is this election in defiance of these injunctions, but in the face of a positive dissent by one branch, armed by the people with an absolute veto. But a presiding officer, who is no part of the legislature, usurped the powers and prerogatives of the legislature; all the forms and guarantees with which the people hedged in their legislative servant were disregarded, and it is claimed that the act is as valid as if they had been observed.

To sustain Messrs. Bright and Fitch the constitution of Indiana is made a dead letter. Will the Senate, the peculiar guardians of State rights, reared up for that especial purpose, exclude Indiana from her weight and voice in it by instruments empowered by her? Will she be allowed to interpret her own constitution and acts, or will the Senate, under any pretense, blot her out of the confederacy, and realize all those fears portrayed by some of the framers of the Constitution by an absorbtion of and encroachment upon State rights?

The legislative power enshrines and protects all rights subject to its jurisdiction. Prior to the confederation the several States owed this duty to their citizens. They did not

surrender it, but intrusted it to the Federal for their better protection with the right guaranteed them of a voice in the Senate, as a means of enforcing this duty through the Federal instrument.

We deny that under a constitutional grant of power, with prescribed modes of its exhibition, that you can discriminate between elections and laws. The selection of a general, upon whose skill the fate of an army or the country may depend, or of a judge upon whose legal attainments and integrity the lives, liberties, and property of the citizen may depend, is of less moment than some petty law.

The same power is as requisite to the creation of the one as the other.

But it may be said that this question is *res adjudicata*.

We deny that our rights or title are barred by a decision had *before they were created*.

We deny that the judicial power of the Senate is capable of self-exhaustion. We deny that the political right of the State is capable of annihilation without annihilating the Constitution which creates the right.

We insist that the right to judge of the election and qualification of members must continue while the term continues.

The qualifications are continuing conditions of title.

We deny that courts are ever estopped by their own action.

We deny that sovereigns are estopped.

We deny that Indiana was, prior to this time, a party to the proceedings of the Senate, or had opportunity to allege or elicit the true facts.

We deny the power of the Senate, under the power to judge, to *create* Senators for Indiana.

We claim for her a superior knowledge of her own acts and grants.

We insist that the simple admission of a Senator to his seat upon credentials is a decision, and that it was never pretended this precluded his ouster if his title were not good.

If the Senate have not power to exclude foreign elements at all times, it is not equal to the duties intrusted to its guardianship.

And we will not believe that the Senate is the only tribunal on earth whose wrongs, once done, are eternal and irrevocable.

W. M. McCARTY.
H. S. LANE.

In the case of the State of Mississippi, in the House of Representatives in the Twenty-fifth Congress, the power to re-examine a decision made on an election of members was fully considered and decided. Gohlston and Claiborne were, at a special election held on the proclamation of the governor, chosen representatives from that State to a special session of Congress, called by the President. At that session exception was taken to them, but after some objection they were admitted to their seats. Their case and papers were referred to the Committee on Elections, who made report, and thereupon, on full and elaborate discussion, it was resolved that they were duly elected members of the Twenty-fifth Congress, and entitled to their seats. This was in September. In November following an election was holden in said State, and Prentiss and Ward were elected members of the Twenty-fifth Congress, who, in December following, presented their credentials and claimed their seats. It was then insisted in that case, as it now is in this, that the decision so before made was conclusive of the right of Claiborne and Gohlston to their seats as members of the Twenty-fifth Congress, and the whole matter was "*res adjudicata*." But on full examination and after full discussion, the former resolution declaring said Caliborne and Gohlston as duly elected members of the Twenty-fifth Congress was *rescinded*.

We are therefore of opinion that the memorial of the legislature of Indiana should be duly entertained and considered, and the said Lane and McCarty fully heard; and that if on full examination and hearing the Senate find that the present sitting members were not duly elected, the resolution declaring them elected should be reconsidered. And if the Senate find that the said Lane and McCarty were legally elected they should be admitted to their seats.

J. COLLAMER.
L. TRUMBULL.

THURSDAY, *February* 10, 1859.

On motion by Mr. Bayard, the Senate proceeded to consider the report of the Committee on the Judiciary on the memorial of the legislature of Indiana asking that the Hon. Henry S. Lane and the Hon. William M. McCarty be admitted to seats in the Senate of the United States, as Senators duly elected by that legislature; and,

On motion by Mr. Bayard,

Ordered, That the further consideration thereof be postponed until to-morrow.

On motion by Mr. Seward, the Senate proceeded to consider the resolution, submitted

by him the 3d instant, to admit the Hon. Henry S. Lane and the Hon. William M. McCarty to seats on the floor of the Senate during the discussion of the report of the Committee on the Judiciary in relation to their election, and to permit them to speak on the merits of their rights to seats in the Senate; and,

On motion by Mr. Seward,

Ordered, That the further consideration thereof be postponed until to-morrow.

[A short debate is found on pages 922, 923 of the Congressional Globe, part 1, 2d sess. 35th Cong.]

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On motion by Mr. Seward to postpone all prior orders to consider the report of the Committee on the Judiciary on the memorial of the State of Indiana in relation to the representation of that State in the Senate of the United States, it was determined in the negative—yeas 19, nays 20.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bell, Broderick, Cameron, Chandler, Clark, Collamer, Crittenden, Doolittle, Durkee, Foot, Harlan, Johnson of Tennessee, King, Seward, Simmons, Thompson of Kentucky, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Allen, Bates, Benjamin, Bigler, Brown, Clingman, Davis, Fitzpatrick, Gwin, Houston, Hunter, Jones, Mallory, Mason, Pugh, Reid, Sebastian, Shields, Slidell, and Ward.

So the motion was not agreed to.

[A short debate on the order of business is found on pages 933, 934 of the Congressional Globe, part 1, 2d sess. 35th Cong.]

FRIDAY, *February* 11, 1859.

On motion by Mr. Seward, the Senate resumed the consideration of the report of the Committee on the Judiciary on the memorial of the State of Indiana, relating to the Senators of that State, viz, that the committee be discharged from the further consideration of the memorial.

An amendment being submitted by Mr. Seward, and an amendment to that amendment being proposed by Mr. Pugh,

While Mr. Seward was engaged in debate a question was raised, at 1 o'clock, by Mr. Iverson, whether the special order of the day (S. 497), being the unfinished business of yesterday, was not entitled to precedence.

The Vice-President decided that Mr. Seward was still entitled to the floor, on a privileged question.

On motion by Mr. Pugh that the report of the committee, with the pending amendments, lie on the table, it was determined in the affirmative—yeas 31, nays 20.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Bayard, Benjamin, Bigler, Brown, Chesnut, Clay, Clingman, Davis, Fitzpatrick, Gwin, Hammond, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Mallory, Mason, Polk, Pugh, Reid, Rice, Sebastian, Slidell, Stuart, Thompson of Kentucky, Toombs, and Ward.

Those who voted in the negative are Messrs. Bates, Bell, Broderick, Cameron, Chandler, Clark, Collamer, Doolittle, Douglas, Durkee, Fessenden, Foot, Hale, Harlan, King, Seward, Simmons, Trumbull, Wade, and Wilson.

[A short debate is found on pages 957–959 of the Congressional Globe, part 1, 2d sess. 35th Cong.]

MONDAY, *February* 14, 1859.

On motion by Mr. Collamer, the Senate proceeded to consider the report of the Committee on the Judiciary on the memorial of the State of Indiana in relation to the Senators from Indiana, with the reported resolution, that the Committee on the Judiciary be discharged from the further consideration of the memorial of the legislature of Indiana.

An amendment having been proposed by Mr. Seward, to amend the resolution to discharge the Committee on the Judiciary by striking out all after "resolved" and inserting,

"That Henry S. Lane and William M. McCarty have leave to occupy seats on the floor of the Senate pending the discussion of the report of the Committee on the Judiciary on the memorial of the legislature of Indiana declaring them her duly elected Senators, and that they have leave to speak to the merits of their rights to seats and on the report of the committee,"

On motion by Mr. Pugh to amend the amendment proposed by Mr. Seward, by striking out all after "that" and inserting "the resolution of the Senate, adopted June 12,

1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution."

On motion by Mr. Harlan "That all the papers in this case be recommitted to the Committee on the Judiciary with instructions to inquire whether Graham N. Fitch and Jesse D. Bright or Henry S. Lane and W. M. McCarty, or any one of them, has been elected to the office of Senator of the United States from the State of Indiana as provided by the Constitution of the United States, and in accordance with the laws and usages of the State of Indiana, and report the facts connected with and bearing on the supposed election of each to the Senate, and that the contestants be allowed to appear at the bar of the Senate when such report shall be made and argue their right to seats,"

After debate,

A division of the motion made by Mr. Harlan was called for by Mr. Stuart; and the question being taken on the first division, viz, "That all the papers in this case be recommitted to the Committee on the Judiciary," it was determined in the negative—yeas 14, nays 32.

On motion by Mr. Pugh, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cameron, Chandler, Clark, Collamer, Doolittle, Douglas, Fessenden, Foot, Hamlin, Harlan, King, Seward, Trumbull, and Wilson.

Those who voted in the negative are Messrs. Bayard, Benjamin, Bigler, Broderick, Brown, Chesnut, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Lane, Mallory, Mason, Polk, Pugh, Reid, Rice, Shields, Slidell, Smith, Stuart, Toombs, and Ward.

So the motion to recommit with instructions was disagreed to.

The question recurring on agreeing to the amendment proposed by Mr. Pugh to the amendment proposed by Mr. Seward, it was determined in the affirmative—yeas 30, nays 16.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Benjamin, Bigler, Brown, Chesnut, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Houston, Hunter, Iverson, Johnson of Arkansas, Jones, Kennedy, Lane, Mallory, Mason, Polk, Pugh, Reid, Rice, Shields, Slidell, Smith, Stuart, Toombs, and Ward.

Those who voted in the negative are Messrs. Broderick, Cameron, Chandler, Clark, Collamer, Doolittle, Douglas, Fessenden, Foot, Hamlin, Harlan, Johnson of Tennessee, King, Seward, Trumbull, and Wilson.

On the question to agree to the amendment of Mr. Seward, as amended, it was determined in the affirmative—yeas 29, nays 16.

On motion by Mr. King, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Benjamin, Bigler, Brown, Chesnut, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Houston, Hunter, Iverson, Johnson of Arkansas, Jones, Kennedy, Lane, Mallory, Mason, Polk, Pugh, Reid, Rice, Shields, Slidell, Smith, Stuart, Toombs, and Ward.

Those who voted in the negative are Messrs. Broderick, Cameron, Chandler, Clark, Collamer, Doolittle, Douglas, Fessenden, Foot, Hamlin, Harlan, Johnson of Tennessee, King, Seward, Trumbull, and Wilson.

On the question to agree to the resolution from the Committee on the Judiciary, amended, as follows:

"*Resolved*, That the committee be discharged from the further consideration of the memorial of the State of Indiana, and that the resolution of the Senate adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, and conclusive, as well upon the legislature of Indiana, and all persons claiming under its authority, as upon the Senators named in the resolution,"

It was determined in the affirmative—yeas 30, nays 15.

On motion by Mr. Johnson, of Tennessee, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Benjamin, Bigler, Brown, Chesnut, Clay, Clingman, Davis, Fitzpatrick, Green, Gwin, Houston, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Kennedy, Lane, Mallory, Mason, Polk, Pugh, Reid, Rice, Shields, Slidell, Smith, Stuart, Toombs, and Ward.

Those who voted in the negative are Messrs. Broderick, Cameron, Chandler, Clark, Collamer, Doolittle, Douglas, Fessenden, Foot, Hamlin, Harlan, King, Seward, Trumbull, and Wilson.

So the reported resolution, as amended, was agreed to.

[The debates are found on pages 1014–1019 of the Congressional Globe, part 1, 2d sess. 35th Cong., and on pages 128–148 of the Appendix to the Congressional Globe, part 2, 2d sess. 35th Cong.]

[Special session of Senate, March, 1857.]

SIMON CAMERON,

Senator from Pennsylvania from March 17, 1845, *till March* 3, 1849; *from March* 4, 1857, *till he resigned in March*, 1861; *and from March* 4, 1867, *till he resigned in March*, 1877.

Soon after Mr. Cameron had taken his seat in the Senate for the term beginning March 4, 1857, a protest against the legality of his election by certain members of the legislature of Pennsylvania was presented to the Senate. The subject was referred to the Committee on the Judiciary. The committee reported that the grounds of the protest were (1) that there was not a concurrent majority of each house in favor of Mr. Cameron; (2) that the State senate did not comply in certain particulars with an act of the State regulating the election of Senators; and (3) that the election was procured "by corrupt and unlawful means." The committee reported in regard to the first ground of the protest that it was "untenable under the statute of Pennsylvania and the uniform practical construction of the Federal Constitution for the last half century;" in regard to the second ground of the protest they reported that the provisions of law alleged to have been disregarded were purely directory, and that a failure to comply with them would not vitiate an election; and in regard to the third ground of the protest, reported that the "allegation was entirely too vague and indefinite" to justify the recommendation of an investigation by the United States Senate. The report ended with the resolution that the committee be discharged from the further consideration of the subject. The minority of the committee concurred with the majority in reference to the two first points, but submitted a report dissenting from the conclusion of the majority in regard to the third point, on the ground that when a protest of this nature comes from a responsible source the Senate should investigate the charges and allow the persons protesting an opportunity of submitting the proof upon which the charges rest. After a brief debate the resolution reported by the committee was adopted.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 3d sess. 34th Cong., 1856–'57, and the report of the committee in the case from Senate Reports, 3d sess. 34th Cong., Report No. 1 of the special session.

The debates in the case are found within pages 387–391 of the Appendix to the Congressional Globe, 3d sess. 34th Cong., 1856–'57.

Special references to the debate of each day are inserted below.

FRIDAY, *January* 16, 1857.

The President *pro tempore* presented the credentials of the Hon. Simon Cameron, elected a Senator by the legislature of Pennsylvania for the term of six years commencing on the 4th day of March next; which were read.

WEDNESDAY, *March* 4, 1857.

The oath prescribed by law was administered to Simon Cameron, and he took his seat in the Senate.

FRIDAY, *March* 6, 1857.

Mr. Bigler presented a protest of fifty-four members of the house of representatives, and a protest of fifteen members of the senate of the State of Pennsylvania against the proceedings under which the Hon. Simon Cameron claims to represent the State in the Senate of the United States from the 4th of March, 1857.

Ordered, That they lie on the table.

MONDAY, *March* 9, 1857.

On motion by Mr. Cameron,

Ordered, That the protest of certain members of the house of representatives of the State of Pennsylvania, and the protest of members of the senate of the said State, presented the 6th of March, be referred to the Committee on the Judiciary.

WEDNESDAY, *March* 11, 1857.

Mr. Benjamin, from the Committee on the Judiciary, to whom were referred a protest of members of the senate, and a protest of members of the house of representatives of the State of Pennsylvania against the election of the Hon. Simon Cameron as a Senator in Congress, submitted a report (No. 1), accompanied by the following resolution:

"*Resolved*, That the Committee on the Judiciary be discharged from the further consideration of the subject."

Ordered, That the report be printed.

Mr. Pugh submitted the views of the minority of the Committee on the Judiciary on the same subject; which were ordered to be printed with the report of the committee.

Mr. Foot submitted the following resolution for consideration:

"*Resolved*, That Simon Cameron is entitled to a seat upon this floor as a legally chosen Senator from the State of Pennsylvania."

[The debate is found on pages 388, 389 of the Appendix to the Congressional Globe referred to in the head-note.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Butler (chairman), Bayard, Toombs, Pugh, Benjamin, Collamer, and Trumbull.]

Report of the Committee on the Judiciary, on the protests of certain members of the legislature of Pennsylvania against the election of the Hon. Simon Cameron as a Senator in Congress.

MARCH 11, 1857.—Submitted, and ordered to be printed with the views of the minority of the committee.

The Committee on the Judiciary, to whom was referred the protest of certain members of the senate and house of representatives of the State of Pennsylvania, alleging certain irregularities and illegalities in the election of the Hon. Simon Cameron, a Senator from said State, report:

That the grounds of protest are stated as follows, viz:

First. That there was not a concurrent majority of each house in favor of the candidate declared to be elected.

Second. That the senate did not comply with the requirements of the act of 2d July, 1839, by appointing a teller and making a nomination of persons to fill said office, and giving notice of said appointment and nomination at least one day previous to the meeting of said convention.

In addition to the two grounds aforesaid, the protest presented by the members of the house of representatives charges,

Third. "That the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action and votes of certain members of the house of representatives of this State; and they request that an investigation be ordered by your honorable body, not only into the regularity of the said election, but into the charges herein presented, in order that an opportunity may be afforded of submitting the proof upon which they rest."

In relation to the first two grounds of protest, the committee are unanimously of opinion that no facts are presented tending in the slightest degree to impair the validity of the election of Mr. Cameron.

It is true that the law of Pennsylvania on the subject of the election of Senators requires that each branch of the legislature shall appoint one teller and nominate at least one person to fill such office, and communicate to the other house the names of the persons so appointed and nominated at least one day previous to the joint meeting; but the same law also provides that at the hour of twelve, on the second Tuesday in January next preceding the expiration of the constitutional term of a Senator, the members of both houses shall meet in convention in the chamber of the house of representatives and choose a Senator *viva voce* from the persons so nominated as aforesaid; and also expressly provides that the person who shall receive the votes of a majority of the members present shall be declared duly elected.

From the extracts furnished by the protesting parties, taken from the journals of the two houses, it appears that the two houses did meet in joint convention on the day and at the place appointed by law, and in accordance with resolutions passed in each house separately, and that one hundred and thirty-three members, composing the entire legislature of Pennsylvania, were present and voted, and that Simon Cameron received 67 votes, and 66 votes were given for all the other candidates; and that Simon Cameron, having thus obtained a majority of the votes of all the members present, was declared duly elected Senator.

It appears from the journal of the senate that the appointment of a teller and the nomination of candidates, and the communication to the other house of the appointment and nomination so made, all took place on the day of the election, instead of one day previous to the election, as required by the law of the State; but your committee regard this provision of law as purely directory in its nature, and are of opinion that a failure to comply with this formality would under no circumstances suffice to vitiate an election otherwise legal and valid; but where, as in the present case, both houses proceeded without objection from any source to perform their constitutional duty of electing a Senator, the necessity of complying with any particular forms required by law may fairly be considered as waived by common consent, and it is entirely too late, after the result of the voting has been ascertained, to raise a question as to the mode of proceeding.

The objection that there was not a concurrent majority of each house in favor of the candidate declared to be elected is equally untenable under the statute of Pennsylvania, and the uniform practical construction of the Federal Constitution for the last half century.

The third ground of protest is signed by members of the house of representatives of Pennsylvania, but not by the members of the senate of that State.

It is a general allegation "that the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action

and votes of certain members of the house of representatives," and the Senate of the United States is asked to investigate the charge.

The committee cannot recommend that this prayer be granted. The allegation is entirely too vague and indefinite to justify such a recommendation. Not a single fact or circumstance is detailed as a basis for the general charge. Neither the nature of the means alleged to be corrupt and unlawful, nor the time, place, or manner of using them, is set forth, nor is it even alleged that the sitting member participated in the use of such corrupt means or, indeed, had any knowledge of their existence. Under no state of facts could your committee deem it consistent with propriety, or with the dignity of this body, to send out a roving commission in search of proofs of fraud in order to deprive one of its members of a seat to which he is, *prima facie*, entitled; still less can they recommend such a course when the parties alleging the fraud and corruption are themselves armed with ample powers for investigation. If it be, indeed, true that members of the house of representatives of Pennsylvania have been influenced by corrupt considerations or unlawful appliances, the means of investigation and redress are in the power of the very parties who seek the aid of the Senate of the United States. Let their complaint be made to the house of which they are members, and which is the tribunal peculiarly appropriate for conducting the desired investigation. That their complaint will meet the respectful consideration of that house your committee are not permitted to doubt. If upon such investigation the facts charged are proven, and if they in any manner involve the character of the recently elected member of this body from the State of Pennsylvania, the Constitution of the United States has not left the Senate without ample means for protecting itself against the presence of unworthy members in its midst.

In the mean time your committee see no reason for initiating any proceeding on the subject, and submit the following resolution:

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the subject.

VIEWS OF THE MINORITY.

The undersigned, a member of the Committee on the Judiciary, dissents from the conclusion at which his colleagues have arrived in reference to the contested election of a Senator for the State of Pennsylvania.

In the protest submitted by forty-four members of the house of representatives in that State will be found an allegation in these words:

"The undersigned further charge that the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means influencing the action and votes of certain members of the house of representatives in this State; and they request that an investigation be ordered by your honorable body, not only into the regularity of the said election, but into the charges herein presented, *in order that an opportunity may be afforded of submitting the proof upon which they rest.*"

It is objected by the majority of the committee that this paragraph does not specifically relate the facts on which a charge of corruption can be predicated.

If the case were only between contestor and contestee, as individuals, there might be some force in the objection; but it is one in which a number of the qualified electors, themselves public agents, inform the Senate that corrupt as well as unlawful means have been used in the election.

The accusation comes from a responsible source, and is too serious, too distinctly and directly made, to be treated with indifference. It concerns the honor of the Senate and the security of the Government that no rule of merely technical character, applicable as between individuals, should prevent a thorough investigation of the case. This would seem to be a duty the more imperative in view of the statute, enacted at the late session, in which very stringent and unusual provisions have been made for the detection of corrupt practices by members of Congress.

The undersigned concurs with the majority in reference to the other points of contest.

G. E. PUGH.

FRIDAY, *March* 13, 1857.

The Senate proceeded to consider the resolution reported by the Committee on the Judiciary, to whom were referred the protests of certain senators and members of the house of representatives of the State of Pennsylvania, against the election of the Hon. Simon Cameron as a Senator in Congress from that State; and, in concurrence therewith,

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the subject.

Mr. Foot, on his motion, obtained leave to withdraw the resolution, submitted by him the 11th instant, respecting the right of the Hon. Simon Cameron to a seat in the Senate.

[The debate that took place on the adoption of the resolution is found on page 391 of the Appendix to the Congressional Globe referred to in the head-note.]

[Thirty-fifth Congress—First session.]

JAMES SHIELDS,

Senator from Minnesota from May 12, 1858, *till March* 3, 1859.

February 26, 1857, Congress passed an act entitled "An act to authorize the people of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States." The constitution, when formed, having been referred to the Committee on Territories, that committee reported a bill January 26, 1858, entitled "A bill for the admission of Minnesota into the Union," which was approved May 11, 1858. February 25, 1858, a paper purporting to be the credentials of Mr. Shields as a Senator from the State of Minnesota, and a letter from him setting forth the grounds upon which he claimed a right to a seat in the Senate, were presented. He claimed that Minnesota was at that time a State by virtue of the act of February 26, 1857; that that act enabled her on certain terms and conditions to be at once a State; that she had performed those conditions. March 4, 1858, the committee unanimously reported a resolution that Minnesota was not a State of the Union under the Constitution and laws, the grounds on which the resolution was based not being given. No action was taken on the resolution. Mr. Shields was admitted to the seat after the bill admitting the State was approved. It appears from the debates which took place on the question whether the subject was a privileged question, that some Senators thought Mr. Shields entitled to the seat for the reasons given in his letter; that some thought that no act of admission would have been necessary if the Territory had complied with the conditions of the enabling act, but that it had not done so; that others thought that an act of admission was essential even if the conditions of the enabling act had been complied with. Extracts from speeches will show more at length the grounds upon which different Senators proceeded.

May 12, 1858, the day on which the Minnesota Senators were sworn, a debate arose on the question whether the Senators were duly elected in December, 1857, or whether an election must take place after the passage of the act of admission. This debate is found on pages 2076, 2077 of the Congressional Globe, part 3, 1st sess. 35th Cong. There was no division of the Senate on the question.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 1st sess. 35th Cong.; the report of the committee, from Senate Reports, 1st sess. 35th Cong., vol. 1, No. 104; the letter of Mr. Shields, from the Congressional Globe, 1st sess. 35th Cong., part 1, pages 861, 862, and extracts from speeches from the same volume of the Globe.

The debates in the case are found on pages 861–867 of the Congressional Globe, part 1, 1st sess. 35th Cong.

LETTER OF MR. SHIELDS.

WASHINGTON, *February* 24, 1858.

SIR: I beg leave to offer a few reasons to show that Minnesota is one of the sovereign States of this Union. My first proposition is, that there are only two forms of political organization under which a community of American citizens can legitimately exist within the jurisdiction and under the Constitution of the United States. The one is the organization of a Territory of the Union; the other, that of a State of the Union. These are the only determinate shapes into which political communities can be molded under our Constitution. Each has its appropriate place in our federal system. A community of American citizens living under a territorial organization is in direct and legitimate connection with the Federal Government. That same community, transformed into a State, is also in direct legitimate connection with the Federal Government. In the transition from a Territory to a State, there is no point of time at which this connection can by any possibility be broken. The territorial government continues in full force until it is superseded by a State government; and whenever the people constitute themselves lawfully into a State, it is, *Io instanti*, a State of the Union. There is no such political anomaly as a State out of the Union, or not yet in the Union. These erroneous terms have been applied so vaguely to communities whose condition is not easily determined that the public begin to think there must be some intermediate provisional, probationary state, in which communities are sometimes kept on their passage from the condition of Territories to that of sovereign States of the Union. California was denominated, not many years ago, a State out of the Union. Minnesota is, I suppose, at present considered by some a State not yet in the Union, or, perhaps, a provisional State. Certainly the representatives of Minnesota are at present in a provisional dilemma, not knowing whether they represent a State in the Union or out of the Union.

I now beg leave to refer you to the law of 1857 authorizing the people of Minnesota to form a State government. The first section contains the following language: "The inhabitants of Minnesota are hereby authorized to form for themselves a constitution and State government by the name of Minnesota, and to come into the Union on an equal footing with the original States, according to the Federal Constitution." Here the authority is absolute and unconditional, first, to form a constitution and State govern-

ment; secondly, to come into the Union on an equal footing with the original States; authority to make a State and authority to come into the Union. No language could be more positive; no authority could be more plenary; no act could be more determinate. The people have performed their engagements in good faith, and they have a right to expect a like compliance on the part of Congress. These engagements, too, affect the most sacred of all political rights—the constitutional rights of a sovereign State. The third section of the Minnesota enabling act strengthens and corroborates this position. It provides that a convention of delegates shall assemble at the capital of said Territory on the second Monday of July next (1857), and first determine by a vote whether it is the wish of the people of the proposed State to be admitted into the Union "at that time." Mark the language: not thereafter; not upon the happening of any future contingency; but "at that time," to wit, on the second Monday in July, 1857; "and if so," that is, if they shall so determine, "shall proceed to form a constitution, and to take all necessary steps for the establishment of a State government in conformity with the Federal Constitution, subject to the approval and ratification of the people of the proposed State."

Here two things are to be specially observed: first, the determination to become a State at that time; not the determination at that time to become a State, but a State at that time. Second, the submission to the approval and ratification of the people. When was Minnesota to become a State? At that time. How was her constitution to be ratified? By submission to the people. She has complied with every requirement. She entered the Union at the time prescribed; her constitution is ratified in the manner prescribed; and yet she is now as completely postponed and ignored as if she had disregarded all her obligations. Permit me to cite two precedents, which, I hope, will prove conclusive in this case. In 1802 an enabling act was passed for Ohio somewhat similar to, but not so decisive as, the Minnesota act. The authority given was to form a constitution and State government; and then follows this language: "The State, when formed, shall be admitted into the Union on the same footing with the original States." This was then considered an authorized admission of the State, and the only act of admission that ever took place in the case of Ohio; and that State is now in the Union under and by virtue of the authority of that enabling act.

The enabling act in the case of Indiana contains the following language: "The State, when formed, shall be admitted into the Union." Mark the difference in the two acts. In the case of Minnesota authority is given to come in at the present time. In the case of Indiana a promise is given for her admission at some future time; under the law Indiana adopted a constitution and elected Representatives, as Minnesota has done.

On the 2d December, 1816, Mr. Hendricks, Representative from the new State, presented his credentials in the House of Representatives, was sworn in, was appointed on a committee, and was allowed to vote and act as a member of that body; and yet it was not until ten days afterward (on the 12th of the same month) that a joint resolution was passed by both branches of Congress formally admitting Indiana. This kind of resolution was then considered form—nothing but mere form—something which Congress has the power to observe or omit at pleasure, but something with which the State has no concern, and which cannot affect its right. This was then the opinion of John C. Calhoun, at that time a member of the other House; and this, we may fairly presume, would be his opinion if he were a member of the Senate now. When the precedent was established Daniel Webster was also a member of the House, and gave it the weight of his authority. But Minnesota stands upon far stronger grounds than Ohio or Indiana—the ground of Congressional authority. If this authority is good Minnesota cannot fail. This is a great question—a question of constitutional right, of national faith. Congressional faith, I sincerely hope, will be held sacred and inviolate in the case of Minnesota by the prompt admission of her representatives. My sense of duty to my constituents compels me, through you, to make this appeal to the Senate.

I have the honor to be, your obedient servant,

JAMES SHIELDS,
Senator from Minnesota.

Hon. JOHN J. CRITTENDEN.

[Extract from remarks of Mr. Pugh, of Ohio, maintaining that the application of Mr. Shields is a question of privilege, but that Minnesota was not a State, not having complied with the conditions of the enabling act, page 862, part 1, of the Globe referred to in the head-note.]

"I say that an enabling act was justified when it was first proposed, on the ground that it was an act of admission, a conditional act of admission, and when the State to be formed complied with the conditions, she was in the Union without anything else. That is the beginning of all the enabling acts; and that is the only excuse Congress ever had for passing one. That is one reason why, in my judgment, it is not necessary for Kan-

sas, or any other new State, when she presents herself, to have any enabling act. Nothing is requisite but an act of admission.

"But cases have arisen where both Houses of Congress have been obliged to consider whether the proposed State has complied with the conditions in the previous act of admission; and that is the question in relation to Minnesota. I have read the report of the Committee on Territories with very great care, and examined the documents submitted with that report; and, although I acknowledge there is no error which we may not heal by a joint resolution of admission, I do not think Minnesota has complied with the terms of the enabling act. I do not think she ever held a convention of delegates as required by that law. I do not consider the breach healed by the subsequent vote that was taken in October. If we object to the form of the vote that was taken in Kansas on the 21st of December, the form of the vote that was taken in Minnesota is just as objectionable; but I agree that these are not fatal defects. They are defects which we can heal by a joint resolution, or a subsequent act of Congress. Therefore, whilst I do believe that this is a question of privilege, that when this gentleman presents himself here, and claims to be a Senator from a State which we have so far recognized as to authorize her to become one on the performance of certain conditions, his claim is a question of privilege. I do not agree that Minnesota has so far complied with the terms of admission as to entitle her Senators and Representatives to be sworn without some waiver by Congress in the shape of a joint resolution. Therefore, whilst I shall vote to consider it a question of privilege, I cannot, on the facts stated by the Committee on Territories, vote that Minnesota is entitled to have her Representatives and Senators here."

[Extract from remarks of Mr. Crittenden, of Kentucky, in support of the right of Mr. Shields to a seat, pages 863, 864, part 1, of the Congressional Globe referred to in the head-note.]

"The point that is made on the part of the individual applying to take his seat as a Senator is, that Minnesota is a State in virtue of the enabling act; that that act enabled her on certain terms and conditions to be at once a State, and to come into the Union as such under the Federal Constitution. She has performed those conditions. She has become a State, according to his view and his argument, and is entitled to be represented on this floor as a State. As Mr. Hendricks was permitted in the other House to take his seat, and to vote, and the votes of electors for President and Vice-President were allowed to be counted, although they were elected before any formal admission by Congress, I see no reason why the gentleman in question has not a just, constitutional, and lawful privilege to take his seat here; and, if it be denied to him, to appeal to you and to this body as upon a question of privilege to maintain and vindicate his right.

"The allowing him to take his seat here is one thing and a formal admission of the State another. There may be, and are, certain purposes for which it is very convenient to pass an act of formal admission into the Union. That may be done; but it does not follow because that may be done that the Senator shall not be permitted, before this formal act be done, to take his seat and represent his State. You know that the constitution has been made; you know, and the Senate know, that that constitution is of the character required by the enabling law, and by the Constitution of the United States we know the capacity of the principal to appoint such representatives; we know, however, that in transactions, of such consequence as the admission of States it may be well enough for us to adhere to the principle of giving a subsequent consent, and admitting the State by subsequent act. We can retain that; but where is the reason why this State shall be unrepresented in either House, until you can have passed that act? The forms require delay. Here is a State entitled to admission, and if it is entitled to admission it is entitled to representatives on this floor. It is the privilege of the State to require it; it is the privilege of the person she elects to represent her to require it, and that is all that is done.

"The first question required by the enabling act, in respect to Minnesota in forming her constitution, to be decided, is whether the people of the Territory described desire to be formed and admitted as a State into the Union at once. That question was put, and that question was decided in the affirmative. The people of Minnesota said, 'We desire to be admitted at once; it is not now our wish hereafter to be admitted, but it is our desire, our determination, to be admitted now, at once, into the Union.' That is the question which Congress directed to be put. That is the question which was decided, and every other condition required by Congress was fully complied with, as the constitution now before you shows.

"What evasion then is it, Mr. President, to decline to receive her representatives on this floor on an equal footing with those of the other States of this Union. I confess it seems to me they have as perfect a right as I have to a seat here, and if I might come from my State, with all the legally required authentications of my right, and present them to you, and from negligence, from apathy, from opposition, or from any other

cause, you were to refuse to administer to me the oath, the argument of the gentleman from Virginia would apply—'Oh, this is no breach of privilege; you are not a Senator; your State has certified you to be a Senator; the legislature has declared you to be a Senator; but the Federal authorities require you to take an oath, and that oath is necessary to make you a Senator.' No, sir; I am as much a Senator before I take the oath as I am afterwards. It contributes nothing to make me a Senator. If I fail to take that oath and presume to act without it, I am guilty of an offense; but I am a Senator before. Can you treat any gentleman elected to this body in this manner—refuse to administer to him the oath, and then tell him, 'For that cause I have annulled you as a Senator, and you can make no question of privilege in regard to it; one must be a Senator before a question of privilege can attach to him; you are not one, because I have not sworn you; and I will not swear you, because I do not intend that you shall act as a Senator?' If that is not a breach of privilege it is utterly incomprehensible to me what can be. It is a breach of privilege—a flagrant one; and it is not less a breach of privilege because there is the power in those who commit it to avoid responsibility for it."

[Extract from remarks of Mr. Toombs, of Georgia, citing the case of Ohio, page 866, part 1, of the Congressional Globe referred to in the head-note.]

"In 1802, when Ohio, under an enabling act, had made a constitution and went on under the regular forms to constitute a State government, a committee of this body was appointed. You will not find it in the printed Journals, but it is now in manuscript in the Secretary's office. The committee were to inquire whether or not Ohio was a State. They said Congress had passed an enabling act, that Ohio had complied with the conditions, and that nothing else was necessary but to extend the laws of the United States over her. They did that, and swore in the members. They decided that she had complied with all the conditions, and was a State."

[Extract from remarks of Mr. Brown, of Mississippi, maintaining that Minnesota could not become a State until the passage of an act of admission, page 866, part 1, of the Congressional Globe referred to in the head-note.]

"Now, is Minnesota a State of the Union? I shall vote for the resolution proposed by the Senator from Georgia, but I do it in deference to the judgment of other gentlemen, and to get clear of the question now, and not because there is one single shade of a shadow of doubt on my mind on the subject. Minnesota is not a State of the Union. If she is, she must have been made so by the enabling act. There is no pretense that she has become a State in any other way. Who knows? How has it been Congressionally ascertained that she has complied with the enabling act? Where is the judgment on that subject? How has it been ascertained that her constitution does not infringe or violate the Constitution of the United States? When was it ascertained and put upon the record that her constitution is republican in its form? All these things may be true, but they have not been ascertained. There is nothing on the record to show that they are true. Where is the evidence that in fixing her boundaries she has not run into the adjoining States and cut off a part of Iowa and Wisconsin? Has it been ascertained that that is not true? Suppose, without inquiry, just by virtue of the enabling act, she is now in the Union, and it turns out that her constitution is not republican in form, that her boundaries violate the boundaries of the adjoining States, that she has in other respects violated the Constitution of the United States: then what? Is she out of the Union? Do you break up the Union by turning her out to-morrow as soon as you ascertain that these things are true? If she is in the Union, she is in from the day her constitution was passed by the members of the convention which made it, for you have done nothing to give sanction to it since that. If she is in by virtue of the enabling act she is in from the very hour when the convention made the constitution; and then I suppose the very instant you find out that her constitution is in violation of the Constitution of the United States she goes out. That is an act of dissolution.

"I speak of these matters simply to show what strikes me to be the absurdity of declaring a State in the Union in this sort of informal way. If she cannot be in the Union with a constitution anti-republican; if she cannot be in with boundaries which infringe the boundaries of other States; if she cannot be in because her constitution provides for orders of nobility, stars, and garters, and all that; if she cannot be in for any one of the hundred reasons which I could name, then there must be a necessity for ascertaining that these objections do not exist before she is in at all. Who has ascertained it? It is the duty of Congress under the clause of the Constitution which authorizes it to admit new States to ascertain all these points. When they have done it and put that ascertainment in the form of a judgment on the records, the State is in, and not till then. About this I have no doubt, and I am astonished to find that anybody else has; but still in deference to the opinion of other gentlemen, and to get clear of the question, I will vote for the resolution of the Senator from Georgia."

THURSDAY, *February* 25, 1858.

Mr. Crittenden presented, as a privileged subject, a letter from the Hon. James Shields, setting forth the grounds upon which he claims a right to a seat as a Senator from the State of Minnesota; which was read.

Mr. Crittenden also presented a paper purporting to be the credentials of the Hon. James Shields as a Senator from the State of Minnesota; which was read; and moved that the oath of office be administered to Mr. Shields, and that he be admitted to a seat in the Senate.

Mr. Johnson, of Arkansas, raised the question of order, whether the subject presented by Mr. Crittenden was a *privileged* subject.

The Vice-President submitted the question for the decision of the Senate.

On motion by Mr. Johnson, of Arkansas, that the subject lie on the table, it was determined in the negative—yeas 22, nays 26.

On motion by Mr. Iverson, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allen, Biggs, Bright, Brown, Clay, Evans, Green, Hammond, Hunter, Iverson, Johnson of Arkansas, Johnson of Tennessee, Jones, Mallory, Mason, Pearce, Polk, Sebastian, Slidell, Thomson of New Jersey, Toombs, and Wright.

Those who voted in the negative are Messrs. Bell, Benjamin, Broderick, Chandler, Clark, Collamer, Crittenden, Dixon, Doolittle, Douglas, Durkee, Fessenden, Fitch, Foot, Foster, Gwin, Hamlin, Harlan, Houston, King, Pugh, Seward, Simmons, Sumner, Trumbull, and Wilson.

Whereupon

Mr. Toombs submitted the following resolution:

"*Resolved*, That the question of the admission of James Shields to a seat in this body, as a Senator from the State of Minnesota, be referred to the Judiciary Committee, with instructions to inquire whether or not Minnesota is a State of the Union under the Constitution and laws."

The Senate proceeded to consider the resolution; and the resolution was agreed to.

THURSDAY, *March* 4, 1858.

Mr. Bayard, from the Committee on the Judiciary, who were instructed by a resolution of the Senate to inquire whether or not Minnesota is a State of the Union under the Constitution and laws, submitted a report (No. 104), accompanied by the following resolution:

"*Resolved*, That Minnesota is not a State of the Union under the Constitution and laws."

On motion by Mr. Bayard,

Ordered, That the report be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Bayard (chairman), Toombs, Pugh, Benjamin, Green, Collamer, and Trumbull.]

IN THE SENATE OF THE UNITED STATES.

MARCH 4, 1858.—Ordered to be printed.

Mr. Bayard submitted the following report:

The Senate referred to the Committee on the Judiciary, on the 25th ultimo, the following resolution:

"*Resolved*, That the question of the admission of James Shields to a seat in this body as a Senator from the State of Minnesota be referred to the Judiciary Committee, with instructions to inquire whether or not Minnesota is a State of the Union under the Constitution and laws."

Having considered the question as to which they were by the foregoing resolution instructed to inquire, the committee have *unanimously* adopted the following resolution:

Resolved, That Minnesota is not a State of the Union under the Constitution and laws.

COMPENSATION OF SENATORS.

TUESDAY, *May* 25, 1858.

The Vice-President laid before the Senate a letter of the Secretary of the Senate asking the direction of the Vice-President as to the time at which the compensation of the Senators from Minnesota is to commence.

Ordered, That it be referred to the Committee on the Judiciary.

THURSDAY, *June* 3, 1858.

Mr. Bayard, from the Committee on the Judiciary, to whom was referred a letter of the Secretary of the Senate in relation to the compensation of the Senators from Minnesota, reported:

That there is no express provision in the act regulating the compensation of members of Congress applicable to the particular case presented; but, in the opinion of the committee, a correct construction of the act of August 16, 1856, forbids the allowance of compensation until the State of Minnesota was admitted into the Union, and that the compensation to the Senators from that State should commence on the day of admission, May 11, 1858.

[There was no debate on the subject of compensation, nor any action on the report.]

[Thirty-seventh Congress—First session.]

WAITMAN T. WILLEY AND JOHN S. CARLILE, *of Virginia.*

July 13, 1861, the credentials of Mr. Willey, elected to fill the unexpired term ending March 3, 1863, of James M. Mason, expelled, and the credentials of Mr. Carlile, elected to fill the unexpired term ending March 3, 1865, of Robert M. T. Hunter, expelled, were presented. A motion was made that the credentials be referred to the Committee on the Judiciary. The credentials stated that the election had been held July 9, 1861, and that it had been "to fill the vacancy which has happened by the withdrawal and abdication" of the two preceding Senators. The motion to refer the credentials was not agreed to, and, after debate, the oaths were administered. Some Senators maintained that by admitting Messrs. Willey and Carlile to their seats the Senate would be undertaking to recognize a government of the State which was not the regular State government, even though that State government were in a state of rebellion; and that the Senate was bound to recognize the fact that the term of office of the governor who was in rebellion had not expired, and that the credentials were not signed by him, but by another as governor. Others favored reference to a committee on the ground that at the time of the election, July 9, 1861, there was no vacancy in the Senate from Virginia, inasmuch as Messrs. Mason and Hunter had not been expelled until July 12, and that the Senate had recognized them as Senators until that day by its action in expelling them at that time. Extracts from speeches given below will show more at length the grounds upon which Senators proceeded.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 1st sess. 37th Cong., with extracts from remarks by Messrs. Bayard, Saulsbury, and Trumbull.

The debates are found on pages 103–109 of the Congressional Globe, 1st sess. 37th Cong.

SATURDAY, *July* 13, 1861.

Mr. Johnson, of Tennessee, presented the credentials of the Hon. John S. Carlile, elected a Senator by the legislature of the State of Virginia "to fill the vacancy which has happened by the withdrawal and abdication of Robert M. T. Hunter;" which were read.

Mr. Johnson, of Tennessee, presented the credentials of the Hon. Waitman T. Willey, elected a Senator by the legislature of the State of Virginia "to fill the vacancy which has happened by the withdrawal and abdication of James M. Mason;" which were read.

On motion by Mr. Bayard that the credentials of the Hon. Mr. Carlile and the Hon. Mr. Willey be referred to the Committee on the Judiciary, it was determined in the negative—yeas 5, nays 35.

On motion by Mr. Powell, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Bright, Polk, Powell, and Saulsbury.

Those who voted in the negative are Messrs. Anthony, Bingham, Browning, Chandler, Clark, Collamer, Cowan, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Howe, Johnson of Tennessee, Kennedy, King, Lane of Indiana, Lane of Kansas, Latham, McDougall, Morrill, Pomeroy, Rice, Sherman, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Wilmot, and Wilson.

So the motion of Mr. Bayard was not agreed to.

The Vice-President then administered to Mr Carlile and Mr. Willey the oath prescribed by law, and they took their seats in the Senate.

[Extract from remarks of Mr. Bayard, of Delaware, in support of the motion made by him that the credentials be referred to a committee; taken from page 103 of the Congressional Globe referred to in the head-note.]

"Before the Senate proceeds to swear in these gentlemen, I beg leave to enter my protest. I think these credentials ought to be referred to the Committee on the Judiciary. They involve very grave questions. You are undertaking to recognize a government of the State of Virginia which is not the regular State government, even though that State government may be in what you may call a state of rebellion. You are bound to take notice of the fact that Mr. Letcher is governor of Virginia, and that his term of office, under the constitution and laws of Virginia, has not yet expired. If you say he is in rebellion, that does not authorize a portion of the people of Virginia to form a legislature for the purpose of electing Senators to take seats in this body. You have no authority to create a new State out of a part of an existing State. I think the questions are very grave.

"Of course, I know very well that you have the commanding majority in this House;

but I think you had better pause and have an investigation before you undertake to swear in members under such an authority. I make the motion, before swearing in either of these gentlemen, that the credentials be referred to the Committee on the Judiciary. I have no personal feeling of any kind about this matter, but it seems to me to be a grave violation of the Constitution of the United States, and I must enter my protest against it. I make the motion that the credentials be referred to the Committee on the Judiciary."

[Extract from remarks of Mr. Saulsbury, of Delaware, in support of the motion offered by Mr. Bayard that the credentials be referred to a committee; taken from page 103 of the Congressional Globe referred to in the head-note.]

"It is a matter of indifference to me, sir, what disposition is made of the credentials of the proposed Senators from Virginia; but I wish to call the attention of the Senate to one fact, which, in my mind, shows the propriety of the motion now made. These credentials, as read by the Secretary, state that on the 9th day of July the legislature of the State of Virginia, owing to the abdication of Mr. Mason and Mr. Hunter, elected these gentlemen to seats upon this floor. No longer ago, however, sir, than yesterday, this body treated Mr. Mason and Mr. Hunter as members of the Senate of the United States. Yesterday you expelled those gentlemen from seats upon the floor of this Senate as members of the Senate. Then, at the time of this election by the new government of Virginia, there was no vacancy in the Senate of the United States from that State, according to the judgment of the American Senate. Yesterday morning, when you met, according to the judgment of a majority of the members here Mr. Mason and Mr. Hunter were members of this body. You treated them as members of this body; you exercised your power of expulsion upon them. Could you have expelled them, as members of the Senate, from seats on this floor, if they were not at the time of the vote, in your judgment, actually members of this body? If they were yesterday morning members of the Senate of the United States—and you have treated them as such, and expelled them—can you now allow these gentlemen to be sworn in as Senators from the State of Virginia when the credentials presented here show on their face that they were elected not to fill any vacancy; when the facts, as you have decided them, show that there was no vacancy in the Senate? For that reason, and for none other, I think the credentials should go to the Committee on the Judiciary."

[Extract from remarks of Mr. Trumbull, of Illinois, in opposition to the motion made by Mr. Bayard that the credentials be referred to a committee; taken from page 104 of the Congressional Globe referred to in the head-note.]

"Mr. President, I think that we should not "stick in the bark" as to dates here. I presume the Senator from Delaware was elected before the vacancy which he filled existed. There is scarcely a Senator here that was not elected in advance, before the office became vacant. I recollect well that the Senators from Minnesota were admitted to seats upon this floor who were elected long before the State of Minnesota was a member of the Union. Nearly every new State which has come into the Union has elected her Senators before the State was admitted.

Now, let me put a case. A few years ago this country was engaged in a war with Mexico. Suppose that one of the Senators from Delaware, instead of being loyal and true to his country, had turned traitor and joined the Mexican army and fought against the United States, and the legislature of Delaware had been in session, knowing the fact that one of their Senators in this body was fighting against this country in the armies of its enemies: must the legislature of Delaware wait till the Congress of the United States assembles, and the Senate, by a formal resolution, expels that Senator? Would not the legislature of Delaware proceed at once to elect a Senator, and when Congress did convene, and a resolution was offered to expel the traitor to his country, would it be said, because the State of Delaware acted before Congress had convened and expelled the traitor, that therefore the other election should go for nothing, and that her legislature must be convened and a new election held?

"Sir, the guilt and the turpitude of the men who once sat as Senators here is far greater than it would have been in the case I have supposed. They have joined in a fratricidal war against their country. They have not joined a foreign enemy, but they have uncertaken to stir up a domestic war. I do not think there is any necessity for their waiting till the formal resolution of expulsion was passed here. Why, sir, these credentials recite the fact that the former Senators have withdrawn and abdicated; and when the expulsion takes place, it may well have reference to the time of their withdrawal and abdication.

"Now, sir, we have the credentials here fair on their face. They purport to be the credentials of Senators elected by the old Commonwealth of Virginia, sent by a person purporting to be the governor of Virginia, and under the great seal of the State. This

appears to be fair. But Senators say, "Oh, well; but we know this is not the legislature of Virginia; there is another legislature, and there is another man who is governor." Well, if you are going outside of these credentials to rely on the knowledge which you have of the condition of things in the State of Virginia, then you know that the old governor of Virginia and the old legislature are in rebellion against the country. They are rebels and traitors in arms against the Government, and are not to be recognized as the government of Virginia, but are to be recognized as enemies and traitors, whom the whole power of this Government is now put forth to subdue and bring into obedience to the Constitution and the laws; and I would to God that the power was used to bring them to obedience.

"Now, sir, as I said, I am not for "sticking in the bark" about this matter. Let us take the condition of things as it is. Here is the State of Virginia in rebellion. If you are going outside to inquire after the fact, you will ascertain that a portion of the people of that State have risen in arms against the Government; another portion of the people of that State are loyal to the Union; and the loyal men of Virginia have elected a legislature and seek representation in the Congress of the United States. They are entitled to representation here, and the enemies of the country are not.

"I think there is no necessity for referring this matter to the committee, unless there are some facts to be inquired into. On its face this purports to be an election of Senators from the Commonwealth of Virginia. There is no objection to the form of it, and I do not know that any fact has been suggested by the Senator from Delaware that is to be inquired into. What fact does he propose to inquire into? If he goes to his general knowledge, is he not satisfied that what was the old legislature of Virginia and its former governor are now in rebellion against the Government? And will he recognize them as having any authority to send Senators here? I presume not. And if Virginia is in the Union, her loyal men and not her traitors have a right to be represented here. I trust, sir, that the Senators will be sworn in."

[Thirty-seventh Congress—First and second sessions.]

FREDERIC P. STANTON vs. JAMES H. LANE, *of Kansas.*

The credentials of Mr. Lane, one of two first Senators elected by the legislature of Kansas in April, 1861, were presented July 4, 1861, and he took his seat. July 12, 1861, a paper purporting to be the credentials of Mr. Stanton, appointed a Senator by the governor to the seat held by Mr. Lane, was presented, and referred to the Committee on the Judiciary. August 2, 1861, the committee reported that Mr. Lane "was, by the Executive, appointed a brigadier-general in the volunteer forces of the United States on the 20th of June, 1861; that he accepted said appointment, and was legally qualified to perform its duties." In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general, the sitting member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time. On the 8th day of July, 1861, the governor of Kansas gave to the contestant, Mr. Stanton, a commission in due form appointing him a Senator of the United States from the State of Kansas to fill the aforesaid vacancy, and by virtue of that commission Mr. Stanton now claims his seat. Your committee recommend the adoption of the following resolutions: "1. *Resolved*, That James H. Lane is not entitled to a seat in this body. 2. *Resolved*, That Frederic P. Stanton is entitled to a seat in this body." No action was taken on the report or resolutions during this session of Congress. December 18, 1861, in the next session of Congress, the report was recommitted to the committee. The committee reported the same without amendment January 6, 1862. January 16, 1862, the first resolution was amended by striking out the word "not," and it was "*Resolved*, That James H. Lane is entitled to a seat in this body;" and the second resolution was indefinitely postponed. Of those voting in favor of Mr. Lane's title to the seat some proceeded upon the ground that on the 20th of June, 1861, the office of brigadier-general did not exist, and consequently that Mr. Lane was not a "person holding any office;" others upon the ground that although he held an office after he had been elected Senator, yet, having resigned the same before taking his seat in the Senate, he did not come within the provision of section 6 of the first article of the Constitution.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 1st and 2d sess. 37th Cong., with the report of the committee from Senate Reports, 1st sess. 37th Cong., No. 1.

The documents relating to the case are Ex. Doc. No. 8 and Mis. Doc. No. 11, from Senate Executive and Miscellaneous Documents, 1st sess. 37th Cong.

Special references to the debates of each day are inserted below.

THURSDAY, *July* 4, 1861.

Mr. Grimes presented the credentials of the Hon. James Henry Lane, elected a Senator by the legislature of the State of Kansas.

The credentials were read, and the oath prescribed by law was administered to Mr. Lane.

FRIDAY, *July* 12, 1861.

Mr. Foot presented a paper purporting to be the credentials of the Hon. Frederic P. Stanton, appointed a Senator by the governor of the State of Kansas; which was referred to the Committee on the Judiciary.

Mr. Foot presented a memorial of Frederic P. Stanton, asking admission as a member of the Senate of the United States; which was referred to the Committee on the Judiciary.

[A brief statement by Mr. Lane is found on page 82 of the Congressional Globe, 1st sess. 37th Cong.]

TUESDAY, *July* 16, 1861.

Mr. Lane, of Kansas, presented a letter from the chief clerk of the War Department inclosing a copy of the appointment of F. P. Stanton as special agent to Kansas and New Mexico; which was referred to the Committee on the Judiciary.

WEDNESDAY, *July* 31, 1861.

Mr. Lane, of Indiana, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the President of the United States be requested to inform the Senate whether the Hon. James H. Lane, a member of this body from Kansas, has been appointed a brigadier-general in the Army of the United States; and, if so, whether he has accepted such appointment."

FRIDAY, *August* 2, 1861.

Mr. Foster, from the Committee on the Judiciary, to whom were referred the credentials and the memorial of Frederic P. Stanton, claiming to be entitled to a seat in the United States Senate, under an appointment of the governor of Kansas, in the place of

the Hon. James H. Lane, submitted a report (No. 1), accompanied by the following resolutions:

"*Resolved*, That James H. Lane is not entitled to a seat in this body.

"*Resolved*, That Frederic P. Stanton is entitled to a seat in this body."

On motion by Mr. Foster,

Ordered, That the report be printed.

[Remarks in regard to recommitting the report for the purpose of having printed with it the President's reply to the resolution of July 31, given above, are found on pages 406, 407 of the Congressional Globe, 1st sess. 37th Cong.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan, Harris, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

AUGUST 2, 1861.—Ordered to be printed.

Mr. Foster made the following report:

The Committee on the Judiciary, to whom were referred the credentials and the memorial of Frederic P. Stanton, of the State of Kansas, asking admission to a seat in this body in place of the Hon. James H. Lane, now holding said seat, having had the same under consideration, report:

That the contestant and sitting member have appeared before them and submitted, severally, their statements and made their exhibits.

The committee find the following facts: That the sitting member, the Hon. James H. Lane, was, by the Executive, appointed a brigadier-general in the volunteer forces of the United States on the 20th of June, 1861; that he accepted said appointment, and was legally qualified to perform its duties.

In the opinion of the committee the office of brigadier-general under the United States is incompatible with that of member of either House of Congress. By accepting the office of brigadier-general, the sitting member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time.

On the 8th day of July, 1861, the governor of Kansas gave to the contestant, Mr Stanton, a commission in due form appointing him a Senator of the United States from the State of Kansas to fill the aforesaid vacancy, and by virtue of that commission Mr. Stanton now claims his seat.

Your committee recommend the adoption of the following resolutions:

1. *Resolved*, That James H. Lane is not entitled to a seat in this body.
2. *Resolved*, That Frederic P. Stanton is entitled to a seat in this body.

The evidence from which your committee find the facts herein set forth is, substantially, the following:

WAR DEPARTMENT, *July* 15, 1861.

SIR: In reply to your inquiry in regard to the appointment of the Hon. James H. Lane as brigadier-general, I herewith transmit you documents upon the case:

A. Copy of letter to Secretary of War from Adjutant-General Thomas.
B. Form of appointment (printed blank).
C. Telegram of assistant adjutant-general to commanding officer at Fort Leavenworth.
D. Letter of acceptance of regiments.

The Secretary of War directs me to state that he himself, after having signed the commission of Hon. James H. Lane as brigadier-general, handed it personally to him in presence of the Adjutant-General at the War Department.

Respectfully,

JAMES LESLEY, JR.,
Chief Clerk, War Department.

Hon. F. P. STANTON.

A.

ADJUTANT-GENERAL'S OFFICE,
Washington, July 15, 1861.

SIR: In reply to the inquiry of the Hon. F. P. Stanton of the 13th instant, referred by you to this office, I respectfully state that on the 20th ultimo you directed an appointment as brigadier-general of the three years' volunteers to be made for the Hon.

James H. Lane, of Kansas. The appointment was made as directed, and handed to you for signature, but was not returned to this office for record.

I inclose herewith a blank letter of appointment, similar to the one used in his case.

I have the honor to be, sir, very respectfully, your obedient servant,

L. THOMAS,
Adjutant-General.

Hon. SIMON CAMERON,
Secretary of War.

—

B.

WAR DEPARTMENT,
Washington, June 20, 1861.

SIR: You are hereby informed that the President of the United States has appointed you brigadier-general of the volunteer force raised in conformity with the President's proclamation of May 3, 1861, in the service of the United States, to rank as such from 17th day of May, 1861. Should the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly.

Immediately on receipt hereof, please to communicate to this Department, through the Adjutant-General's Office, your acceptance or non-acceptance of said appointment; and, with your letter of acceptance, return to the Adjutant-General of the Army the oath, herewith inclosed, properly filled up, subscribed, and attested, reporting at the same time your age, residence, when appointed, and the State in which you were born.

Should you accept you will at once report by letter for orders to Secretary of War.

Brig. Gen. JAMES H. LANE,
United States Volunteers.

The original of which this purports to be a copy was not produced before the committee. General Lane stated that it was in the hands of Colonel Weer, at Leavenworth. General Lane also stated that there was a variation, in some respects, between this copy and the original, but no variation was specified which the committee deemed material.

—

C.

[By telegraph.]

ADJUTANT-GENERAL'S OFFICE,
Washington, D. C., July 10, 1861.

Detail an officer to muster in General Lane's brigade. The companies will be mustered when presented, even though less than the standard, and will be filled up afterwards.

By order:

GEORGE D. RUGGLES,
Assistant Adjutant-General.

COMMANDING OFFICER *Fort Leavenworth, Kansas,*
Leavenworth City, Kans.

Official copy.

L. THOMAS,
Adjutant-General.

ADJUTANT-GENERAL'S OFFICE, *July* 16, 1861.

The above order was given at the request of General Lane.

L. THOMAS,
Adjutant-General.

ADJUTANT-GENERAL'S OFFICE, *July* 16, 1861.

—

D.

WAR DEPARTMENT, *June* 20, 1861.

DEAR SIR: This Department will accept two regiments, for three years or during the war, in addition to the three regiments the Department has already accepted from the governor of Kansas, to be raised and organized by you in Kansas. Orders will be given

to muster the same into service immediately on being ready to be so mustered; and on being mustered the requisite arms, &c., will be furnished on the requisition of the mustering officer, who is hereby authorized to make the same.

By order of the President.

SIMON CAMERON,
Secretary of War.

General JAMES H. LANE.

Official copy.

J. LESLEY, JR.,
Chief Clerk.

I, John D. Clark, justice of the peace in and for Washington County, District of Columbia, do hereby certify that on or about the 20th day of June last General James H. Lane swore to and subscribed the form of the within oath before me, which I duly certified and delivered to him.

Given under my hand this 15th July, 1861.

JOHN D. CLARK, *J. P.*

By request of Mr. Stanton.

I, James H. Lane, appointed a brigadier-general in the Army of the United States, do solemnly swear, or affirm, that I will bear true allegiance to the United States of America; and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever, and observe and obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and articles for the government of the armies of the United States.

Sworn to and subscribed before me, at ———, this ——— day of ———, 186–.

———— ————,
Justice of the Peace.

The following article appeared in the Daily Times, of Leavenworth, on the 26th of June last:

LEAVENWORTH, *June* 25, 1861.

Mr. EDITOR: On the 20th instant I was duly appointed a brigadier-general in the volunteer force of the United States, and thereupon received the following order:

WAR DEPARTMENT, *June* 20, 1861.

DEAR SIR: This Department will accept two regiments for three years or during the war, in addition to the three regiments the Department has already accepted from the governor of Kansas, to be raised and organized by you in Kansas. Orders will be given to muster the same into service immediately on being ready to be so mustered; and on being mustered the requisite arms, &c., will be furnished on the requisition of the mustering officer, who is hereby authorized to make the same.

By order of the President.

SIMON CAMERON,
Secretary of War.

General JAMES H. LANE.

Fellow-citizens of Kansas and adjoining States and Territories:

The important trust thus confided to me has occurred at a momentous period in our history as a nation. An insurrectionary war, commenced by rebels, in defiance of patriotism and duty, has now approached our border. Treason has raised its bloody hand almost in our very midst to strike down our glorious flag made blessed by the memories of our fathers. The horrors of war are no longer far removed from us, but have been brought by traitorous hands to our very hearthstones. Impressed with the necessity of prompt and vigorous action in defense of our country, its flag, and our homes, the President has authorized the formation of a brigade of five regiments in Kansas. He has been pleased to place in my hands the honor of leading the gallant sons of the youngest State of the Union to victory in defence of that Union of which it has so lately become a part. Treason and rebellion surround us. Loyal American citizens driven from their homes are crying to us for protection. The best Government in the world is assailed by wicked hands. Men of Kansas and the surrounding country, in the name of all we hold sacred, and by the authority of our constitutional ruler, I invoke you to rally to the Stars and Stripes; come forward and join the regiments accepted from our State.

When organized, the watchword of the brigade will be the downfall of treason wherever found and the upholding of Union men in every State and place.

JAMES H. LANE,
Brigadier-General.

General Lane stated to the committee that he wrote the body of the address only, and did not affix his name as brigadier-general.

The requisitions mentioned in the following letter of General Meigs were read before the committee by General Lane; he stated that he made them but did not sign them as brigadier-general, nor was that title annexed to his name. The requisitions not being in possession of the committee are not inserted in this report.

QUARTERMASTER-GENERAL'S OFFICE,
Washington City, June 26, 1861.

SIR: I am informed that you are able and willing to supply the regulation uniforms for two regiments, including four companies of cavalry, four companies of mounted artillery, and twelve companies of infantry, subject to regulation, inspection as to work and material, and at the United States prices.

This clothing is for two regiments to be raised and commanded by General Lane, of Kansas, and must be delivered in time to reach Fort Leavenworth before the 20th July, at which time the regiment is to take the field.

I inclose General Lane's requisitions, three in number, specifying the articles and indorsed by me for identification. Also a copy of order No. 23, of November 30, 1859, fixing prices.

Be good enough to signify by telegraph your acceptance or rejection of this order, and if rejected return the requisitions by bearer.

When ready for inspection a United States inspector will be sent to Boston to look at them.

M. C. MEIGS,
Quartermaster-General.

Messrs. HAUGHTON, SAWYER & Co.,
Boston, Mass.

The above is a true copy.

M. C. MEIGS,
Quartermaster-General.

MONDAY, *August* 5, 1861.

Mr. Lane, of Kansas, presented papers relative to his appointment as a brigadier-general of volunteers, and his acceptance of the said appointment.

Ordered, That they lie on the table and be printed.

* * * * * * *

Mr. Foster rose to a question of privilege, and moved that the Senate proceed to the consideration of the report of the Committee on the Judiciary on the credentials of Frederic P. Stanton, claiming to be a Senator of the State of Kansas, under an appointment of the governor of the State, in the place of the Hon. James H. Lane; and

On the question to agree to the motion of Mr. Foster, it was determined in the negative—yeas 17, nays 21.

On motion by Mr. Foster, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Breckinridge, Carlile, Cowan, Doolittle, Foot, Foster, Grimes, Harris, Johnson of Tennessee, King, Pearce, Powell, Simmons, Ten Eyck, Trumbull, and Wade.

Those who voted in the negative are Messrs. Baker, Bingham, Bright, Browning, Chandler, Clark, Dixon, Fessenden, Hale, Harlan, Howe, Lane of Indiana, Latham, Polk, Rice, Saulsbury, Sherman, Sumner, Wilkinson, Wilmot, and Wilson.

So the motion of Mr. Foster was not agreed to.

[The debate is found on pages 438–441 of the Congressional Globe, 1st sess. 37th Cong.]

TUESDAY, *August* 6, 1861.

The following message was received from the President of the United States by Mr. Nicolay, his secretary:

To the Senate of the United States:

In answer to the resolution of your honorable body of date July 31, 1861, requesting the President to inform the Senate whether the Hon. James H. Lane, a member of that

body from Kansas, has been appointed a brigadier-general in the Army of the United States, and if so, whether he has accepted such appointment, I have the honor to transmit herewith certain papers, numbered 1, 2, 3, 4, 5, 6, and 7, which, taken together, explain themselves; and which contain all the information I possess upon the questions propounded.

It was my intention, as shown by my letter of June 20, 1861, to appoint Hon. James H. Lane, of Kansas, a brigadier-general of United States volunteers, in anticipation of the act of Congress, since passed, for raising such volunteers; and I have no further knowledge upon the subject except as derived from the papers herewith inclosed.

ABRAHAM LINCOLN.

EXECUTIVE MANSION, *August* 5, 1861.

* * * * * * *

Mr. Trumbull submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the President be requested to communicate to the Senate, at its next session, copies of any order under which General James H. Lane is authorized to raise troops for the war; also of all requisitions made by the said Lane, and of all orders given by the War Department at his instance for horses, arms, clothing, subsistence, and for mustering into service the troops composing the brigade known as General Lane's brigade in Kansas."

[Brief remarks in regard to the printing of the President's message are found on pages 450–452 of the Congressional Globe, 1st sess. 37th Cong.]

[Second session of the Thirty-seventh Congress.]

WEDNESDAY, *December* 11, 1861.

On motion by Mr. Foster, the Senate proceeded to consider the resolutions reported from the Committee on the Judiciary, on the 2d of August last, on the application of the Hon. Frederic P. Stanton for admission to a seat in the Senate as a Senator from the State of Kansas, under an appointment from the governor, in the place of the Hon. James H. Lane; and

On motion by Mr. Foster,

Ordered, That the resolutions lie on the table.

TUESDAY, *December* 17, 1861.

The Senate resumed the consideration of the resolutions reported from the Committee on the Judiciary, declaring Frederic P. Stanton to be entitled to the seat in the Senate now occupied by the Hon. James H. Lane; and

On motion by Mr. Lane, of Kansas,

Ordered, That the further consideration thereof be postponed to to-morrow at 1 o'clock.

WEDNESDAY, *December* 18, 1861.

On motion by Mr. Foster, the Senate resumed the consideration of the resolutions reported from the Committee on the Judiciary affirming the right of Frederic P. Stanton to the seat in the Senate now occupied by the Hon. James H. Lane; and

After debate,

On motion by Mr. Collamer that the resolutions and the report of the committee be recommitted to the Committee on the Judiciary, it was determined in the affirmative—yeas 26, nays 9.

On motion by Mr. Foster, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bright, Browning, Carlile, Chandler, Clark, Collamer, Cowan, Fessenden, Foot, Grimes, Hale, Harlan, Harris, Howe, King, Lane of Indiana, Latham, Morrill, Pearce, Pomeroy, Saulsbury, Sherman, Sumner, Wade, Willey, and Wilson.

Those who voted in the negative are Messrs. Bayard, Dixon, Doolittle, Foster, Johnson of Tennessee, Nesmith, Simmons, Ten Eyck, and Trumbull.

So it was

Ordered, That the resolutions and the report of the committee be recommitted to the Committee on the Judiciary.

[The debate on the motion to recommit is found on pages 127–130 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

MONDAY, *January* 6, 1862.

Mr. Foster, from the Committee on the Judiciary, to whom was recommitted the report of the Committee on the Judiciary on the credentials of the Hon. Frederic P. Stanton, claiming to be entitled to the seat in the Senate now occupied by the Hon.

James H. Lane, reported the same without amendment, and with a recommendation that the Senate do adopt the following resolutions:

Resolved, That James H. Lane is not entitled to a seat in this body.

Resolved, That Frederic P. Stanton is entitled to a seat in this body.

TUESDAY, *January* 7, 1862.

On motion by Mr. Foster, the Senate resumed the consideration of the resolutions reported from the Committee on the Judiciary, declaring Frederic P. Stanton entitled to the seat in the Senate now held by the Hon. James H. Lane as a Senator from the State of Kansas; and

On motion by Mr. Kennedy, the Senate adjourned.

WEDNESDAY, *January* 8, 1862.

The Senate resumed the consideration of the resolutions reported from the Committee on the Judiciary, declaring Frederic P. Stanton entitled to the seat in the Senate now held by the Hon. James H. Lane as a Senator from the State of Kansas; and

After debate,

On motion by Mr. Grimes,

Ordered, That the further consideration thereof be postponed to to-morrow.

[The debate is found on pages 222–227 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

MONDAY, *January* 13, 1862.

The Senate resumed the consideration of the resolutions reported from the Committee on the Judiciary, declaring Frederic P. Stanton entitled to the seat now held by the Hon. James H. Lane as a Senator from the State of Kansas.

On motion by Mr. Collamer that Frederic P. Stanton, who contests the seat of the Hon. James H. Lane, have leave to be heard in person at the bar of the Senate, it was determined in the affirmative—yeas 32, nays 4.

On motion by Mr. Fessenden, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bright, Browning, Carlile, Chandler, Clark, Collamer, Davis, Doolittle, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Howe, Johnson, King, Lane of Indiana, Lane of Kansas, Latham, McDougall, Morrill, Nesmith, Pearce, Pomeroy, Powell, Simmons, Ten Eyck, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Dixon, Hale, Sumner, and Wilkinson.

So it was

Ordered, That Frederic P. Stanton, who contests the seat of the Hon. James H. Lane, have leave to be heard in person at the bar of the Senate.

On motion by Mr. Fessenden that the Senate reconsider the vote agreeing to the motion of Mr. Collamer, it was determined in the negative.

On motion by Mr. Clark to amend the first resolution reported by the committee by striking out the word "not,"

After debate, and the consideration of executive business,

On motion by Mr. Pearce, the Senate adjourned.

[The debate is found on pages 290–297 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

WEDNESDAY, *January* 15, 1862.

The Senate resumed the consideration of the resolution reported from the Committee on the Judiciary, declaring Frederic P. Stanton entitled to the seat now held by the Hon. James H. Lane as a Senator from the State of Kansas; and

The amendment proposed by Mr. Clark to the first resolution, viz, strike out the word "not," being under consideration,

After debate, and the consideration of executive business,

On motion by Mr. Hale, the Senate adjourned.

[The debate is found on pages 336–344 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

THURSDAY, *January* 16, 1862.

The Vice-President announced that the hour of 1 o'clock having arrived, it was the duty of the Chair to call up the unfinished business of the Senate of yesterday, which was the resolutions reported from the Committee on the Judiciary, declaring Frederic P. Stanton entitled to the seat in the Senate now held by the Hon. James H. Lane as a Senator from the State of Kansas; and the Senate resumed the consideration of the said resolutions.

On the question to agree to the amendment proposed by Mr. Clark to the first resolution, viz, strike out the word "not,"

After debate, it was determined in the affirmative—yeas 24, nays 16.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bright, Browning, Chandler, Clark, Collamer, Cowan, Doolittle, Fessenden, Hale, Harlan, Harris, Howe, King, Lane of Indiana, Latham, Morrill, Pomeroy, Rice, Sherman, Sumner, Trumbull, Wilkinson, Wilmot, and Wilson.

Those who voted in the negative are Messrs. Anthony, Bayard, Carlile, Davis, Dixon, Foot, Foster, Johnson, Kennedy, McDougall, Nesmith, Pearce, Powell, Saulsbury, Ten Eyck, and Wade.

So the amendment was agreed to.

On the question to agree to the resolution as amended, it was determined in the affirmative.

So it was

Resolved, That James H. Lane is entitled to a seat in this body.

On the question to agree to the second resolution reported by the committee,

On motion by Mr. Hale,

Ordered, That the further consideration of the resolution be postponed indefinitely.

COMPENSATION OF MR. STANTON.

[First session of the Thirty-seventh Congress.]

TUESDAY, *August* 6, 1861.

Mr. Dixon submitted the following resolution; which was considered by unanimous consent and agreed to:

"*Resolved*, That the usual mileage and pay be allowed and paid to Frederic P. Stanton while contesting his right to a seat in the Senate from the State of Kansas."

[Second session of the Thirty-seventh Congress.]

THURSDAY, *January* 16, 1862.

Mr. Dixon submitted the following resolution; which was considered by unanimous consent, and referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the usual compensation and mileage of a Senator be allowed to Frederic P. Stanton up to the time of the termination of his contest for a seat in the Senate as a Senator for the present Congress, to be paid out of the contingent fund."

[The debate is found on pages 359–364 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

FRIDAY, *January* 17, 1862.

Mr. Dixon, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution allowing the usual pay and mileage of a Senator to Frederic P. Stanton during the time he was contesting the seat of the Hon. James H. Lane, reported it without amendment.

The Senate proceeded to consider the said resolution, as in Committee of the Whole, and having been amended on the motion of Mr. Fessenden, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read a third time, as follows:

"*Resolved*, That the usual compensation, exclusive of mileage which he has already received, of a Senator be allowed to Frederic P. Stanton up to the termination of his contest for a seat in the Senate as a Senator for the present Congress, to be paid out of the contingent fund;"

And on the question, Shall the resolution pass? it was determined in the affirmative.

* * * * * * *

On motion by Mr. Fessenden that the Senate reconsider the vote on the passage of the resolution allowing pay and mileage to Frederic P. Stanton, it was determined in the affirmative.

The question recurring upon the passage of the resolution, and the same having been amended on the motion of Mr. Fessenden, by striking out the words "which he has already received," it was agreed to, as follows:

"*Resolved*, That the usual compensation, exclusive of mileage, of a Senator be allowed to Frederic P. Stanton up to the time of the termination of his contest for a seat in the Senate as a Senator for the present Congress, to be paid out of the contingent fund."

[The debate is found on pages 376–379 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

[Thirty-seventh Congress—Second session.]

BENJAMIN STARK,

Senator from Oregon from February 27, 1862, till September 13, 1862.

January 6, 1862, the credentials of Mr. Stark, who had been appointed by the governor of Oregon to fill a vacancy, were presented in the Senate. A resolution was submitted that the oath be not administered to Mr. Stark, and that his credentials be referred to the Committee on the Judiciary. January 10, after a debate on the *prima facie* right of Mr. Stark to the seat, the resolution was agreed to. February 7, the committee, "without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case," reported a resolution that Mr. Stark was entitled to take the oath of office. Mr. Trumbull, dissenting, "conceived that it was the duty of the committee to have expressed its opinion on the evidence of disloyalty before it, and to have reported in favor of or against the swearing in of the Senator, as the evidence should warrant, and not allow him to be first sworn and leave the question of his loyalty to be subsequently determined on a motion to expel." The report was accompanied by testimony. February 27 the resolution reported by the committee passed after amendment, and Mr. Stark took his seat. February 28 a resolution was submitted that the papers relating to the loyalty of Benjamin Stark be referred to the same committee with instructions to investigate the charges preferred against him. March 18 this resolution passed the Senate, having been so amended that the papers were referred to a select committee instead of to the Committee on the Judiciary. April 22 this committee reported the conclusions from the facts proved, one of which was "that the Senator from Oregon is disloyal to the Government of the United States." One member of the committee did not concur in this conclusion. May 7 a resolution was submitted that Mr. Stark, who had been found disloyal by a committee of the Senate, be expelled, which resolution was determined in the negative, June 6, by a vote of 16 yeas to 21 nays.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 37th Cong.; the report (majority and minority) of the Committee on the Judiciary (excepting the evidence), from Senate Reports, 2d sess. 37th Cong., No. 11; and the report of the select committee from Senate Reports, *Ib.* No. 38.

Special references to the debates of each day are inserted below.

MONDAY, *January* 6, 1862.

Mr. Nesmith presented the credentials of the Hon. Benjamin Stark, appointed a Senator in Congress by the governor of the State of Oregon to fill the vacancy occasioned by the death of the Hon. Edward D. Baker; which were read.

Mr. Fessenden moved that the oath prescribed by law be not administered to Mr. Stark, and that his credentials, together with certain papers presented by Mr. Fessenden, be referred to the Committee on the Judiciary.

After debate,

On motion by Mr. Bayard,

Ordered, That the motion of Mr. Fessenden lie on the table.

[The debate is found on pages 183–185 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

THURSDAY, *January* 9, 1862.

On motion by Mr. Bayard that the Senate proceed to the consideration of the motion submitted by Mr. Fessenden the 6th instant, that the oath prescribed by law be not administered to Mr. Stark, and that his credentials, together with certain papers presented by Mr. Fessenden, be referred to the Committee on the Judiciary, it was determined in the negative.

FRIDAY, *January* 10, 1862.

The Senate resumed the consideration of the motion submitted by Mr. Fessenden the 6th instant, "that the oath prescribed by law be not administered to Mr. Stark, and that his credentials, together with certain papers presented by Mr. Fessenden, be referred to the Committee on the Judiciary."

On motion by Mr. Bayard to amend the motion of Mr. Fessenden by striking out the word "not,"

After debate, it was determined in the negative—yeas 9, nays 29.

On motion by Mr. Bayard, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Bright, Latham, Nesmith, Pearce, Powell, Rice, Saulsbury, and Thomson.

Those who voted in the negative are Messrs. Anthony, Browning, Chandler, Collamer, Cowan, Davis, Dixon, Doolittle, Fessenden, Foster, Grimes, Hale, Harlan, Harris, Howe, Johnson, King, Lane of Indiana, Lane of Kansas, Morrill, Pomeroy, Sherman, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, and Wilson.

On the question to agree to the motion of Mr. Fessenden, it was determined in the affirmative—yeas 28, nays 11.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Browning, Chandler, Collamer, Cowan, Davis, Dixon, Doolittle, Fessenden, Foster, Grimes, Hale, Harlan, Harris, Howe, Johnson, King, Lane of Indiana, Lane of Kansas, Morrill, Pomeroy, Sherman, Simmons, Sumner, Ten Eyck, Trumbull, Wade, and Wilson.

Those who voted in the negative are Messrs. Bayard, Bright, Carlile, Kennedy, Latham, Nesmith, Pearce, Powell, Rice, Saulsbury, and Thomson.

[The debate is found on pages 265–269 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

FRIDAY, *February* 7, 1862.

Mr. Harris, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. Benjamin Stark, with certain papers presented by Mr. Fessenden in reference thereto, submitted a report (No. 11), accompanied by the following resolution (resolution given below in report).

Mr. Trumbull asked and obtained leave to submit the views of the minority of the Committee on the Judiciary on the subject.

On motion by Mr. Sumner,

Ordered, That the report of the Committee on the Judiciary, with the views of the minority of the committee, and the accompanying papers, be printed.

[The debate is found on pages 696, 697 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan Harris, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 7, 1862.—Read, and ordered to be printed.

Mr. Harris submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of Benjamin Stark as a Senator from the State of Oregon, with the accompanying papers, have had the same under consideration, and, without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case, they report the following resolution:

Resolved, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the Constitutional oath of office.

VIEWS OF THE MINORITY

Of the Committee on the Judiciary (Mr. Trumbull) on the credentials of Benjamin Stark as a Senator from Oregon, and the papers presented on the subject.

FEBRUARY 7, 1862.—Ordered to be printed.

Unable to agree with the majority of the committee, to whom were referred the credentials of Benjamin Stark, with the accompanying papers, the undersigned submits the following views:

A preliminary question was raised in the Senate when this case was referred to the committee, whether it was competent for the Senate for any cause to refuse to allow a person to be sworn as a member of the Senate whose credentials were in proper form, and who possessed all the qualifications as to age, citizenship, and inhabitancy prescribed by the Constitution, and whether the only remedy which the Senate had to protect itself against the presence of an infamous person, a convicted felon, or an avowed and open traitor, was not by expulsion by a two-thirds vote after he should have been sworn into office. The Senate decided, after debate, to refer the credentials of Mr. Stark, with the accompanying papers, consisting of written statements and affidavits impeaching his loyalty, to the committee without allowing him to be sworn. A majority of the committee now report the case back, with a resolution that Mr. Stark is entitled to take the Constitutional oath, expressly stating that they do so "without expressing any opinion as to the effect of the papers before them upon any subsequent proceedings in the case."

This reservation of opinion on the evidence could only have become necessary on the sup-

* The accompanying documents are annexed to the report (pages 5–15), a reference to which is given in the head-note.

position that some subsequent proceedings might be taken in the case, referring doubtless to a motion to expel the Senator after he should have been admitted a member, for the reasons assigned in the accompanying papers, in effect establishing the principle that evidence of disloyalty, which might be sufficient to expel a member when admitted, was not sufficient to prevent his qualifying as a member. To this principle the undersigned cannot agree. He believes it was the duty of the committee to examine and pass upon the evidence before it, and if found insufficient to prevent Mr. Stark from taking the Constitutional oath, that it would also be insufficient to warrant his expulsion after he was admitted.

It is admitted that neither the Senate, Congress, nor a State can superadd other qualifications for a Senator to those prescribed by the Constitution, and yet either may prevent a person possessing all those qualifications, and duly elected, from taking his seat in the Senate. Does any one question the right of a State to arrest for crime a person duly qualified for and appointed a Senator, hold him in confinement, and thereby prevent his appearing in the Senate to qualify? Suppose a Senator, after his appointment, and before qualifying, to commit the crime of murder, would any one question the right of the State authorities where the crime was committed to arrest, confine, and, if found guilty, execute the murderer, and thereby forever prevent his taking his seat? Or, if the punishment for the offense was imprisonment, would any one question the right to hold the Senator in prison, and thereby prevent his appearing in the Senate?

Could the Senate in such a case expel him before he had been admitted to a seat? Or must he [be] brought from the felon's cell, be introduced into the Senate, and sworn as a member before his seat could be declared vacant? If not, must the State go unrepresented till the time for which he was appointed has expired? Or would it be competent for the Senate in such a case, by a majority vote, to declare the convict incompetent to hold a seat in the body, and thereby open the way for the appointment of a successor? It is manifest that the prescribing of the qualifications for a Senator in the Constitution was not intended to prevent his being held amenable for his crimes. The fact that the Constitution declares that Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same." is conclusive that for those offenses they may be arrested. As a punishment for crime, then, it is clear that a Senator-elect, possessing all the Constitutional qualifications of age, citizenship, and inhabitancy, may be prevented from taking the oath of office. Congress has repeatedly acted upon the presumption that it was entirely competent for it to prescribe, as a punishment for crime, an inability forever afterwards to hold any office of honor, profit, or trust under the United States.

By a statute passed in 1790, any person giving a reward to a United States judge as a bribe to procure from him any opinion or judgment, and the judge receiving such bribe, are both declared to be forever disqualified to hold any office of honor, trust, or profit under the United States. By an act passed in 1853, any member of Congress after his election, and whether before or after he is qualified, who shall accept any reward given for the purpose of influencing his vote on any question which may come before him in his official capacity is declared incapable forever of holding any office of honor, trust, or profit under the United States. Similar laws, it is believed, exist in most of the States, prescribing as part of the punishment for particular offenses, such as dueling, bribery, and some others, a disqualification for holding any office under the State, and this notwithstanding the State constitutions may have prescribed the qualifications for members of their legislatures, of which the disqualification arising from the conviction for crime was not one. The power of Congress to prescribe the punishment for treason is expressly given by the Constitution, except that it cannot be made to work corruption of blood or forfeiture beyond the life of the person attainted. Does any one doubt the power of Congress under this clause of the Constitution to declare that a person convicted of treason should forever be incapable of holding any office under the United States? If this were done, would it be pretended that a convicted traitor was entitled to be sworn as a Senator? The clause of the Constitution prescribing the qualifications of Senators and Representatives could never have been intended to limit the power to make disqualification to hold those or any other offices a penalty for the commission of crime, especially treason. Its design, doubtless, was to produce uniformity of qualification in all the States, and to prevent any particular class of persons, such as ministers of the gospel, or others, from being excluded from these positions. If it be competent for Congress to make disqualification to hold office a punishment for an offense against the United States, then it is clearly competent for the Senate, which, by the Constitution, is made "the judge of the elections, returns, and qualifications of its own members," to do the same thing, so far as the right to take a seat in that body is concerned. Doubtless a law of Congress declaring that a person convicted of a particular offense should not hold office under the United States, and the decision of the

courts sustaining such a law, would not preclude the Senate from admitting such a person to a seat, should it think proper, because the Senate is the exclusive judge of the elections, returns, and qualifications of its own members; yet it is hardly conceivable that the Senate ever would admit such a person to be sworn; nor does the fact that Congress has not adopted such a punishment for disloyalty or treason prevent the Senate from refusing to allow to be sworn as a member a person believed by the body to be guilty of those offenses or other infamous crimes.

That one avowed traitor, a convicted felon, or a person known to be disloyal to the Government, has a constitutional right to be admitted into the body, would imply that the Senate had no power of protecting itself—a power which, from the nature of things, must be inherent in every legislative body. Suppose a member sent to the Senate, before being sworn, were to disturb the body and by violence interrupt its proceedings, would the Senate be compelled to allow such a person to be sworn as a member of the body before it could cast him out? Surely not, unless the Senate is unable to protect itself and preserve its own order. The Constitution declares that "each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member." The connection of the sentence in which the power of expulsion is given would indicate that it was intended to be exercised for some act done as a member, and not for some cause existing before the member was elected or took his seat. For any crime or infamous act done before that time the appropriate remedy would seem to be to refuse to allow him to qualify, which, in the judgment of the undersigned, the Senate may properly do; not by way of adding to the qualifications imposed by the Constitution, but as a punishment due to his crimes or the infamy of his character. Hence, the undersigned, conceiving that it was the duty of the committee to have expressed its opinion on the evidence of disloyalty before it, and to have reported in favor of or against the swearing in of the Senator, as the evidence should warrant, and not allow him to be first sworn, and leave the question of his loyalty to be subsequently determined on a motion to expel, the undersigned forbears to review the evidence of disloyalty before the committee, or to express any opinion upon it, till the pending question of jurisdiction to consider it is determined.

LYMAN TRUMBULL.

TUESDAY, *February* 18, 1862.

On motion by Mr. Harris, the Senate proceeded to consider the resolution reported by the Committee on the Judiciary, declaring Benjamin Stark, appointed a Senator by the governor of the State of Oregon, entitled to take the constitutional oath of office; and

On motion by Mr. Hale that the report of the Committee on the Judiciary in the case of Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, be recommitted to the committee, and that said committee be instructed to report on the facts proved or admitted, whether, in their judgment, the evidence before them so far impeaches his loyalty as to disqualify him from holding a seat in the Senate of the United States,

After debate,

On motion by Mr. Doolittle, the Senate adjourned.

[The debate is found on pages 861–873 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

THURSDAY, *February* 20, 1862.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, declaring that Benjamin Stark, appointed a Senator by the governor of the State of Oregon, is entitled to take the constitutional oath of office; and

On motion by Mr. Wilkinson,

Ordered, That the further consideration thereof be postponed to to-morrow at 1 o'clock.

MONDAY, *February* 24, 1862.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, declaring Benjamin Stark, appointed a Senator by the governor of the State of Oregon, entitled to take the constitutional oath of office; and,

After debate and the consideration of executive business, the Senate adjourned.

[The debate is found on pages 925–929 of the Congressional Globe, part 1, 2d sess. 37th Cong.]

WEDNESDAY, *February* 26, 1862.

On motion by Mr. Harris, the Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, affirming the right of Benjamin Stark, ap-

pointed a Senator by the governor of the State of Oregon, to take the constitutional oath of office; and

Mr. Hale having withdrawn the motion made by him to recommit the report to the Committee on the Judiciary, with certain instructions,

On motion by Mr. Sumner to amend the resolution by striking out the words "is entitled to take the constitutional oath of office," and in lieu therof inserting "and now charged with disloyalty by the affidavits of many citizens of Oregon, and also by a letter addressed to the Secretary of State, and signed jointly by many citizens of Oregon, some of whom hold public trusts under the United States, is not entitled to take the constitutional oath of office without a previous investigation into the truth of the charge,"

After debate,

On motion by Mr. Fessenden that the Senate adjourn, it was determined in the affirmative—yeas 21, nays 20.

[The debate is found on pages 963–975 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

THURSDAY, *February* 27, 1862.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, affirming the right of Benjamin Stark, appointed a Senator by the governor of the State of Oregon, to take the constitutional oath of office; and

On the question to agree to the amendment proposed by Mr. Sumner to the resolution, viz:

Strike out the words "is entitled to take the constitutional oath of office" and in lieu thereof insert "and now charged with disloyalty by the affidavits of many citizens of Oregon, and also by a letter addressed to the Secretary of State, and signed jointly by many citizens of Oregon, some of whom hold public trusts under the United States, is not entitled to take the constitutional oath of office without a previous investigation into the truth of the charge,"

After debate, it was determined in the negative—yeas 18, nays 26.

On motion by Mr. Sumner, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Chandler, Clark, Dixon, Doolittle, Grimes, Hale, Harlan, Howard, King, Lane of Indiana, Morrill, Pomeroy, Sumner, Trumbull, Wade, Wilkinson, Wilmot, and Wilson of Massachusetts.

Those who voted in the negative are Messrs. Anthony, Browning, Carlile, Collamer, Cowan, Davis, Fessenden, Foster, Harris, Henderson, Howe, Johnson, Kennedy, Latham, McDougall, Nesmith, Pearce, Powell, Rice, Saulsbury, Sherman, Simmons, Ten Eyck, Thomson, Willey, and Wilson of Missouri.

On motion by Mr. Doolittle to amend the resolution by inserting at the end thereof the words "without prejudice to any subsequent proceedings in the case," it was determined in the affirmative.

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That Benjamin Stark, of Oregon, appointed a Senator of that State by the governor thereof, is entitled to take the constitutional oath of office without prejudice to any subsequent proceedings in the case,"

It was determined in the affirmative—yeas 26, nays 19.

On motion by Mr. Sumner, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Browning, Carlile, Collamer, Cowan, Davis, Fessenden, Foster, Harris, Henderson, Howe, Johnson, Kennedy, Latham, McDougall, Nesmith, Pearce, Powell, Rice, Saulsbury, Sherman, Simmons, Ten Eyck, Thomson, Willey, and Wilson of Missouri.

Those who voted in the negative are Messrs. Chandler, Clark, Dixon, Doolittle, Foot, Grimes, Hale, Harlan, Howard, King, Lane of Indiana, Morrill, Pomeroy, Sumner, Trumbull, Wade, Wilkinson, Wilmot, and Wilson of Massachusetts.

So the resolution as amended was agreed to; and

The Vice-President administered to Mr. Stark the oath prescribed by law, and he took his seat in the Senate.

[The debate is found on pages 988–994 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

FRIDAY, *February* 28, 1862.

Mr. Stark submitted the following resolution for consideration:

"*Resolved*, That the papers relating to the loyalty of Benjamin Stark, a Senator from Oregon, be withdrawn from the files of the Senate and referred to the Committee on the Judiciary, with instructions to investigate the charges preferred against said Stark on all evidence which has been or may be presented, and with power to send for persons and papers."

The Senate proceeded, by unanimous consent, to consider the said resolution; and

After debate,

On motion by Mr. McDougall that the resolution lie on the table, it was determined in the negative—yeas 7, nays 32.

On motion by Mr. King, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Carlile, Hale, McDougall, Nesmith, Pearce, Powell, and Saulsbury.

Those who voted in the negative are Messrs. Anthony, Browning, Chandler, Clark, Collamer, Cowan, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Henderson, Howard, Howe, Johnson, King, Lane of Indiana, Latham, Morrill, Pomeroy, Rice, Sherman, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Willey, and Wilson of Massachusetts.

Pending further debate upon the resolution,

The Vice-President announced that the hour of 1 o'clock had arrived, and that it was the duty of the Chair to call up the special order of the day for that hour, which was the bill (S. 151) to confiscate the property and free the slaves of rebels, being the unfinished business of the Senate at its last adjournment; and the Senate resumed the consideration of the said bill.

[The debate is found on pages 1011–1014 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

TUESDAY, *March* 18, 1862.

On motion by Mr. Howe, the Senate resumed the consideration of the resolution submitted by Mr. Stark the 28th of February, in relation to an investigation into certain charges of disloyalty preferred against him; and

After debate,

On motion by Mr. Wilkinson that the resolution lie on the table, it was determined in the negative—yeas 3, nays 35.

On motion by Mr. Howe, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Hale, Saulsbury, and Wilkinson.

Those who voted in the negative are Messrs. Anthony, Bayard, Browning, Clark, Collamer, Cowan, Davis, Dixon, Doolittle, Fessenden, Foot, Foster, Harlan, Harris, Henderson, Howard, Howe, Kennedy, King, Lane of Indiana, Lane of Kansas, Latham, Morrill, Nesmith, Pomeroy, Powell, Sherman, Simmons, Sumner, Ten Eyck, Thomson, Trumbull, Wade, Wilmot, and Wilson of Massachusetts.

After further debate,

On motion by Mr. Trumbull to amend the resolution by striking out the words "the Committee on the Judiciary" and inserting "a select committee to consist of five members," it was determined in the affirmative.

On the question to agree to the resolution, as amended, as follows:

"*Resolved*, That the papers relating to the loyalty of Benjamin Stark, a Senator from Oregon, be withdrawn from the files of the Senate and referred to a select committee to consist of five members, with instructions to investigate the charges preferred against said Stark on all evidence which has been or may be presented, and with power to send for persons and papers,"

It was determined in the affirmative—yeas 37, nays 3.

On motion by Mr. Hale, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Browning, Clark, Collamer, Cowan, Davis, Dixon, Doolittle, Fessenden, Foot, Foster, Harlan, Harris, Henderson, Howard, Howe, Kennedy, King, Lane of Indiana, Lane of Kansas, Latham, Morrill, Nesmith, Pomeroy, Powell, Rice, Sherman, Simmons, Sumner, Ten Eyck, Thomson, Trumbull, Wade, Wilkinson, Wilmot, Wilson of Massachusetts, and Wright.

Those who voted in the negative are Messrs. Bayard, Hale, and Saulsbury.

So the resolution as amended was agreed to.

On motion by Mr. Collamer,

Ordered, That the select committee authorized by the said resolution be appointed by the Vice-President.

The Vice-President appointed Mr. Clark, Mr. Howard, Mr. Wright, Mr. Willey, and Mr. Howe.

[The debate is found on pages 1261–1266 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

TUESDAY, *April* 2, 1862.

Mr. Clark, from the select committee appointed to investigate the truth of certain charges against the Hon. Benjamin Stark, a Senator from the State of Oregon, submitted a report (No. 38), which was ordered to be printed.

REPORT OF SELECT COMMITTEE.

[The committee consisted of Messrs. Clark, Howard, Wright, Willey, and Sherman.*]

IN THE SENATE OF THE UNITED STATES.

APRIL 22, 1862.—Ordered to be printed.

Mr. Clark submitted the following report:

The select committee to whom were referred "the papers relating to the loyalty of Benjamin Stark, a Senator from Oregon," report:

By the resolution under which the committee were appointed they were instructed "to investigate the charges preferred against said Stark on all the evidence which has been or may be presented, and with power to send for persons and papers."

The first question which presented itself for the consideration of the committee was, whether they would proceed to take further testimony than that already taken and referred to them by the resolution. In determining this question the committee were influenced by the facts that the Senator whose loyalty is questioned comes from the distant State of Oregon; that the witnesses who could be supposed to know most in regard to his loyalty resided in that State, and that their testimony could not be had until the next session of Congress; that the Senator was appointed by the governor of Oregon to fill the vacancy occasioned by the death of the lamented Baker, and that his term would expire upon the meeting of the legislature of Oregon in September next, and before the testimony could be received and used.

The committee therefore came to the conclusion that it was not practicable to take further testimony, unless the Senator from Oregon, Mr. Stark, might desire to take testimony to rebut that already before the committee.

To ascertain Mr. Stark's desire on this point, they caused to be addressed to him a letter, of which the following is a copy:

UNITED STATES SENATE,
Committee Room on Claims, March 20, 1862.

SIR: At a meeting of the select committee authorized by the resolution of the Senate of the 18th instant "to investigate the charges preferred against Mr. Stark, on all evidence which has been or may be presented, with power to send for persons and papers," the following resolution was adopted:

On motion by Mr. Howard,

"*Resolved*, That the Hon. Mr. Stark be notified of the next meeting of the committee, and be invited to attend and submit to the committee any suggestions or matters he may be pleased to present in relation to the subject with which the committee is charged."

In conformity with the foregoing resolution you are respectfully notified that the next meeting of the committee will be held at the room of the Senate Committee on Claims on Monday next, the 24th instant, at 11 o'clock a. m., which you are invited to attend.

By order of the committee.

N. C. TOWLE,
Clerk Select Committee, &c.

Hon. BENJAMIN STARK,
Senator from Oregon.

The committee met on the 24th of March, and the Senator from Oregon attended the meeting in compliance with the invitation of the committee, and desired that the committee should examine the papers before them, and if they should come to the conclusion that grounds were furnished for the charge of disloyalty by the papers and testimony, that the committee should draw up specific charges, to which he would file his answer. This the committee declined to do, for the reason that they did not wish to become his prosecutors, and were charged by the Senate with investigation and not accusation.

Mr. Stark was informed that the committee did not propose to take any further testimony unless he desired it, but would investigate the charges as presented by the papers then before them. To which the committee understood Mr. Stark to reply that he did not wish to take any further testimony as the matter stood. It was then suggested by the committee to the Senator from Oregon that he should sumbit to the committee his answer in writing to the allegations and evidence then before the committee, with any further evidence he might wish to present, and that the committee would adjourn to afford him the necessary time for that purpose.

With this proposal the Senator expressed his compliance and satisfaction, and the committee adjourned to meet again at his convenience.

* Mr. Sherman was appointed in place of Mr. Howe, excused

At a subsequent meeting of the committee on the 14th April the following statement was presented from Mr. Stark and considered:

WASHINGTON, D. C., *April* 10, 1862.

SIR: I have the honor to acknowledge the reception of a note from your committee, inviting me to make any suggestions I may think proper upon the statements and *ex parte* affidavits in relation to my loyalty, which were referred to the committee under the resolution adopted by the Senate on the —— ultimo.

Deeply sensible of the courtesy of the committee thus extended to me, I regret that unavoidable absence from the city and the pressure of other engagements have prevented me from making an earlier response.

I presume that in extending to me this invitation before entering upon the investigation necessary to a discharge of the delicate duty devolved upon them by the Senate the committee designed simply to afford me an opportunity, if I should deem it proper to do so, to present my personal views of the matter now pending before them.

Under the resolution of reference, the committee are clothed with the fullest powers for the purpose of confirming or dissipating any doubts which may have been engendered by these statements and affidavits as to my loyalty. In offering that resolution I have shown, I think conclusively, that there was no disposition on my part to shun the most searching investigation. If the committee propose to confine their investigation exclusively to those statements and *ex parte* affidavits now before them, in connection with what I may submit for their consideration, it may not be inappropriate for me to express my opinions in regard to them, and I shall do so in the same spirit by which the committee appear to have been actuated in making the request.

As it could not be fairly supposed that I would permit myself to occupy the attitude of self-prosecutor, or that I would assume the task of defending myself when no charge on *prima facie* evidence had been preferred against me, I trust that I may do so without derogating from the true position which my honor and self-respect demand that I should occupy.

With all due deference, therefore, I submit that as a Senator of the United States for the State of Oregon I am entitled to, and I claim, every presumption of honor, integrity, loyalty, and patriotism that can be claimed by any other Senator until such presumption is overborne by competent testimony. It certainly would be very extraordinary to put an honorable Senator upon trial for expulsion without charges and specifications made with reasonable (if not technical) precision, and supported by testimony subjected to all the tests which human wisdom and human experience have found to be essential for the ascertainment of truth. Should such a case ever arise it is reasonable to suppose that it would not be permitted long to interrupt the order or disturb the decorum of the American Senate. Unless the proceedings of your committee are to be regarded as a preliminary inquiry whether or not charges for expulsion ought to be preferred against me, in what essential particular does this case differ from the one suggested?

The papers referred to you I have again examined with that earnest attention which a deep personal interest in the result of an inquiry must ever stimulate, and with the light reflected upon them by the communication which I had the honor to address to the Committee on the Judiciary, under date of January 17th ultimo, I am unable to discover anything upon which a sufficient charge for expulsion can be predicated, or anything in the nature of evidence which an impartial tribunal could receive as sufficient to justify expulsion from the Senate. Accepting all the statements contained in the letters, affidavits, &c., to be true, and there is merely attributed to me *opinions* which in the field of politics might be regarded as heresies, and *expressions* charged upon me which might be characterized as idle, mischievous, and unwise. This suggestion, I need not remind the committee, is not made as palliative upon an admission by me of the truth of any part of these statements, but purely as argumentative and as properly within the scope of my purpose in addressing to them this communication. Guided by this purpose I have in these reflections excluded any denial or admission of anything contained in the papers before the committee, my chief design being accomplished if I shall have succeeded in showing the utter impossibility of making, or even entering upon, a defense of any specific charge or of proffering to rebut evidence when none is presented.

I cannot conclude this brief statement without asserting, as in substance I did in my communication to the Judiciary Committee, that the declarations of my assailants are utterly false in many particulars which might be deemed important, especially the statements of Hull and Law; that the expressions attributed to me in others of the affidavits have been wickedly and maliciously perverted, and that in every respect their declarations are unjust to my real sentiments and at variance with the whole tenor of my life.

Should the committee, however, deem that the public safety and welfare require a formal inquest upon my loyalty and fidelity to the Constitution and Government of my country, I submit with profound respect that justice demands that the general allega-

tions of my assailants should be digested and presented in the form of charges and specifications so that I may have the ordinary and common rights accorded to the humblest citizen when arraigned for trial for the most trivial offense.

I remain, sir, your obedient servant,

BENJAMIN STARK.

Hon. D. CLARK, *Chairman.*

After considering this statement, desirous to know if the Senator had any further communication for the committee or wished to lay before them any further testimony, the committee caused a note to be addressed to him, of which the following is a copy:

UNITED STATES SENATE,
Committee Room on Claims, April 14, 1862.

SIR: At a meeting of the select committee, of which Hon. Mr. Clark is chairman, held at their room this day, your communication of the 10th instant addressed to the committee through its chairman was read and considered, after which it was ordered that a communication be addressed to Mr. Stark requesting him to inform the committee at his earliest convenience whether he desires to submit any further testimony or to make any further statement to the committee in regard to the matters under investigation.

The committee adjourned to Wednesday next at 11 a. m., by which time, if convenient to Mr. Stark, an answer is desired.

By direction of the committee.

N. C. TOWLE, *Clerk.*

Hon. BENJAMIN STARK,
Senator from Oregon.

The committee met again on the 16th of April, when the following note was received from the Senator from Oregon:

SENATE CHAMBER, *April* 15, 1862.

SIR: In answer to the note of your committee, dated yesterday, I have to state that in the absence of information from them as to the course which they deem it to be their duty to pursue I have nothing to add to what I have already communicated to them, nor do I propose in the present situation of the subject before them to present any testimony.

With great respect, I am your obedient servant,

BENJAMIN STARK.

The committee then proceeded to consider the allegations and charges contained in the papers which had been submitted to them by the Senate, in connection with his answer and statement, and upon mature deliberation do find the following conclusions from the facts proved, viz:

1st. That for many months prior to the 21st November, 1861, and up to that time, the said Stark was an ardent advocate of the cause of the rebellious States.

2d. That after the formation of the constitution of the Confederate States he openly declared his admiration for it, and advocated the absorption of the loyal States of the Union into the Southern Confederacy under that constitution as the only means of peace, warmly avowing his sympathies with the South.

3d. That the Senator from Oregon is disloyal to the Government of the United States.

In coming to the foregoing conclusion, the committee cheerfully agree to the statement of the Senator in his answer, that, "as a Senator of the United States for the State of Oregon, I am entitled to, and I claim, every presumption of honor, integrity, loyalty, and patriotism that can be claimed by any other Senator, until such presumption is overborne by competent testimony;" and they cheerfully accord to him all the force and benefit of such a presumption; at the same time they are forced, with pain and reluctance, to find such presumption overborne by the array of witnesses which testify in regard to his conduct and declarations. Thirteen witnesses, who are not only unimpeachable, but are among the most respectable people of the city of Portland, where Mr. Stark resides, testify to the truth of the first of the foregoing propositions. They are William H. Rector, William C. Johnson, C. B. Conelon, A. B. Clough, Levi Anderson, Colburn Barrell, Henry Failing, John S. White, W. H. Bamhart, S. P. Reed, H. W. Corbet, Simeon Francis, and Samuel E. Barr. They say "Mr. Stark, who is a resident here, and personally known to us all, *has been, for the past twelve months, an ardent advocate of the cause of the rebellious States.*" It may be objected that these witnesses do not make this statement under oath, and such is the fact; but they nevertheless, in the opinion of the committee, are entitled to belief. Their character for respectability,

and the positions of some of them, entitle them to it. They gave their testimony months ago, on the 21st November, 1861. It seems to be fair and unprejudiced. They declare that a sense of duty induces them to make their statement. It has been a long time before the Senate; and, although in his communication to the Committee on the Judiciary, dated the 17th January, 1862, the Senator from Oregon declared "that in a forum, competent to try and determine the issue, he should be able to prove the allegations against his loyalty to be utterly unfounded; and that, in many important particulars, the declarations of his assailants were false," yet when an opportunity has been given to the Senator, upon his own motion, to send for persons and papers to disprove these allegations before a committee legally, if not otherwise, competent, the Senator does not desire these witnesses to be put under oath, nor to be re-examined, nor cross-examined; nor does he offer any rebutting testimony, or express a wish that any should be taken; nor does he, in his statement, filed before the committee, so far as the committee remember, attempt to deny or impeach it—for while he says that the statements of Hull and Law are especially false, he makes no such allegation against these thirteen witnesses, or any one of them. He objects to no one of these witnesses because his statement was not made under oath.

These witnesses, however, do not stand alone, nor does the finding of the committee on this proposition rest solely upon testimony given without the sanctity of an oath.

Wesley C. Hull, upon oath, on the 18th November, 1861, says that, in the month of February previous, he heard Mr. Stark make use of the following language: "If there is to be any war between the North and the South, all my property is for sale at fifty cents on the dollar, *and I will go and help the South fight.* The Palmetto flag is my flag; the Southern Confederacy is the only legal government in existence; that the United States Government is broken up; that Jeff. Davis is fighting in a good cause, and it will be impossible to defeat him;" that afterwards upon another occasion he heard the said Stark use the following language: "The United States forces may fight the South from one end of their government to the other, but it will amount to nothing; they will close up behind them, and they cannot be conquered. The South is fighting in a good cause, for government and order, and they cannot be conquered."

Henry Law, also on oath, says that he is acquainted with Mr. Stark; that as early as December, 1860, he heard Mr. Stark say "that he did not go one cent on the Stars and Stripes; that the Palmetto flag was his flag, and if there was any issue between the North and South, he would sell all his property and go South."

A. M. Starr, also under oath, on the 20th November, 1861, declared that within the then last two weeks past he had heard Mr. Stark say that there was no United States Government; and also he heard Mr. Stark say, when the President first called for volunteers, "that the United States Government could not support an army of 30,000 in the field for six months; that the people of the loyal States *would not back up the Administration in trying to put down this rebellion.*"

Thirty other witnesses, likewise under oath, say, on the 15th November, 1861, "that Mr. Stark *is well known* and generally reputed *to be an open and avowed friend to the Southern Confederacy as against the Union.*"

Samuel E. Barr, the magistrate before whom the last-named thirty witnesses made oath, says he is acquainted with each and every one of them, and that they are all men of truth and veracity, and further, that he subscribes to the facts which they stated.

Here are forty-six witnesses, all testifying, materially and directly, to the same substantive fact, to wit, that Mr. Stark has been the advocate of the Southern Confederacy; uncontradicted and unimpeached, except so far as the statement of Mr. Stark may go to that purpose; and the committee are unable to see how a larger number of witnesses could establish the truth of the proposition more firmly. They do not forget, however, that Mr. Stark says that the testimony of two of those witnesses, especially Hull and Law, is false, and he is entitled to any deduction that may be made from their credibility on that account, and to the fact that one of them is evidently mistaken in fixing the time of a particular conversation. They stand, however, with the other witnesses testifying to similar facts, and are uncontradicted by any other person; and the committee can come to no other conclusion than that the facts thus stated by these witnesses are substantially and fully proved, even if the testimony of these two witnesses should be excluded.

The second finding of the committee is proved partly by the declaration of most of these same witnesses, and partly by the distinct and unqualified declaration of the Senator himself to the committee. The same thirteen witnesses above named, in their letter of the 21st November, 1861, say: "He (the Senator from Oregon) has openly avowed his sympathies for the South, declaring the Government disrupted, and openly expressing his admiration for the constitution of the Confederate States, and advocating the absorption of the loyal States of the Union into the Southern Confederacy under that constitution as the only means of restoring peace."

This, these witnesses say, he has done *openly.* The witnesses live in the same city

with him, and there can be no question that they had the means of knowing the conduct, opinions, and declarations of Mr. Stark on these matters.

Mr. Hull testifies, on the 18th November, 1861, that some time after the month of February, 1861, the precise time he does not mention, he heard Mr. Stark say: "The United States forces may fight the South from one end of their government to the other, but it will amount to nothing; they will close up behind them, and they cannot be conquered. The South is fighting in a *good* cause, for government and order, and they cannot be conquered."

Henry Law, on the 20th November, 1861, says he has heard the said Stark say that *he was a secessionist, and all his sympathies were for the South.*

John M. Breck, on the 21st of November, 1861, deposes that he and Mr. Stark live in the same place, and that he is personally acquainted with him; that just after the news of the reverses of the national armies at Bull Run, the affiant being at the time standing at the entrance of the Bank Exchange in the city of Portland, did then and there distinctly hear and see the said Benjamin Stark drink a toast in company *with a well-known secessionist*, to the following effect, viz: "Beauregard," or "Beau-Regard;" that he cannot certainly say that the said Stark alluded to the notorious rebel of that name, but such was his understanding, never having previously heard said Stark use the latter phrase.

It is due to the Senator from Oregon to state that on referring to this testimony before the committee he declared that it was not true. He did not, however, say that the witness was not a truthful man, and worthy of belief under oath, but that he was mistaken, or misunderstood what was said. That he might have drank the toast with some one, and have said, "My regards to you, sir," and that expression been taken for what the witness testifies. But the committee deem it proper to remark, in justice to the witness and to truth, that the witness says "he did then and there *distinctly hear and see* the said Stark, in company with a well-known secessionist, drink the toast." &c. And here is presented a touchstone for ascertaining the truth of the witness's statement. The witness says he drank this toast with a well-known secessionist—and with such a person, the committee submit, he would be likely to drink it if he drank it at all—and this person would know whether or not Mr. Breck is correct in his statement. Mr. Stark had it in his power, and at his option, without expense to him, to have summoned Breck before the committee, and inquired of him who the person was with whom he, Mr. Stark, drank the toast. He then could have summoned that person before the committee and ascertained the truth or falsity of Mr. Breck's statement. Yet this he entirely failed or neglected to do, not because he was unaware of the importance of the testimony, for his attention was attracted to it, and he had taken pains himself to deny it. This testimony, therefore, is entitled to credibility, for the Senator had the means placed at his power of overthrowing it if incorrect, and failed to do so. If, then, this statement of Mr. Breck's be true, how completely and to what extent does it show the sympathies of the Senator were with the rebels! How full of disloyalty must have been the heart of the Senator to the Union cause, thus, in company with a well-known secessionist, exultantly to drink a toast to the man who had planted the batteries against and breached the fortifications of his own Government—and such a Government! and who led a host which slaughtered his fellow-citizens, mutilated their dead bodies, and struck with traitorous swords at the heart of the country?

Thirty-one other witnesses, whose names the committee have, say that Mr. Stark is well known and reputed to be an open and avowed friend of the Southern Confederacy as against the Union.

Peter Smith, on the 21st of November, 1861, deposes that Mr. Stark maintained before him that any State had a right to secede from the rest of the Union, * * * and there was no constitutional right to coerce them into submission.

On the 29th of January, 1862, Joseph Lane appeared before the Judiciary Committee of the Senate and testified that in a conversation with Bishop Scott he heard Mr. Stark say that his sympathies were with the South, and that they were right. He does not undertake to give the precise words of the conversation, which occurred in June, 1861. This witness Mr. Stark had the opportunity of cross-examining, and here again he had the opportunity, if Mr. Lane had been mistaken, to have corrected him. He might have called Bishop Scott before the committee and inquired if he had any such conversation with Mr. Stark or heard him make any such declarations, but he neglected entirely the opportunity of ascertaining the truth or of contradicting the testimony against him.

The committee, however, did not rely entirely upon the testimony of witnesses for this finding. Mr. Stark in the presence of the committee, at one of their meetings, distinctly admitted and said that *now* he would be willing that the loyal States should be absorbed under the confederated constitution for the sake of peace.

The committee were equally pained and surprised at such an expression, but could not fail to perceive how pungent a force it gave to much of the testimony against him; nor could they fail to come to the conclusion, however disagreeable.

Thirdly. That the Senator from Oregon is disloyal to the Government of the United States.

If the first two findings of the committee be correct and the testimony of the witnesses be received and credited, this third finding results almost as a matter of necessity. The Southern Confederacy is the work of rebellion; those who formed it are in arms against the Government of the United States. Its constitution is the product of treason. It is antagonistic, inconsistent, and hostile to the Government of the Union. If rebellion be successful and the Southern Confederacy be established, the Government of the United States must be overthrown and destroyed in nearly one-half its legitimate jurisdiction. Those, therefore, who advocate and support the course of the Southern Confederacy must be deemed opposed to the Government of the United States and disloyal thereto. The truly loyal citizen cannot desire and will not permit a rebellion in any of the States to succeed. Success to the one is the disruption, overthrow, and defeat of the other; especially when the two sections are in arms will the true citizen give all his sympathies, his efforts, and his prayers to the maintenance of a Government which has diffused its blessings so bounteously and so widely as our own. There may be some excuse or palliation for those who, living in rebellious States, are swept away or absorbed by the terrible events there occurring; but there certainly can be none for one who, like the Senator from Oregon, remote from the scene of strife, voluntarily, among a people disposed to be loyal, thus sympathizes with and advocates the cause of rebellion.

By disloyalty the committee mean the want of fidelity to his allegiance to the country, and a disregard of the duty he owes her in this her hour of need and peril.

Now, if it be loyal to advocate the cause of the seceded States, then the Senator from Oregon may be loyal. If it be loyal to sympathize with the rebels, to declare that they are right, and cannot be coerced; to desire for them peace, that they may perfect and carry out their schemes, then may the Senator from Oregon be loyal. If it be loyal not only to express an admiration for the constitution which the rebels have adopted to combine their strength, and make it effectual for the permanent disruption of the American Union and the permanent establishment of their own confederacy, but also to desire the absorption of the other States under it, thus, so to speak, nationalizing treason and making the Government succumb to treason, rather than treason to the Government, then may the Senator from Oregon be loyal. If it be loyal, when the President called for volunteers to save the capital from seizure and suppress rebellion, discouragingly to assert that the United States could not support an army of thirty thousand men, nor would the people sustain the Administration in trying to put down the rebellion; if it be loyal, when the fortifications of the country are battered down by the cannon of domestic foes, and our soldiers are defeated, put to rout and slain, and their dead bodies mutilated and buried, "to drink the health" of the traitor who led the host that perpetrated these enormities, then may the Senator from Oregon be loyal.

But if, as the committee think, such conduct and declarations, at the time when the Government was accepting war as a dire necessity, and struggling for its very existence, could only proceed from a heart sadly and wickedly inclined to sympathize with treason, and show itself false to every duty and deaf to every call of patriotism, then is the finding of the committee fully warranted by the evidence.

"No man can serve two masters." Sympathy with rebellion must shut out patriotism from the heart. It can only exist where the other is not. No man can be true to his country who would do or say aught to aid a conspiracy so wicked, so malignant, so remorseless, and so traitorous as the present rebellion.

The Senator from Oregon cannot be ignorant of the aim and design of the seceding States. They confederated together to break up the Federal Government. They openly proclaimed their determination; and if the Senator aided them by word or deed, he did it with a full knowledge that it was a blow at his country's existence.

The committee do not forget that it is asserted by the Senator that many of the papers referred to the committee are from his bitterest political enemies; and did the findings of the committee rest upon such papers alone, much consideration should be given this statement.

But, turning from these papers of his political enemies to the Senator's own letter to the Democratic mass convention held in Linn County, Oregon, June 5, 1861, the committee find sad evidence of the same spirit animating the contents and dictating the expressions. "Civil war cannot avert disunion;" "Subjugation cannot prolong the Union;" "To subjugate the South, were that even possible, would be the establishment of a military despotism," are expressions found in this letter, and so marvelously like many of those attributed by the witnesses to the Senator that there is no difficulty in believing that they all belong to the same family and have a common parent. And they all are calculated to *encourage the rebellion*, and *discourage the efforts* to suppress it. Whoever may read this letter, mutilated as it is, keeping in mind that it was written about

the time he is said to have uttered the expressions attributed to him by the witnesses, will the more readily believe that the statement of the witnesses closely accords with the evidence furnished by the Senator himself.

Indeed, this letter of June, 1861, and the statement of the Senator to the committee have added much to the weight of the other proof. The first tallies in sentiment and spirit with the witnesses; the other, though made when the Senator was under an accusation of disloyalty in papers referred to the committee upon his own motion, and though the committee by inviting that statement intended to give the Senator an opportunity to express his sympathy with his suffering country and menaced Government, and to remove so far as he could in that way any impeachment of his loyalty, is as barren of all such expressions as a bill of indictment. There is not in it a paragraph, nor a sentence, nor a line such as must spontaneously have burst out from a loyal heart under such an accusation. True, he speaks of being entitled to the presumptions of loyalty, but there is no manly declaration of any determination to stand by the country in weal or woe or to give life or fortune or any assistance whatever to her requirements. In Oregon he was frequent and open in his expressions of sympathy for the rebels. He was, say the witnesses, the advocate of their cause. But here he is as silent as the grave. Though accused of disloyalty, though the country "bleeds at every pore," though she imploringly raises her hands to him in his high place for aid and succor—he has never a word in his statement, nor an expression, sentence, or line from which a drop of sympathy can be wrung, unless it be in his assertion that "in every respect their declarations are unjust to my real sentiments and at variance with the whole tenor of my life."

What those sentiments are he does not tell us, nor have the committee any means of knowing by any evidence before them. If he had declared them to the committee, asserting his loyalty to the Government, the committee would have given him the full benefit of them; and perhaps they might have gone far to have removed the unfavorable conclusions to which the committee have come. But in the absence of any such declarations the committee could only pass on the evidence that was before them, giving him the full benefit of every presumption that can arise in his favor, and of every deduction that should be made for a conflict of testimony.

"He that is not for us is against us" are the words of inspiration, and never more applicable than on occasions like the present. It is quite true the Senator was under no obligation to use any such expressions in his statement, but the committee cannot but believe that had the feelings existed which would have prompted them they could not have been confined in a patriotic heart—they would have found expression.

Upon taking his seat in the Senate, the Senator took the oath to support the Constitution of the United States; and it may be objected he would not have done so if not loyal to the Government. What were the reservations, what the limitations or interpretations, with which the Senator took that oath the committee do not inquire; for the Senator does not assert that his feelings and views have changed since the witnesses testified. He does not pretend that he is more loyal now than when he declared his sympathies were with the South, that they were right and could not be coerced. And the committee remember and know that in their presence, since the taking of that oath, and since the institution of this inquiry, the Senator boldly and without condition declared he would be willing the loyal States should be absorbed under the constitution of the Confederacy for the sake of peace—that is, that the Constitution of our fathers, which he had just sworn to support, should be cast out of its rightful inheritance by this bastard sprout of a gigantic rebellion, which should "reign in its stead."

Could the traitors desire more, to wit, peace and the adoption of *their* government?

It is the aim of their efforts; their avowed intent and purpose. No man can yield it, unless compelled by dire necessity, and not be liable to an impeachment of his loyalty.

All true lovers of the country desire peace, but he who would seek it through its destruction and overthrow must be either a craven or disloyal citizen.

The committee are, therefore, compelled to dismiss this consideration, and adopt the foregoing findings; adding that the appearance of the Senator before the committee, his singular declarations, statements, and conduct, have done much to strengthen the last conclusion of the committee.

Itwould have been far pleasanter to them not to have done so, and they hoped, upon entering upon this investigation, the Senator would have made such proofs and statements as would have removed from him all suspicion of disloyalty. But he has failed to do so, and the duty was left to the committee to judge only upon what was before them. From that duty there could be no shrinking in a time like this; and the committee have endeavored to discharge it thoroughly and fearlessly, and now submit their conclusions to the Senate.

DAN'L CLARK.
J. M. HOWARD.
JOSEPH A. WRIGHT.
JOHN SHERMAN.

Concurring in the first two conclusions of the majority of the committee, I am yet constrained, not without hesitation, to differ with them in their third and last conclusion. Distrusting all *ex parte* testimony, especially in regard to expressions uttered in the heat of high political excitement, seeing that the sentiments and opinions thus attributed to Mr. Stark are virtually denied and repudiated by him in his written statement before the committee; remembering that since it is alleged those conversations took place, and those expressions were uttered, Mr. Stark, in taking his seat as a Senator, has purged himself of these sinister allegations by taking the oath to support the Constitution of the United States, and especially fearing the danger of making mere difference of opinion, however wide and fundamental, a test of fidelity to the Government, I am not prepared to say that Mr. Stark *is now disloyal*.

W. J. WILLEY.

WEDNESDAY, *May* 7, 1862.

Mr. Sumner submitted the following resolution for consideration:

"*Resolved*, That Benjamin Stark, a Senator from Oregon, who has been found by a committee of this body to be disloyal to the Government of the United States, be, and the same is hereby, expelled from the Senate."

[The debate is found on page 1983 of the Congressional Globe, part 3, 2d sess. 37th Cong.]

FRIDAY, *June* 6, 1862.

On motion by Mr. Sumner that the Senate proceed to the consideration of the resolution submitted by him for the expulsion of the Hon. Benjamin Stark from the Senate, it was determined in the negative—yeas 16, nays 21.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Chandler, Clark, Foot, Grimes, Harlan, Howe, Lane of Kansas, Morrill, Pomeroy, Sumner, Trumbull, Wade, Wilkinson, Wilmot, Wilson of Massachusetts, and Wright.

Those who voted in the negative are Messrs. Anthony, Bayard, Browning, Carlile, Cowan, Davis, Dixon, Fessenden, Foster, Hale, Harris, Kennedy, Latham, McDougall, Nesmith, Powell, Rice, Saulsbury, Simmons, Ten Eyck, and Willey.

[Thirty-eighth Congress and first session Thirty-ninth Congress.]

WILLIAM M. FISHBACK, ELISHA BAXTER, AND WILLIAM D. SNOW,

of Arkansas.

May 21, 1864, the credentials of Mr. Fishback, elected to fill the unexpired term, ending March 3, 1865, of William K. Sebastian, expelled, were presented; and May 31 the credentials of Mr. Baxter, elected to fill the unexpired term, ending March 3, 1867, of Charles B. Mitchell, expelled, were presented. June 13, the oath of office not having been administered, their credentials were referred to the Committee on the Judiciary. At the same time a joint resolution for the recognition of the free State government of the State of Arkansas, which had been presented to the Senate June 10, was referred to the committee. June 27, the committee reported in regard to the election of the Senators substantially as follows: August 16, 1861, the President had declared the inhabitants of Arkansas, except those of such parts thereof as should maintain a loyal adhesion to the Union, or might be from time to time occupied and controlled by United States forces, to be in a state of insurrection. At the date of the proclamation no part of the State was occupied and controlled by forces of the United States, nor did the inhabitants of any part of the State publicly maintain a loyal adhesion to the Union. Hence at that time a state of civil war existed between the inhabitants of Arkansas and the United States, and there was not then any organized authority competent to elect Senators of the United States. It is claimed, however, that since that period the greater portion of the State has been thus occupied, and that the inhabitants, loyal to the Union, have reorganized their State government, and have a right through their legislature to choose Senators. The question to be determined by the Senate is, Was the body electing Messrs. Fishback and Baxter the legislature of Arkansas? Less than one-fourth of the number of persons who voted for President in 1860 took part in the reorganization of the State government. This, however, would not be fatal to the reorganization if the State was free from military control, which is not the case. At the time the claimants were elected, and at this time, the State is occupied by hostile armies. While this state of things continues, and the right to exercise armed authority is claimed and exerted by the military power, it cannot be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union. When the rebellion shall have been so far suppressed in the State that the loyal inhabitants thereof shall maintain a State government by the aid of and not in subordination to the military, they shall then and not before be entitled to representation in Congress. The committee recommend the adoption of the following resolution: "*Resolved*, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas." This resolution passed the Senate June 29, 1864, by a vote of 27 yeas to 6 nays.

The joint resolution above referred to was reported adversely at the same time that the report on the credentials was presented. In the next session of Congress a similar joint resolution was submitted and referred to the same committee, but was not reported. The proceedings of the Senate relating to these joint resolutions are not included in the extracts given below.

March 7, 1865, the credentials of Mr. Snow, elected for the term succeeding that for which Mr. Fishback had been elected, were presented and referred to the Committee on the Judiciary. The committee recommended that the question be postponed to the next session, and until Congress should take action in regard to the recognition of the alleged existing State government in Arkansas. No action was taken. February 26, 1866, the credentials of Messrs. Baxter and Snow having been taken from the files of the Senate, a motion was made that they be referred again to the committee. It was ordered that they lie on the table. No further action was taken on the credentials.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 38th Cong. and 1st sess. 39th Cong.; the report of the committee on on the credentials of Messrs. Fishback and Baxter from Senate Reports, 1st sess. 38th Cong. (No. 34); the report on the credentials of Mr. Snow from Senate Reports, 2d sess. 38th Cong. (No. 1, special session); also the proceedings of the Senate from the Journals relating to the payment of mileage to the claimants.

Special references to the debates of each day are inserted below.

[First session of the Thirty-eighth Congress.]

CREDENTIALS OF MESSRS. FISHBACK AND BAXTER.

SATURDAY, *May* 21, 1864.

Mr. Lane, of Kansas, presented the credentials of the Hon. William M. Fishback, elected a Senator of the United States by the legislature of the State of Arkansas to fill the unexpired term of the Hon. William K. Sebastian, who was expelled by a resolution of the Senate of July 11, 1861; which were read.

On motion by Mr. Conness that the credentials be referred to the Committee on the Judiciary,

Ordered, That the further consideration thereof be postponed to to-morrow.

WEDNESDAY, *May* 25, 1864.

The Senate resumed the consideration of the motion submitted by Mr. Conness, the 21st instant, to refer the credentials of the Hon. William M. Fishback to the Committee on the Judiciary; and

On motion by Mr. Fessenden,

Ordered, That the further consideration thereof be postponed to to-morrow.

[The debate is found on pages 2458, 2459 of the Congressional Globe, part 3, 1st sess. 38th Cong.]

TUESDAY, *May* 31, 1864.

Mr. Foot presented the credentials of the Hon. Elisha Baxter, elected a Senator of the United States by the legislature of the State of Arkansas to fill the unexpired term of the Hon. Charles B. Mitchell, who was expelled by a resolution of the Senate July 11, 1861.

The credentials were read.

Ordered, That they lie on the table.

MONDAY, *June* 13, 1864.

On motion by Mr. Lane, of Kansas, that the joint resolution, together with the credentials of the Hon. William M. Fishback and the Hon. Elisha Baxter, Senators-elect from the State of Arkansas, be referred to the Committee on the Judiciary.

* * * * * * *

On the question to agree to the motion of Mr. Lane, of Kansas,

After debate,

On motion by Mr. Wade that the joint resolution and the credentials lay on the table, it was determined in the negative—yeas 5, nays 32.

On motion by Mr. Lane, of Kansas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Chandler, Howard, Richardson, Sumner, and Wade.

Those who voted in the negative are Messrs. Anthony, Brown, Buckalew, Clark, Conness, Davis, Doolittle, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Hendricks, Howe, Johnson, Lane of Indiana, Lane of Kansas, McDougall, Morgan, Morrill, Pomeroy, Powell, Ramsey, Saulsbury, Sherman, Sprague, Trumbull, Van Winkle, Wilkinson, Willey, and Wilson.

On the question to agree to the motion of Mr. Lane, of Kansas, it was determined in the affirmative.

So it was

Ordered, That the joint resolution, with the credentials of the Hon. William M. Fishback and the Hon. Elisha Baxter, be referred to the Committee on the Judiciary.

* * * * * * *

Mr. Lane, of Kansas, presented a proclamation of Major-General Steele, commanding the Department of Arkansas, declaring that peace has been so far restored in Arkansas as to enable the people to institute proceedings for the restoration of the civil government, and issuing regulations for an election to be held for the adoption or rejection of the State constitution adopted by the convention of citizens of that State; which was referred to the Committee on the Judiciary, and ordered to be printed.*

[The debate is found on pages 2895–2907 of the Congressional Globe, part 3, 1st sess. 38th Cong.]

TUESDAY, *June* 21, 1864.

Mr. Lane, of Kansas, presented a letter† of William M. Fishback, addressed to him, giving a detailed account of his conduct during the present rebellion, and defending himself against charges of disloyalty; which were referred to the Committee on the Judiciary, and ordered to be printed.

MONDAY, *June* 27, 1864.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. William M. Fishback and the Hon. Elisha Baxter, elected Senators of the United States by the legislature of the State of Arkansas, submitted a report (No. 94), accompanied by the following resolution:

"*Resolved*, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas."

On motion by Mr. Trumbull,

Ordered, That the report be printed.

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*This proclamation is found in Senate Miscellaneous, 1st sess. 38th Cong., No. 124.

†This letter is found in Senate Miscellaneous, 1st sess. 38th Cong., No. 129.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Harris, Howard, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

JUNE 27, 1864.—Ordered to be printed.

Mr. Trumbull submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of William M. Fishback and Elisha Baxter, claiming seats from the State of Arkansas, report:

That the credentials presented are in due form, purporting to be under the seal of the State of Arkansas, and to be signed by Isaac Murphy, governor thereof; and if the right to seats were to be determined by an inspection of the credentials Messrs. Fishback and Baxter would be entitled to be sworn as members of this body. It is, however, admitted by the persons claiming seats, and known to the country, that in the spring of 1861 the State of Arkansas, through its constituted authorities, undertook to secede from the Union, set up a government in hostility to the United States, and maintain the same by force of arms. Congress, in view of the condition of affairs in Arkansas and some other States similarly situated, passed an act July 13, 1861, authorizing the President, in case of an insurrection in any State against the laws of the United States, and when the insurgents claimed to act under the authority of the State, and such claim was not repudiated, nor the insurrection suppressed by the persons exercising the functions of government in such State, to declare the inhabitants of such State, or part thereof where such insurrection existed, to be in a state of insurrection against the United States; and that thereupon all commercial intercourse by and between the same and the citizens of the United States, except under license and upon certain conditions, should cease and be unlawful so long as such condition of hostility should continue.

In pursuance of this act the President, August 16, 1861, issued his proclamation declaring the inhabitants of the State of Arkansas, except the inhabitants of such parts thereof as should maintain a loyal adhesion to the Union and the Constitution, or might be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents, to be in a state of insurrection against the United States, and that all commercial intercourse between them and citizens of other States was and would be unlawful, except when carried on under special license, until such insurrection should cease. At the date of this proclamation no part of the State of Arkansas was occupied and controlled by the forces of the United States, nor did the inhabitants of any part of the State at that time publicly maintain a loyal adhesion to the Union and the Constitution. Hence, upon the issuing of said proclamation, a state of hostility or civil war existed between the inhabitants of the State of Arkansas and the United States, and there was not at that time any organized authority in Arkansas, loyal to the Constitution, competent to choose or appoint Senators of the United States. It is claimed, however, that since that period the State, or the greater portion of it, has been occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents, and that the inhabitants of said State, loyal to the Union and the Constitution, have reorganized their State government, and have the right, through the legislature they have instituted, to choose two Senators for said State.

The Constitution declares that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years," and makes each House "the judge of the election, returns, and qualifications of its own members." In the investigation of the claimants' right to seats the first question to be determined is, Was the body by whom they were elected clothed with authority to elect Senators; in other words, was it, in a constitutional sense, "the legislature of Arkansas?"

A question similar to this arose some years since between Robbins and Potter, each claiming to have been elected Senator by the legislature of Rhode Island, though by different bodies. In that case the Senate was called upon to decide, and did decide, which of the two bodies, each claiming to be legitimate, was the legislature contemplated by the Constitution. The Supreme Court of the United States, in the case of Luther *vs.* Borden, growing out of the political difficulties in Rhode Island in 1841 and 1842, held that "when the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government."

The claimants laid before the committee a statement of the circumstances attending

the assembling of the body by which they were elected, in which, after detailing the condition of the State while under rebel control, and prior to September, 1863, they say:

"Upon the advent of the Union army the rebels in the State, guerrillas and all, for the most part left with their armies, leaving about two-thirds of the State comparatively free from guerrilla depredation.

"The Union men came flocking from the mountains, where they had lain for two years, to the Federal standard, and nearly every man whom the medical examiners would receive joined the Federal army.

"Those who were rejected (and their number was enormous, their constitutions having been broken by exposure and their hardships), and those whom circumstances prevented from joining the army, found themselves, so far as law was concerned, in a state of chaos. Many of them, living remote from military posts, had not even the protection of military law.

"Immediately they began to agitate the question of a reorganization of their State government. They first moved in primary meetings, and on the 30th of October, 1863, they held a mass meeting in the city of Fort Smith, in which some twenty counties are said to have been represented, and at which they called upon all the counties in the State to elect delegates (after having elected commissioners of election) to a State convention, to be held in the city of Little Rock on the 8th day of January, 1864, for the purpose of so amending the constitution as to abolish slavery. Simultaneously with this meeting meetings were held in a number of other counties. In every single one (in ignorance of the action of others in many instances) they declared for a convention and for the abolition of slavery.

"Commissioners of election were first elected, and they held the elections for the delegates.

"All this was prior to the President's amnesty proclamation.

"When the convention met forty-five delegates were present, representing about one-half of the State. (Several of the delegates failed to attend.) They repudiated the rebel debt, State and Confederate, abolished slavery, and submitted the constitution to the people for their ratification. They also provided for taking the vote for State and county officers and members of the legislature at the same time with the vote for the ratification of the constitution.

"The result of those elections was 12,177 for the constitution and 226 against it, an election of State and county officers, an election of delegates to the lower house of Congress, and a representation in the State legislature from forty-six of the fifty-four counties of the State."

The number of persons in Arkansas who voted for President in 1860 was 54,043, less than one-fourth of whom, as appears from the statement of the claimants, took part in the reorganization of the State government. This, however, would not be fatal to the reorganization, if all who were loyal to the Union had an opportunity to participate, and the State was free from military control. Such, however, is understood not to have been the case. The President had not then, nor has he up to this time, recalled his proclamation, which declared the inhabitants of Arkansas in a state of insurrection against the United States, nor was there any evidence before the committee that said insurrection had ceased or been suppressed. At the time when the body which chose the claimants was elected, when it assembled, and at this time, the State of Arkansas is occupied by hostile armies, which exercise supreme authority within the districts subject to their control. While a portion of Arkansas is at this very time, as the committee are informed, in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it cannot be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union.

When the rebellion in Arkansas shall have been so far suppressed that the loyal inhabitants thereof shall be free to re-establish their State government upon a republican foundation, or to recognize the one already set up, and by the aid and not in subordination to the military to maintain the same, they will then, and not before, in the opinion of your committee, be entitled to a representation in Congress, and to participate in the administration of the Federal Government. Believing that such a state of things did not at the time the claimants were elected, and does not now, exist in the State of Arkansas, the committee recommend for adoption the following resolution:

Resolved, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas.

WEDNESDAY, *June* 29, 1864.

On motion by Mr. Trumbull, the Senate proceeded to consider the resolution reported by the Committee on the Judiciary, declaring that William M. Fishback and Elisha Baxter are not entitled to seats as Senators elect from the State of Arkansas.

On motion by Mr. Wade to postpone the further consideration of the resolution to to-morrow, and that the Senate proceed to the consideration of the bill (H. R. 244) to guarantee to certain States whose governments have been usurped or overthrown a republican form of government, it was determined in the negative—yeas 5, nays 28.

On motion by Mr. Wade, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Clark, Harlan, Lane of Kansas, Sherman, and Wade.

Those who voted in the negative are Messrs. Anthony, Brown, Buckalew, Carlile, Chandler, Conness, Cowan, Davis, Fessenden, Foot, Foster, Grimes, Harris, Hendricks, Hicks, Howe, Johnson, McDougall, Morgan, Powell, Ramsey, Riddle, Sumner, Ten Eyck, Trumbull, Van Winkle, Willey, and Wilson.

After debate,

On the question to agree to the resolution, it was determined in the affirmative—yeas 27, nays 6.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Brown, Buckalew, Carlile, Chandler, Clark, Cowan, Davis, Fessenden, Foot, Foster, Hale, Harlan, Harris, McDougall, Morgan, Morrill, Powell, Ramsey, Riddle, Saulsbury, Sherman, Sumner, Ten Eyck, Trumbull, Wade, and Wilkinson.

Those who voted in the negative are Messrs. Doolittle, Hicks, Howe, Lane of Kansas, Nesmith, and Pomeroy.

So it was

Resolved, That William M. Fishback and Elisha Baxter are not entitled to seats as Senators from the State of Arkansas.

[The debate is found on pages 3360–3368 of the Congressional Globe, part 4, 1st sess. 38th Cong.]

[Special session of Senate, March, 1865.]

CREDENTIALS OF MR. SNOW.

TUESDAY, *March* 7, 1865.

Mr. Lane, of Kansas, presented the credentials of the Hon. William D. Snow, elected a Senator by the legislature of the State of Arkansas for the term of six years commencing on the 4th day of March, A. D. 1865.

Objection to the reception of the credentials being made by Mr. Howard,

The President *pro tempore* submitted the question to the decision of the Senate; and, on the question, Shall the credentials be received?

After debate, and the consideration of executive business, the Senate adjourned.

[The debate is found on pages 1427–1429 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

WEDNESDAY, *March* 8, 1865.

The Senate resumed the consideration of the credentials of the Hon. William D. Snow, yesterday presented by Mr. Lane, of Kansas, the reception of which was objected to by Mr. Howard; and

After debate,

Mr. Howard having withdrawn his objection to their reception,

On motion by Mr. Lane, of Kansas,

Ordered, That the credentials be referred to the Committee on the Judiciary.

[The debate is found on pages 1429–1432 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

THURSDAY, *March* 9, 1865.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of William D. Snow, claiming to have been elected a Senator, commencing on the 4th day of March, 1865, submitted a report (No. 1), recommending that the further consideration of the subject be postponed to the next session of Congress.

Ordered, That the report be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Harris, Collamer, Sherman, Johnson, Williams, and Hendricks.]

IN THE SENATE OF THE UNITED STATES.

MARCH 9, 1865.—Ordered to be printed.

Mr. Trumbull submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of William D. Snow, claiming to have been elected a Senator from the State of Arkansas for six years from the 4th of March instant, report:

That, in the year 1861, the constituted authorities of the State of Arkansas undertook to withdraw that State from the Union, and so far succeeded in the attempt as by force of arms to expel from the State for a time the authority of the United States, and set up a government in hostility thereto, and, in pursuance of an act of Congress, the inhabitants of said State have since been declared to be in a state of insurrection against the United States. The committee therefore recommend that the question of the admission of Mr. Snow to a seat be postponed to the next session of Congress, and until Congress shall take action in regard to the recognition of the alleged existing State government in Arkansas.

[First session of the Thirty-ninth Congress.]

CREDENTIALS OF MESSRS. BAXTER AND SNOW.

MONDAY, *February* 26, 1866.

A motion was made by Mr. Lane, of Kansas, that the credentials of Elisha Baxter and William D. Snow, as Senators-elect from the State of Arkansas, be taken from the files of the Senate, and that they be referred to the Committee on the Judiciary.

A division of the question was called for by Mr. Clark; and,

On the question to agree to the first branch of the motion, to wit, that the credentials of Elisha Baxter and William D. Snow as Senators-elect from the State of Arkansas be taken from the files of the Senate, it was determined in the affirmative; and,

On the question to agree to the second branch of the motion, to wit, and that they be referred to the Committee on the Judiciary,

On motion by Mr. Clark that the credentials lie on the table, it was determined in the affirmative—yeas 29, nays 17.

On motion by Mr. Lane, of Kansas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Morrill, Nye, Poland, Pomeroy, Ramsey, Sherman, Sumner, Trumbull, Wade, Willey, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Buckalew, Cowan, Davis, Dixon, Doolittle, Guthrie, Hendricks, Johnson, Lane of Kansas, Morgan, Nesmith, Norton, Riddle, Saulsbury, Stewart, Stockton, and Van Winkle.

So it was

Ordered, That the credentials lie on the table.

* * * * * * *

A motion was made by Mr. Lane, of Kansas, to admit the Senators-elect from the State of Arkansas to seats on the floor of the Senate.

On motion by Mr. Wade that the motion of Mr. Lane, of Kansas, lie on the table, it was determined in the affirmative—yeas 27, nays 18.

On motion by Mr. Lane, of Kansas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Morrill, Nye, Poland, Ramsey, Sherman, Sumner, Trumbull, Wade, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Buckalew, Cowan, Davis, Dixon, Doolittle, Guthrie, Hendricks, Johnson, Lane of Kansas, Morgan, Nesmith, Norton, Riddle, Saulsbury, Stewart, Stockton, Van Winkle, and Willey.

So it was

Ordered, That the motion lie on the table.

[The debate is found on pages 1025–1027 of the Congressional Globe, part 2, 1st sess. 39th Cong.]

MILEAGE TO CLAIMANTS.

[First session of the Thirty-eighth Congress.]

WEDNESDAY, *June* 29, 1864.

Mr. Trumbull asked, and by unanimous consent obtained, leave to submit the following resolution:

"*Resolved* That the Secretary be instructed to pay, out of the contingent fund of the Senate, the usual mileage of Senators to Elisha Baxter and William M. Fishback, respectively, as claimants for seats in the Senate from Arkansas, at the first session of this Congress."

The said resolution was read the first and second times, by unanimous consent, and considered as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time by unanimous consent.

Resolved, That it pass

[Second session of the Thirty-eighth Congress.]

FRIDAY, *March* 3, 1865.

Mr. Lane, of Kansas, submitted the following resolution for consideration:

"*Resolved*, That the Secretary be instructed to pay out of the contingent fund of the Senate the usual mileage to Elisha Baxter and William M. Fishback, respectively, as claimants for seats in the Senate from Arkansas, and Charles Smith and R. King Cutler, respectively, as claimants for seats in the Senate from Louisiana, at the second session of this Congress."

[Special session of Senate, March, 1865.]

MONDAY, *March* 6, 1865.

Mr. Lane, of Kansas, submitted the following resolution for consideration (the same that was submitted March 3).

WEDNESDAY, *March* 8, 1865.

On motion by Mr. Lane, of Kansas, the Senate proceeded to consider the resolution submitted by him on the 6th instant, to pay mileage to certain claimants to seats in the Senate from the States of Arkansas and Louisiana; and

The resolution having been modified, on the motion of Mr. Lane, of Kansas, to read as follows:

"*Resolved*, That the Secretary be instructed to pay out of the contingent fund of the Senate the usual mileage to Elisha Baxter, William M. Fishback, and William D. Snow, respectively, as claimants for seats in the Senate from Arkansas, and Charles Smith and R. King Cutler, respectively, as claimants for seats in the Senate from Louisiana, at the second session of the last Congress,"

Ordered, That the resolution be referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

THURSDAY, *March* 9, 1865.

Mr. Morrill, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred a resolution to pay to certain persons claiming seats in the Senate as Senators from Arkansas and Louisiana the mileage of Senators from those States, reported the resolution without amendment, and submitted a report thereon, asking that the committee be discharged from its further consideration.

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Morrill, Ramsey, and Henderson.]

The Committee on the Contingent Expenses of the Senate, to whom was referred a resolution that the Secretary be instructed to pay out of the contingent fund of the Senate the usual mileage to Elisha Baxter, William M. Fishback, and William D. Snow, respectively, as claimants for seats in the Senate from Arkansas, and Charles Smith and R. King Cutler, respectively, as claimants for seats in the Senate from Louisiana, at the second session of the last Congress, having attentively considered the same, report that the committee conceive their authority to be limited by law to the auditing of accounts

* Taken from the Congressional Globe, part 2, 2d sess. 38th Cong., page 1435.

for the ordinary contingent expenses of the Senate, and that mileage is payable only to Senators as members of Congress, and not as claimants for seats in the Senate, without an express order of the Senate. The terms of the resolution exclude the inference that the mileage therein contemplated is either ordinary contingent expenses of the Senate or mileage of Senators—members of Congress. Not regarding the resolution in the nature of an order of the Senate to the committee to audit the mileage of the claimants, and failing to perceive any authority of law for allowing it, they report the resolution back to the Senate, and respectfully ask to be discharged from its further consideration.

FRIDAY, *March* 10, 1865.

On motion by Mr. Lane, of Kansas, the Senate proceeded to consider the resolution to pay out of the contingent fund of the Senate to certain persons claiming to be Senators duly elected from the States of Arkansas and Louisiana the mileage of Senators from those States; and,

After debate,

On motion by Mr. Wilson that the Senate proceed to the consideration of executive business, it was determined in the affirmative—yeas 24, nays 12.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Brown, Buckalew, Chandler, Conness, Cragin, Creswell, Davis, Foot, Grimes, Guthrie, Howard, Johnson, Lane of Indiana, Morgan, Norton, Nye, Riddle, Sprague, Stewart, Sumner, Wade, Wilson, and Wright.

Those who voted in the negative are Messrs. Collamer, Dixon, Doolittle, Foster, Harris, Lane of Kansas, Pomeroy, Trumbull, Van Winkle, Willey, Williams, and Yates.

So the motion was agreed to.

[The debate is found on pages 1436–1440 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

[Thirty-eighth Congress—Second session.]

R. KING CUTLER AND CHARLES SMITH, AND MICHAEL HAHN, *of Louisiana.*

December 7, 1864, the credentials of Mr. Cutler, elected to succeed Mr. Slidell, whose term had expired March 3, 1861, and the credentials of Mr. Smith, elected to fill the unexpired term, ending March 3, 1865, of Mr. Benjamin, retired, were presented. At the same time there was presented a memorial of citizens of Louisiana remonstrating against their admission to seats in the Senate. The credentials and memorial were referred to the Committee on the Judiciary. January 11, 1865, the committee reported that the claimants were duly elected, and that, but for the fact that, in pursuance of an act of Congress passed July 13, 1861, the inhabitants of the State had been declared in a state of insurrection, which condition of things had not ceased at the time of the reorganization of the State government and the election of the claimants, they would recommend their immediate admission to their seats; that the inhabitants of the State having been declared in a state of insurrection in pursuance of a law passed by the two Houses of Congress, the committee deemed it improper for the Senate to admit to seats Senators from Louisiana till by some joint action of both Houses there should be some recognition of an existing State government; that they recommend the adoption of an accompanying joint resolution that the United States recognize the State government referred to as the legitimate government of the State. This resolution was debated, but no action was taken on it, and the claimants were not admitted to seats. The proceedings of the Senate relating to the joint resolution are not included in the extracts given below.

March 2, 1865, the credentials of Mr Hahn, elected for the term succeeding that for which Mr. Smith had been elected, were presented. A motion was made that they be laid on the table. Objection being made to their reception, the Senate voted to lay this motion on the table. March 9, the credentials were taken from the files and presented to the Senate, and it was ordered that the further consideration of them be postponed to the next session. No further action was taken on the credentials.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to the credentials of the claimants from Senate Journal, 2d sess. 38th Cong., and the report of the committee, with the exception of certain accompanying documents, from Senate Reports, 2d sess. 38th Cong., No. 117.

There were no debates in regard to the credentials of the claimants. The debates on the adoption of the joint resolution reported by the committee are found on pages 1011, 1061–1070, 1094–1099, 1101–1111 of the Congressional Globe, part 2, 38th Cong., 2d sess.

Documents relating to the case are found in Senate Miscellaneous, 2d sess. 38th Cong., Nos. 1, 2, and 9.

Mileage was not allowed to the claimants. For the proceedings of the Senate on a resolution to pay them mileage see latter part of preceding case of Fishback, Baxter, and Snow, page 246.

CREDENTIALS OF MESSRS. CUTLER AND SMITH.

WEDNESDAY, *December* 7, 1864.

The President *pro tempore* laid before the Senate a letter of the Hon. Michael Hahn, governor of the State of Louisiana, communicating the credentials of the Hon. Charles Smith and the Hon. R. King Cutler, Senators-elect from that State to the Congress of the United States, with copies of the proceedings of the general assembly of Louisiana in reference to their election; which was read.

Ordered, That they lie on the table, and be printed.

Mr. Morggn presented the credentials of the Hon. Charles Smith and the Hon. R. King Cutler, Senators-elect from the State of Louisiana to the Congress of the United States, with copies of the proceedings of the general assembly of Louisiana in reference to their election.

Ordered, That they lie on the table.

Mr. Wade presented a memorial of citizens of Louisiana remonstrating against the admission of Senators or Representatives from the pretended State of Louisiana into the Congress of the United States and the reception of any electoral vote of that State in counting the votes for President and Vice-President of the United States, and praying the passage of an act guaranteeing republican government in the insurrectionary States.

Ordered, That it lie on the table and be printed.

THURSDAY, *December* 8, 1864.

On motion by Mr. Morgan,

Ordered, That the credentials of the Hon. Charles Smith and the Hon. R. King Cutler, Senators-elect from the State of Louisiana, and the proceedings of the legislature of that State in reference to their election, yesterday presented to the Senate, be referred to the Committee on the Judiciary.

On motion by Mr. Wade,

Ordered, That the memorial of citizens of Louisiana remonstrating against the ad-

mission of Senators or Representatives from the State of Louisiana to seats in the Senate or House of Representatives, yesterday presented by him, be referred to the Committee on the Judiciary.

WEDNESDAY, *January* 11, 1865.

Mr. Trumbull, from the Committee on the Judiciary, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That there be printed for the use of the Committee on the Judiciary certain evidence before them relating to the right to seats of Messrs. Cutler and Smith as Senators from the State of Louisiana."

SATURDAY, *February* 18, 1865.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. Charles Smith and the Hon. R. King Cutler, elected Senators by the legislature of Louisiana, and a memorial of citizens of Louisiana remonstrating against the admission of Senators or Representatives from the State of Louisiana into the Congress of the United States, submitted a report (No. 127), accompanied by a joint resolution (S. 117) recognizing the government of the State of Louisiana.

The resolution was read, and passed to a second reading.

Ordered, That the report be printed.

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Harris, Foot, Powell, and Johnson.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 18, 1865.—Ordered to be printed.

Mr. Trumbull made the following report (to accompany joint resolution S. No. 117):

The Committee on the Judiciary, to whom were referred the credentials of R. King Cutler and Charles Smith, claiming seats from the State of Louisiana, report:

That in the early part of 1861 the constituted authorities of the State of Louisiana undertook to withdraw that State from the Union, and so far succeeded in the attempt as by force of arms to expel from the State for a time the authority of the United States, and set up a government in hostility thereto.

Since that time the United States, as a necessity to the maintaining of its legitimate authority in Louisiana as one of the States of the Union, has been compelled to take possession thereof by its military forces, and, in the absence of any local organizations or civil magistrates loyal to the Union, temporarily to govern the same by military power.

While a large portion of the State, embracing more than two-thirds of its population, was thus under the control of the military power, steps were taken with its sanction, and to some extent under its direction, for the reorganization of a State government loyal to the Government of the United States. The first action had looking to such reorganization was a registration of the loyal persons within the limits of military control entitled to vote under the constitution and laws of Louisiana at the beginning of the rebellion. The lists thus made up contain the names of between fifteen and eighteen thousand voters, which is represented to be more than half the number of voters in the same parishes previous to the rebellion, and more than two-thirds of the voting population within the same localities at the time the registry was taken. The next step taken in the reorganization of the State government was the election of State officers on the 22d of February, 1864, under the auspices of the military authority acting in conjunction with prominent and influential citizens. At this election 11,414 votes were polled, 808 of which were cast by soldiers and sailors, citizens of Louisiana, who would not have been entitled to vote under the constitution of Louisiana as it existed prior to the rebellion, for the sole reason that they were in the military service, but who possessed in other respects all the qualifications of voters required by that instrument. The balance, 10,606, were legal voters under the constitution of the State prior to the rebellion. The third step in the reorganization of the State government was to call a convention for the amendment of the constitution of the State. Delegates to this convention were elected March 28, 1864, under the joint and harmonious direction of the military authorities, and the State officers who had been elected on the 22d February previous. In a paper submitted to the committtee by Major-General Banks he states that delegates were apportioned to every election district in the State, both within and beyond the lines, so

* A reference to certain documents accompanying the report and not here printed is given in the head-note.

that if beyond the lines of the army the people of the State had chosen to participate in that election, the delegates might have been received if they had shown themselves loyal to the Government. They were about 150 in number. All elections subsequent to that for delegates have been ordered and controlled by the representatives of the people.

In the organization of the convention it was provided that a majority of the whole number apportioned to the State, if every district within and beyond the lines had been represented, should constitute a quorum for the transaction of business. Every vote in the convention, from a question of order to the ratification of the constitution, was conducted under this rule, and was approved by a majority of all the delegates apportioned to the State if every district had been represented.

The delegates met in convention, in the city of New Orleans, on the 6th day of April, 1864, remained in session till July 23, 1864, and adopted a constitution, republican in form and in entire harmony with the Constitution of the United States and the great principles of human liberty.

This constitution was submitted, by the convention which adopted it, to the people for ratification on the first Monday of September, 1864, and adopted by a vote of 6,836 for to 1,566 against it.

At the same time the vote was taken on the adoption of the constitution a legislature was elected, representing all those parishes of the State reclaimed from insurgent control, and embracing about two-thirds of its population. This legislature assembled at New Orleans on the 3d day of October, 1864, and proceeded to put in operation a State government by providing for levying and collecting taxes, the establishment of tribunals for the administration of justice, the adoption of a system of education, and such other measures as were necessary to the re-establishment of a State government in harmony with the Constitution and laws of the United States. The State government thus inaugurated has been in succcessful operation since the period of its establishment, and your committee are assured that if no exterior hostile force is permitted to enter the State, the local State government is fully equal to the maintaining of peace and tranquillity throughout the State in subordination to the Constitution and laws of the United States.

The manner in which the new State government was inaugurated is not wholly free from objection. The local State authorities having rebelled against the Government, and there being no State or local officers in existence loyal to its authority, in taking the initiatory steps for a reorganization some irregularities were unavoidable, and the number of voters participating in this reorganization is less than would have been desirable. Yet, when we take into consideration the large number of voters who had left the State in consequence of the rebellion, who had fallen in battle, or were absent at the time of the election, both in the Union and rebel armies, and the difficulties attending the obtaining of a full vote from those remaining, in consequence of the unsettled condition of affairs in the State, and the further fact that the adoption of the amended constitution was not seriously opposed, and therefore the question of its ratification not calculated to call out a full vote, the number of votes cast is perhaps as large as could have been expected, and the State government which has been reorganized, as your committee believe, fairly represents a majority of the loyal voters of the State.

Appended hereto is a copy of the various orders and proclamations issued in regard to the election of State officers, delegates to the constitutional convention, and members of the legislature, and also a copy of election laws and instructions relative to the duties of commissioners of elections, issued for the guidance of officers in conducting said election.

Messrs. Cutler and Smith, the claimants for seats, were duly elected Senators by the legislature which convened on the 3d day of October, 1864, and but for the fact that, in pursuance of an act of Congress passed on the 13th day of July, 1861, the inhabitants of the State of Louisiana were declared to be in a state of insurrection against the United States and all commercial intercourse between them and the citizens of other States declared to be unlawful, which condition of things had not ceased at the time of the reorganization of the State government and the election of Messrs. Cutler and Smith, your committee would recommend their immediate admission to seats.

The persons in possession of the local authorities of Louisiana having rebelled against the authority of the United States and her inhabitants having been declared to be in a state of insurrection in pursuance of a law passed by the two Houses of Congress, your committee deem it improper for this body to admit to seats Senators from Louisiana till by some joint action of both Houses there shall be some recognition of an existing State government acting in harmony with the Government of the United States and recognizing its authority.

Your committee therefore recommend for adoption, before taking definite action upon the right of the claimants to seats, the accompanying joint resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States do hereby recognize the government of the State of Louisiana inaugurated under and by the convention which assembled on the

6th day of April, A. D. 1864, at the city of New Orleans, as the legitimate government of said State, entitled to the guarantee and all other rights of a State government under the Constitution of the United States.

CREDENTIALS OF MR. HAHN.

THURSDAY, *March* 2, 1865.

Mr. Doolittle presented a certified copy of the proceedings of the legislature of the State of Louisiana, showing that the Hon. Michael Hahn was elected a Senator by the legislature of that State for the term of six years commencing on the 4th day of March, A. D. 1865; which were read.

Objection being made by Mr. Davis to the reception of the paper,

On motion by Mr. Trumbull,

Ordered, That it lie on the table.

[The debate is found on page 1278 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

[Special session of Senate, March, 1865.]

THURSDAY, *March* 9, 1865.

On motion by Mr. Doolittle, the credentials of the Hon. Michael Hahn, elected a Senator by the legislature of Louisiana, were taken from the files and presented to the Senate.

On motion by Mr. Doolittle,

Ordered, That the further consideration thereof be postponed to the next session of Congress.

79908°—S. Doc. 1036, 62-3——22

[Second session Thirty-eighth Congress, and special session of Senate, March, 1865.]

JOSEPH SEGAR AND JOHN C. UNDERWOOD,
of Virginia.

February 17, 1865, the credentials of Mr. Segar, elected to fill the unexpired term ending March 3, 1869, of Lemuel J. Bowden, who died January 2, 1864, were presented. A motion was made that they be referred to the Committee on the Judiciary. After debate it was ordered that they lie on the table. It appears from the debate that the question raised was whether the body electing Mr. Segar was the legislature of Virginia, a great part of that State being in rebellion. Extracts from remarks given below show the grounds upon which certain Senators proceeded.

March 9, 1865, the credentials of Mr. Underwood, elected for the term beginning March 4, 1865, were presented. The credentials of Mr. Segar were taken from the files and presented to the Senate. It was ordered that the further consideration of the credentials of both be postponed to the next session of Congress. Mr. Segar and Mr. Underwood were elected at the same time and by the same legislature. No further action was taken on the credentials.

February 18, 1879, a resolution passed the Senate that there be paid to Mr. Segar out of the contingent fund of the Senate the sum of $5,000 in full compensation for his expenses in prosecuting his claim. Petitions for like compensation were filed by the representatives of Mr. Underwood, deceased. Favorable reports were made by the Committee on Privileges and Elections in 1882 and 1884. April 21, 1886, a resolution was passed allowing Mr. Underwood's representatives $5,000 in full compensation of all time and expenses, to be paid out of the contingent fund.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 38th Cong., and extracts from remarks of several Senators. A transcript of the proceedings of the Senate in regard to the allowance of compensation, from Senate Journals, 43d-49th Cong., with the reports thereon, are also given.

Special references to the debates of each day are inserted below.

FRIDAY, *February* 17, 1865.

Mr. Willey presented the credentials of the Hon. Joseph Segar, elected a Senator by the legislature of the State of Virginia to fill the vacancy occasioned by the death of the Hon. Lemuel J. Bowden; which were read.

A motion was made by Mr. Sumner that the credentials be referred to the Committee on the Judiciary.

On motion by Mr. Howard to amend the motion of Mr. Sumner by adding thereto the words "and that the committee be instructed to inquire and report upon the election, returns, and qualifications of the claimant,"

After debate,

On motion by Mr. Sherman that the credentials lie on the table,

Mr. McDougall raised a question of order, to wit: That the subject under consideration being a question of privilege, affecting the organization of the Senate, the motion to lie on the table, which precluded debate, was not in order.

The President *pro tempore* decided that a question of privilege, when brought before the Senate for its action, was subject, like other questions, to such motion as any Senator may think proper to submit; and decided that the motion of Mr. Sherman was in order.

From this decision Mr. McDougall appealed; and the question being submitted to the Senate, Shall the decision of the Chair stand as the judgment of the Senate? it was determined in the affirmative.

So the decision of the Chair was sustained; and,

On the question to agree to the motion that the credentials lie on the table, it was determined in the affirmative—yeas 29, nays 13.

On motion by Mr. McDougall, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Brown, Buckalew, Chandler, Clark, Collamer, Conness, Cowan, Davis, Doolittle, Farwell, Foster, Hale, Harlan, Howard, Howe, Morgan, Morrill, Nye, Powell, Ramsey, Sherman, Sprague, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, and Wilson.

Those who voted in the negative are Messrs. Dixon, Hendricks, Johnson, Lane of Indiana, Lane of Kansas, McDougall, Nesmith, Pomeroy, Richardson, Saulsbury, Van Winkle, Willey, and Wright.

So it was

Ordered, That the credentials lie on the table.

[The debate is found on pages 845–849 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

[Special session of Senate, March, 1865.]

THURSDAY, *March* 9, 1865.

Mr. Doolittle presented the credentials of the Hon. John C. Underwood, elected a Senator by the legislature of Virginia for the term of six years commencing on the 4th day of March, A. D. 1865; which were read.

On motion by Mr. Sumner,

Ordered, That the further consideration of the credentials be postponed to the next session of Congress.

* * * * * * *

On motion by Mr. Willey, the credentials of the Hon. Joseph Segar, elected a Senator by the legislature of Virginia, were taken from the files and presented to the Senate; and,

On motion by Mr. Willey,

Ordered, That the further consideration thereof be postponed to the next session of Congress.

[The debate is found on pages 1433, 1434 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

[Remarks of Mr. Sumner, of Massachusetts, in favor of reference to a committee of Mr. Segar's credentials. Delivered February 17, 1865, and taken from page 846 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

"I regret that a question of this magnitude has been precipitated upon the Senate at this late period of the session when there is so much public business which has not yet received the attention of either House of Congress. The Senator from Michigan does not exaggerate its magnitude. Sir, it is much to be a Senator of the United States, with all the powers and privileges pertaining to that office—powers and privileges, legislative, diplomatic, and executive; and the question now is whether all these extraordinary powers and privileges shall be recognized in a gentleman whose certificate has been sent to the Chair. I thought it my duty, on hearing that certificate read as I entered the Chamber, to move at once its reference to the Committee on the Judiciary. I am astonished that there can be any hesitation in making that reference. Sir, Senators who hesitate show an insensibility to the character of the question. Is the Senate ready to act blindfolded or with the eyes open? I insist that on a question of this magnitude the Senate shall act with the eyes open, wide open; and I know no other way in which they can be brought to act so except through the intervention of a responsible committee of this body. Therefore, sir, I proposed that the credentials should be referred to that committee. It will be the duty of the committee, as my friend from Michigan has suggested, to consider in the first place whether a State in armed rebellion like Virginia can have Senators on this floor. That is a great question, constitutional, political, practical. It will be their duty, then, to consider in the next place whether the gentleman whose credentials have been presented has been chosen legally under the Constitution of the United States by any State. Now, sir, I do not intend to prejudge either of these questions. I simply open them now for the consideration of the Senate.

"I say, sir, I do not mean to prejudge these questions; but I do insist that a measure of this importance shall not be acted on without due consideration, and in absolute indifference to those facts which now stare us in the face, glaring upon us every day in every newspaper that we read. Sir, you cannot be insensible to facts. It is in vain that Senators say that Virginia, now in war against the Union, is entitled to representation on this floor, when you have before you the inexorable fact that the greater part of that State is at this moment in possession of an armed rebellion, and when you have before you the other fact filling almost all the newspapers of the land that the body of men who have undertaken to send a Senator to Congress are little more than the common council of Alexandria; and you have the question distinctly presented to you whether a representative of the common council of Alexandria is to enter this Chamber and share the same powers and privileges of my honorable friend near me, the Senator from New York [Mr. Morgan], or my friend farther from me, the Senator from Pennsylvania [Mr. Cowan]. I merely open these points without now undertaking to decide them, but simply as an unanswerable argument in favor of the reference to the committee."

[Extract from remarks of Mr. Willey, of West Virginia, in favor of allowing Mr. Segar to be at once admitted to his seat. Delivered February 17, 1865, and taken from page 848 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

"But the honorable Senator and those who think with him have taken the ground that Virginia is not entitled to representation on this floor. Why, sir, has not the Senate recognized the fact that she is entitled to such representation during the whole of the session and during the whole of the last session of Congress? Has there not been a Sen-

ator representing the State of Virginia on this floor, participating in the proceedings of this body, recording his yeas and nays, and to the extent of his vote controlling the legislation of Congress? Has he not been recognized without a murmur and without a word of objection? So far as that fact is concerned I hold that the Senate is barred by its own action, that it should have excluded the honorable gentleman who represents Virginia on the floor already if Virginia be not entitled as a State to representation on this floor. I put it to Senators to say, if Mr. Bowden had been living to-day, whether he would not have been allowed to occupy his seat without let or hindrance, without any objection, the same as his honorable colleague has been allowed to occupy his seat without objection. I say, therefore, the action of the Senate itself has recognized the fact not only that Virginia is entitled to representation on this floor, but that she has been and is represented on this floor; and so long as the honorable Senator who represents Virginia here is allowed to retain his seat it strikes me that it is not competent for the Senate to say that Virginia is not entitled to representation on this floor.

"I fully concur in all that has been said in regard to the importance of this question. I know very well, for I have been enabled to see it and to feel it personally, with what eager desire the loyal population of Virginia are looking to the action of Congress in this respect to sustain the legislature at Alexandria. I know how all the northwest portion of Virginia, now composing the State of West Virginia, was brought in around the loyal legislature of Wheeling, forming a nucleus, until the whole State was brought under the flag of the Union and under the jurisdiction of the Federal Constitution; and I know that such will be the result in Virginia if its loyal legislature is sustained. County after county—such is my information from beyond the lines to-day, having letters in abundance to that effect—eagerly desire for the time to come when they shall be relieved of the power of the rebellion, that they may reorganize the old government of Virginia around the legislature of Alexandria.

"But, sir, it is a fact, not only that the Senate of the United States has recognized the existence of Virginia as a State, and her right to be represented on this floor, but the executive branch of the Government has done so, I imagine; for I saw it stated in the papers the other day that the Secretary of State had transmitted the constitutional amendment for the abolition of slavery to the executive of Virginia, and through him it was sent to the legislature to be acted upon, and that legislature had acted upon it and ratified the amendment. We shall place ourselves in a singular position if we reject a gentleman who comes here accredited with a certificate of election in due form and repulse him from our doors and refuse to allow him a seat on the floor when we have another member representing the same State upon the floor and when the executive branch of the Government recognizes the Virginia legislature at Alexandria as the true legislature, and Governor Peirpoint as the true and legitimate governor of Virginia. I trust that this matter will not be referred at all, but that we will hold out the inducement to the loyal people of Virginia to rally around the loyal legislature at Alexandria."

[Remarks of Mr Sherman, of Ohio, accompanying his motion that the credentials of Mr. Segar be laid on the table. Delivered February 17, 1865, and taken from pages 848, 849 of the Congressional Globe, part 2, 2d sess. 38th Cong.]

"I wish to submit to the Senate one or two considerations on this subject, and I shall close my remarks by submitting a motion that is not debatable.

"The credentials presented to us purport to show that this gentleman was elected a member of this body on the 8th day of December last, and they bear date on the 12th day of December last. They have been held by him for more than sixty days. Every intelligent man must have known that the presentation of these credentials would give rise to debate, would involve grave political questions about which there are radical differences of opinion in this body and throughout the country. The condition of the State of Virginia, the condition of the rebel States, the effect of the rebellion, all these matters are involved in the question now presented to the Senate. This gentleman holding these papers might at any moment have presented them as a privileged question, and have stopped all the businesss of this body until they were disposed of, either referred or acted upon. Now, I ask the Senator whether it is reasonable for us at this period of the session to stop our deliberations, when all the important bills of the session remain unacted upon, for the purpose of considering this question? When this gentleman has had these papers in his possession for more than sixty days, when he had the right at any day to present them and call on us to decide the question raised by them, is it reasonable, I ask, to present them at this period of the session, and ask us to postpone all the important business of the session for the purpose of considering them? It seems to me it is not; and, therefore, without going into the merits of the proposition, which is a very grave and difficult one, upon which I myself have not made up my opinion, although I

have read and thought a great deal about it, I submit whether, under the circumstances, the best disposition is not to leave the question to be settled by the next Congress.

"The State of Virginia is now represented by one Senator in this body. The State of West Virginia is ably represented by two Senators. The Senator-elect, or the person who claims to act as the Senator-elect from Virginia, has slept upon his rights for sixty, ay, seventy days. It seems to me, therefore, that for the short period of the term for which he was elected, only fifteen days, it is scarcely worth while for us to delay the ordinary business of the country and stop and deliberate upon his right to a seat which at any rate will expire on the 4th day of March next. The question when presented to the next Congress will be one that we shall have ample time to decide. It will be presented at the threshold on the 4th of March next. No doubt then a gentleman claiming to be a Senator from the State of Virginia will present his credentials. Then we can take up the matter and determine it. We can take time, we can deliberate, we can get full information on the subject; and we can dispose of these grave political questions without interfering with the public business. Now we cannot. Under the circumstances, therefore, I feel it my duty to submit a motion that the credentials do lie upon the table."

[Extract from remarks of Mr. Doolittle, of Wisconsin, maintaining that the case of Virginia stood on different grounds from that of Arkansas, in regard to which the Committee on the Judiciary had recommended a postponement of the question until the next session of Congress. Delivered March 9, 1865, and taken from the Congressional Globe, part 2, 2d sess. 38th Cong.]

"In relation to the State of Virginia I think every Senator can easily see that it stands on very different ground perhaps from any of the other States from which Senators have appeared with their credentials. The State of Virginia, as such, has been recognized by this Government in every form, by the executive department, and by Congress. By legislative action we have recognized the government of Virginia as the legitimate government of that State, for it was by the consent of the legislature of that State that we acted when we agreed to a division of the State of Virginia into West Virginia and East Virginia. Whether the action of Congress was wise or unwise in consenting to the erection of the State of West Virginia is not a question which is now to be discussed. The Government has in every form recognized that State. We had until the 4th day of March a Senator from that State, after the division of the State of Virginia. When West Virginia was represented by two Senators on this floor we had two Senators still from old Virginia, one of whom died during the recess of Congress, Hon. Mr. Bowden, and the other of whom remained until the 4th day of March last. So that by the action of this body we have recognized the existence of the State of Virginia—I mean the old State of Virginia independent of the State of West Virginia.

* * * * * * *

"I will finish in a word all that I desire to say. The Presidential proclamation declaring the population of certain States to be in insurrection excepted from its operation the counties of Alexandria city and county, Berkeley, Accomac, Northampton, Princess Anne, Norfolk, Norfolk city, Portsmouth city, and Elizabeth city and county, in the State of Virginia, containing a population of over 175,000; and these counties are now represented in the legislature at Alexandria.

"But, Mr. President, I see that the Senate do not desire to take up and dispose of any of these questions in relation to the admission of Senators from any of these States at the present session; and my purpose in rising now is not to press any such action on the Senate, but simply to state in answer to what fell from some Senators that this case of the State of Virginia may in some respects stand on a different footing in relation to the proclamation declaring States in insurrection, from the other States, because of the action of Congress already in recognizing the government which is denominated the Peirpoint government as being the true government of the State of Virginia, with which we have dealt, upon whose action we have suffered the erection of a new State within the limits of Virginia, so that we may be already committed on that subject in a different form from what we are in relation to these other States. I agree with the Senator from Missouri in relation to all of them, that it is our duty at the earliest practicable moment to take these free States by the hand and give them the moral support of our recognition."

COMPENSATION OF MR. SEGAR.

[First session of the Forty-third Congress.]

MONDAY, *December* 8, 1873.

Mr. Lewis presented the petition of Joseph Segar, praying to be allowed pay as a Senator from Virginia in 1863; which was referred to the Committee on Privileges and Elections.

THURSDAY, *February* 5, 1874.

Mr. Lewis presented the petition of Joseph Segar, praying compensation as a Senator from Virginia in 1863 and 1864; which was referred to the Committee on Privileges and Elections.

[The debate is found on page 1213 of the Congressional Record, vol. ii, part 2.]

[First session of the Forty-fourth Congress.]

WEDNESDAY, *February* 15, 1876.

Mr. Withers presented the petition of Joseph Segar, praying to be allowed pay as a Senator from Virginia in 1863; which was referred to the Committee on Claims.

MONDAY, *February* 21, 1876.

On motion by Mr. Wright,

Ordered, That the Committee on Claims be discharged from the further consideration of the petition of Joseph Segar, and that it be referred to the Committee on Privileges and Elections.

[Second session of the Forty-fourth Congress.]

SATURDAY, *March* 3, 1877.

Mr. Wadleigh submitted the following resolution for consideration:

"*Resolved*, That the Secretary of the Senate be, and is hereby, authorized and directed to pay to Joseph Segar compensation and mileage as a Senator of the United States from the date of the death of Hon. Lemuel J. Bowden to the end of the term for which said Segar was elected."

[The debate* is found on pages 2195, 2196 of the Congressional Record, vol. v, part 3.]

[Second session of the Forty-fifth Congress.]

WEDNESDAY, *December* 12, 1877.

On motion by Mr. Withers,

Ordered, That the papers of Joseph Segar, on the files of the Senate, be referred to the Committee on Privileges and Elections.

THURSDAY, *June* 13, 1878.

Mr. Hoar, from the Committee on Privileges and Elections, to whom was referred the memorial of Joseph Segar, submitted a report (No. 509) thereon, accompanied by the following resolution. (Resolution given at end of report.)

REPORT OF COMMITTEE.†

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

JUNE 13, 1878.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph Segar, asking for payment of his salary and mileage as Senator from December 8, A. D. 1864, to March 4, 1869, have considered the same, and respectfully report:

If the petitioner had been admitted to the seat which he claimed, his salary and mileage would have amounted to more than $21,000. He was not admitted, and having never performed the duties of a Senator, under the most recent precedent he is not entitled to compensation and mileage as such. By the same precedent, if he prosecuted in good faith and on reasonable grounds a claim for such seat, he should be allowed a moderate compensation for the expenses incurred by him in such prosecution.

On the 23d of February, 1863, Mr. Bowden was elected Senator for Virginia by the legislature assembled at Wheeling, the great portion of Virginia, including Richmond, its former seat of government, being then in rebellion. He was admitted to his seat, the Senate thereby recognizing the legal existence of the State he represented. West Vir-

* This debate took place on a previous proceeding not found in the Senate Journal. The resolution was first offered as an amendment to a resolution annulling the resolution by which William K. Sebastian was expelled.

† Taken from Senate Reports, vol. 2, 2d sess. 45th Cong., No. 509.

ginia was then erected into a separate State. The legislature of Virginia assembled at Alexandria and continued the functions of a State legislature of Virginia. Mr. Bowden continued to represent Virginia in the Senate until his death, on the 2d of January, 1864. December 8, 1864, the petitioner was elected to succeed Mr. Bowden, and prosecuted his claim with diligence. The Alexandria government was recognized as a valid State organization by President Lincoln in his amnesty proclamation of December 8, 1863. It gave its constitutional assent to the adoption of the thirteenth amendment of the Constitution of the United States, and its assent is treated by Mr. Seward in his proclamation announcing the adoption of the amendment as necessary thereto.

Under these circumstances, the petitioner was well warranted in presenting his claim to a seat in the Senate. If the practice then prevailing were now acted upon he would receive full salary and mileage. The Senate in the cases of Ray and McMillan, at the present session, preferred to allow to such claimants only a compensation for reasonable and moderate expenses. As this is a new rule, it would be clearly unjust to require of claimants to furnish minute items and vouchers. We think the sum of $5,000 a reasonable and moderate allowance to Mr. Segar for three years' prosecution of his claim. We therefore recommend the passage of the accompanying resolution:

Resolved, That there be allowed and paid out of the contingent fund of the Senate to Joseph Segar the sum of $5,000, in full compensation for his expenses in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia.

[Third session of the Forty-fifth Congress.]

TUESDAY, *February* 18, 1879.

On motion by Mr. Hoar, the Senate proceeded to consider, as in Committee of the Whole, the following resolution:

"*Resolved*, That there be allowed and paid out of the contingent fund of the Senate to Joseph Segar the sum of $5,000, in full compensation for his expenses in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia;"

And no amendment being made, it was reported to the Senate.

On the question, Shall the resolution be engrossed and read a third time? it was determined in the affirmative—yeas 34, nays 24.

On motion by Mr. Sargent, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Barnum, Blaine, Burnside, Butler, Cameron of Wisconsin, Chaffee, Conover, Davis of West Virginia, Dawes, Dorsey, Edmunds, Ferry, Garland, Gordon, Grover, Hill, Hoar, Ingalls, Jones of Florida, Kirkwood, McMillan, Matthews, Merrimon, Mitchell, Morgan, Paddock, Saunders, Sharon, Teller, Voorhees, Wadleigh, Windom, and Withers.

Those who voted in the negative are Messrs. Bailey, Bayard, Booth, Cameron of Pennsylvania, Cockrell, Coke, Conkling, Davis of Illinois, Eaton, Harris, Kernan, McCreery, McDonald, McPherson, Maxey, Morrill, Randolph, Ransom, Rollins, Sargent, Saulsbury, Spencer, Wallace, and Whyte.

So it was

Ordered, That the resolution be engrossed and read a third time.

And the said resolution was read the third time.

Resolved, That it pass.

[The debate is found on pages 1513–1515 of the Congressional Record, vol. viii, part 2.]

CLAIM OF REPRESENTATIVES OF MR. UNDERWOOD, DECEASED.

[Third session of the Forty-fifth Congress.]

SATURDAY, *February* 22, 1879.

Mr. Withers presented the petition of Maria G. Underwood, administratrix of the estate of John C. Underwood, deceased, praying an appropriation to pay the alleged expenses incident to his election as a Senator in Congress from the State of Virginia; which was referred to the Committee on Privileges and Elections.

[First session of the Forty-seventh Congress.]

TUESDAY, *January* 24, 1882.

Mr. Walker presented the petition of Maria G. Underwood, praying an allowance to her as the administratrix of J. C. Underwood, deceased, on account of the election of the said J. C. Underwood to the United States Senate; which was referred to the Committee on Privileges and Elections.

MONDAY, *May* 29, 1882.

Mr. Lapham, from the Committee on Privileges and Elections, to whom was referred the petition of Maria G. Underwood, submitted a report (No. 656) thereon accompanied by the following resolution; which was read the first and second times by unanimous consent. [Resolution given at end of report.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Hoar (chairman), Cameron of Wisconsin, Sherman, Frye, Lapham, Saulsbury, Hill of Georgia, Vance, and Pugh.]

IN THE SENATE OF THE UNITED STATES.

MAY 29, 1882.—Ordered to be printed.

Mr. Lapham, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the petition of Maria G. Underwood, administratrix of John C. Underwood, deceased, asking payment for salary and mileage of the said John C. Underwood from the 4th of March, 1865, to the 4th of March, 1871, have considered the same, and respectfully report:

That on the 9th day of December, 1864, the petitioner's intestate was duly elected a Senator from the State of Virginia, for the term of six years from the 4th day of March, 1865; that he received a certificate of such election in the words and figures following:

VIRGINIA, *to wit:*

The legislature of this State having, on the ninth day of December, 1864, in pursuance of the Constitution for the United States, chosen John C. Underwood, esquire, a Senator from this State for six years from the fourth day of March next, I, Francis H. Peirpoint, being governor of the Commonwealth, do hereby certify the same to the Senate of the United States.

Given under my hand and the seal of the Commonwealth this the fourteenth day December, 1864.

[SEAL OF VIRGINIA.] F. H. PEIRPOINT.

By the governor:

W. J. COWING,
Secretary of the Commonwealth.

That the said John C. Underwood duly presented his certificate and credentials as aforesaid, on the 9th day of March, 1865, to the Senate of the United States, and made efforts to obtain his seat in the said Senate, traveling from his home in Virginia to the city of Washington from time to time, and incurred a very considerable expenditure of time and money in so doing; that on the same day of the election of said John C. Underwood one Joseph Segar was also duly elected a Senator from said State and presented his credentials to the Senate; that neither the said Segar nor the said Underwood were admitted to take their seats in the Senate; that the said Segar duly presented his memorial to the Senate during the Forty-fifth Congress, at its second session, asking payment for his salary and mileage as Senator from the 9th of December, 1864, to the 4th of March, 1869, which was referred to the Committee on Privileges and Elections, and the committee recommended the passage of a resolution in words and figures following:

"*Resolved*, That there be allowed and paid out of the contingent fund of the Senate to Joseph Segar the sum of $5,000, in full compensation for his expenses in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia."

Which resolution was adopted by the Senate, and the amount therein named was paid to the said Segar. The report of the committee in Segar's case contained the following statements:

"If the petitioner had been admitted to the seat which he claimed, his salary and mileage would have amounted to more than $21,000. He was not admitted and having never performed the duties of a Senator, under the most recent precedent he is not entitled to compensation and mileage as such. By the same precedent, if he prosecuted in good faith and on reasonable grounds a claim for such seat, he should be allowed a moderate compensation for the expenses incurred by him in such prosecution."

On the 23d day of February, 1863, the legislature of Virginia assembled at Wheeling, in said State, the greater portion of the State, including the city of Richmond, its former seat of government, being then in rebellion, and elected one Bowden a United States Senator from that State. Said Bowden was admitted to his seat, the Senate thereby

* Taken from Senate Reports, 1st sess. 47th Cong., No. 656.

recognizing the legal existence of the legislature which elected him. West Virginia, including the city of Wheeling, was then erected into a separate State. The legislature of Virginia, after such formation of a new State, assembled at the city of Alexandria and continued the functions of a State legislature of Virginia. Said Bowden died on the 2d of January, 1864, and said Segar was elected to succeed him at the same time of the election of John C. Underwood, as aforesaid.

The committee in Segar's case further reported as follows:

"The Alexandria government was recognized as a valid State organization by President Lincoln in his amnesty proclamation of December 8, 1863. It gave its constitutional assent to the adoption of the thirteenth amendment of the Constitution of the United States, and its assent is treated by Mr. Seward in his proclamation announcing the adoption of the amendment as necessary thereto.

"Under these circumstances, the petitioner was well warranted in presenting his claim to a seat in the Senate. If the practice then prevailing were now acted upon he would receive full salary and mileage. The Senate in the cases of Ray and McMillen, at the present session, preferred to allow to such claimants only a compensation for reasonable and moderate expenses. As this is a new rule, it would be clearly unjust to require of claimants to furnish minute items and vouchers. We think the sum of $5,000 a reasonable and moderate allowance to Mr. Segar for three years' prosecution of his claim. We therefore recommend the passage of the accompanying resolution."

The cases of said Underwood and Segar are alike in all respects, except the terms for which they were chosen. It is true no actual service as Senator was rendered by either, but each stood ready to perform his duties whenever the Senate should allow it; that the said Underwood performed no such service was the fault of the Senate, not his. The precedents fully justify the allowance to said Segar and the allowance asked by the petitioner. The House of Representatives has frequently paid large sums of money to unsuccessful contestants for seats in that body; and the Senate, at the same session during which the allowance was made to Segar, also paid Messrs. Ray and McMillen, and has also paid two claimants for seats from the State of Georgia, although none of them were allowed to occupy their seats in the Senate. The valuable services rendered by said Underwood to the Government in its struggle for national supremacy are matters of history and need not be here repeated. We think the sum allowed and paid to Mr. Segar is a precedent which should be followed in this case, and recommend the passage of the accompanying resolution:

Resolved, That there be allowed and paid out of the contingent fund of the Senate to Maria G. Underwood, administratrix of John C. Underwood, deceased, the sum of $5,000, in full compensation for the time and expenses of said John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia.

WEDNESDAY, *June* 7, 1882.

On motion by Mr. Lapham, the Senate proceeded to consider, as in Committee of the Whole, the resolution reported by him on the 29th ultimo from the Committee on Privileges and Elections, to pay Maria G. Underwood, administratrix, $5,000 in full compensation for expenses of John C. Underwood in prosecuting his claim to a seat in the Senate.

After debate,

Ordered, That the further consideration thereof be postponed to to-morrow.

[The debate is found on pages 4616–4618 of the Congressional Record, vol. xiii, part 5.]

[Second session of the Forty-seventh Congress.]

SATURDAY, *March* 3, 1883.

On motion by Mr. Lapham, the Senate proceeded to consider, as in Committee of the Whole, the resolution reported by him May 29, 1882, to pay Maria G. Underwood $5,000 in full compensation for expenses of John G. Underwood in prosecuting his claim to a seat in the Senate of the United States.

After debate,

Ordered, That the said resolution be postponed indefinitely.

[The debate is found on pages 3697–3706 of the Congressional Record, vol. xiv, part 4.]

[First session of the Forty-eighth Congress.]

MONDAY, *December* 10, 1883.

On motion by Mr. Hoar,

Ordered, That the petition and papers of Maria G. Underwood, on the files of the Senate, be referred to the Committee on Privileges and Elections.

FRIDAY, *June* 20, 1884.

Mr. Lapham, from the Committee on Privileges and Elections, to whom was referred the petition of Mrs. Maria G. Underwood, administratrix of John C. Underwood, deceased, submitted a report (No. 748) thereon, accompanied by the following resolution for consideration. [Resolution found at end of report.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Hoar (chairman), Cameron of Wisconsin, Sherman, Frye, Lapham, Saulsbury, Vance, Pugh, and Jonas.]

IN THE SENATE OF THE UNITED STATES.

JUNE 20, 1884.—Ordered to be printed.

Mr. Lapham, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the petition of Maria G. Underwood, administratrix of John C. Underwood, deceased, asking payment for salary and mileage of the said John C. Underwood from the 4th of March, 1865, to the 4th of March, 1871, have considered the same, and respectfully report:

That on the 9th day of December, 1864, the petitioner's intestate was duly elected a Senator from the State of Virginia for the term of six years from the 4th day of March, 1865; that he received a certificate of such election in the words and figures following:

VIRGINIA, *to wit:*

The legislature of this State having, on the 9th day of December, 1864, in pursuance of the Constitution of the United States, chosen John C. Underwood, esquire, a Senator from this State for six years from the 4th day of March next, I, Francis H. Peirpoint, being governor of the Commonwealth, do hereby certify the same to the Senate of the United States.

Given under my hand and the seal of the Commonwealth this the 14th day of December, 1864.

[SEAL OF VIRGINIA.] F. H. PEIRPOINT.

By the governor:

W. J. COWING,
Secretary of the Commonwealth.

That the said John C. Underwood duly presented his certificate and credentials as aforesaid, on the 9th day of March, 1865, to the Senate of the United States, and made efforts to obtain his seat in the said Senate, traveling from his home in Virginia to the city of Washington from time to time, and incurred a very considerable expenditure of time and money in so doing; that on the same day of the election of said John C. Underwood one Joseph Segar was also duly elected a Senator from said State and presented his credentials to the Senate; that neither the said Segar nor the said Underwood were admitted to take their seats in the Senate; that the said Segar duly presented his memorial to the Senate during the Forty-fifth Congress, at its second session, asking payment for his salary and mileage as Senator from the 9th of December, 1864, to the 4th of March, 1869, which was referred to the Committee on Privileges and Elections, and the committee recommended the passage of a resolution in words and figures following:

"*Resolved*, That there be allowed and paid out of the contingent fund of the Senate to Joseph Segar the sum of $5,000, in full compensation for his expenses in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia."

Which resolution was adopted by the Senate, and the amount therein named was paid to the said Segar. The report of the committee in Segar's case contained the following statements:

"If the petitioner had been admitted to the seat which he claimed, his salary and mileage would have amounted to more than $21,000. He was not admitted, and having never performed the duties of a Senator, under the most recent precedent he is not entitled to compensation and mileage as such. By the same precedent, if he prosecuted in good faith and on reasonable grounds a claim for such seat, he should be allowed a moderate compensation for the expenses incurred by him in such prosecution."

A majority of the inhabitants of Virginia were opposed to the secession of the State and its union with the confederate government. After the ordinance of secession was adopted, about fifty-five counties in the northwestern portion of the State united in sending delegates to the convention at Wheeling, on the 11th of June, 1861.

* Taken from Senate Reports, 1st sess. 48th Cong., No. 748.

This was done under the advice of the Attorney-General and of President Lincoln, that such counties would be recognized as the lawful government of the State of Virginia if they remained loyal to the Government. The convention thus assembled chose a governor, lieutenant-governor, and council to fill the offices vacated by those who had seceded. John S. Carlile and Waitman T. Willey were chosen United States Senators to occupy the seats vacated by Messrs. Mason and Hunter. They were admitted to their seats in the Senate at the extra session on the 4th of July, 1861. Five members of the House of Representatives were admitted to their seats in that body at the same time, and thus the existence and validity of the government of Virginia were recognized by both Houses of Congress. On the 20th of August, 1861, the convention passed an ordinance to provide for the formation of the State of West Virginia. Delegates from the counties to compose the new State met in convention at Wheeling, framed a constitution for the new State, which was submitted to a vote of the people of said counties in April, 1862, and ratified by an almost unanimous vote.

Governor Peirpoint, the newly installed governor of Virginia, called an extra session of the legislature for the 6th of May, 1862, at which session an act was passed giving the assent of the State of Virginia to the formation of the new State. This consent, with a copy of the proposed constitution, were transmitted to Congress with an application for the admission of West Virginia as a new State. Congress passed an act providing for its admission, which was approved by the President on the 31st of December, 1862, and West Virginia thus became a State in the Union on an equal footing with the original States. The act provided that until the next census the new State should have three members in the House of Representatives. The legislature at Wheeling passed an act authorizing the removal of the seat of government from Wheeling to Alexandria. An election for State officers was held in the fall of 1863. Governor Peirpoint was elected for a full term. Three members of Congress were chosen, and a Senator to take the place of Mr. Willey, who had been elected a Senator from the new State of West Virginia. The Senators and Representatives thus chosen took their seats at the opening of the session of Congress in December, 1863, and continued to hold them until the close of that Congress, on the 4th of March, 1865, except Senator Bowden, who died in the winter of 1865, and Mr. Joseph Segar was chosen to fill his place for the unexpired term.

All the counties represented in the government of Alexandria, as well as those composing the State of West Virginia, were excepted from the proclamation of the President declaring certain States and parts of States in rebellion, and were recognized by the Government as loyal to the United States. The legislature at Alexandria called a convention, which forever abolished slavery in the State of Virginia, and the legislature adopted the thirteenth amendment to the Constitution of the United States. The votes of twenty-seven States were required to make the ratification of the thirteenth amendment valid, and Virginia, under the Alexandria government, made the twenty-seventh.

If Virginia was not a State the thirteenth amendment was never adopted, and slavery has never been legally abolished, nor has West Virginia been constitutionally admitted as a State. In May, 1865, President Johnson issued a proclamation to re-establish the authority of the United States and execute the laws within the limits of the State of Virginia, recognizing Governor Peirpoint as the governor of the State, and directing that he should be aided, so far as might be necessary, in the extension of the State government throughout the limits of the State.

When Congress met in December, 1865, the war had closed, and the State of Virginia, as well the loyal as the disloyal portion, with the other disloyal States, were on some terms to be restored to their relations with the Federal Government. On the first day of the session a resolution was adopted in the House for the appointment of a joint committee of the two Houses to consider that subject and report by bill or otherwise, and providing that until such report no Senator or Member should be admitted to a seat, and that the credentials of all Senators and Members should be referred to said committee. When the resolution came up in the Senate for action Senator Anthony moved to amend the enacting clause so as to make it a concurrent instead of a joint resolution, and also moved to strike out the following words:

"And until such report shall have been made, and final action by Congress on, no member shall be received into either House from any of the so-called Confederate States, and all papers relating to the representation in said States shall be referred to said committee without debate."

Senator Anthony stated that this portion of the resolution was a violation of the Constitution, which made the Senate the exclusive judge of the election returns and qualifications of its own members and also a violation of the practice of the Senate by cutting off debate. Both amendments were adopted by the Senate, and the House concurred in the resolution as amended.

This left Messrs. Segar and Underwood, who had been chosen Senators to represent

Virginia from the 4th of March, 1865, free to press their claims to the seats which had been occupied in the Senate since the reorganization of the State government in 1861. It was their duty to the State to press their claims to such seats, and they would have violated their obligations of honor if they had failed to do so.

The joint committee of the two Houses made no report until the month of June, 1866.

The Senators and Representatives from Tennessee who were denied their seats at the opening of the session were admitted to their seats in the month of July, 1866.

The Senators-elect from Virginia had a right to expect the same results, and in good faith pressed their claims for recognition.

The portion of Virginia from which they were elected was expressly excepted from the President's proclamation declaring the inhabitants of certain States to be in rebellion, also in the proclamation of emancipation and in the amnesty proclamation.

In the proclamation of emancipation Virginia was included, except the forty-eight counties designated as West Virginia, and also the counties of Berkeley, Accomac, Northampton, Elizabeth City, York, Princess Anne, and Norfolk, including the cities of Norfolk and Portsmouth. These formed the State of Virginia, after the cession of West Virginia, and had a population entitling the State to three Representatives in the House. They had abolished slavery in 1864, and as to them the proclamation was unnecessary.

The government of Virginia, as organized in 1861, continued its functions, notwithstanding the reconstruction acts, until Governor Peirpoint's term expired in April, 1868. The convention that framed the new constitution in 1867 expressly validated and recognized as binding all the legislative and judicial acts of the State of Virginia during this whole period.

Still later on, in an action brought by the State of Virginia against West Virginia, the Supreme Court of the United States affirmed the validity of the State government of Virginia and held that its assent in annexing three counties to West Virginia, which were not included in the original cession, was valid and binding upon the State.

Upon these facts and upon the precedents long established, it seems to your committee that Messrs. Segar and Underwood would be entitled to their full salaries as Senators. Mr. Sykes, of Alabama, who had been elected by a legislature pronounced by the Senate as illegal, was allowed his compensation and mileage from March, 1873, to May, 1874, the day he was denied his seat. Mr. Pinchback was allowed pay from March, 1873, when he was elected, to March, 1876, when he was refused a seat, aggregating $16,966.90.

The practice of the Senate, however, in this respect has been modified, and in the cases of Ray and McMillen a compensation for reasonable and moderate expenses only was allowed. Following this rule, the Senate allowed Mr. Segar the sum of $5,000 for his expenses incurred in the prosecution of his claim without an itemized or detailed account of the same.

The fact that Mr. Underwood held and was receiving a salary to another office constitutes no objection to such allowance. Members of the House of Representatives and of the Senate have been granted such allowances while at the same time drawing their salaries. Messrs. Kellogg, Ingalls, and Butler were paid their expenses under similar circumstances. If it was the duty of Judge Underwood to make an effort to obtain his seat he should be paid his expenses, although he could not accept the seat when awarded to him without vacating his other office.

The cases of said Underwood and Segar are alike in all respects, except the terms for which they were chosen. It is true no actual service as Senator was rendered by either, but each stood ready to perform his duties whenever the Senate should allow it; that the said Underwood performed no such service was the fault of the Senate, not his. The precedents fully justify the allowance to said Segar and the allowance asked by the petitioner. The House of Representatives has frequently paid large sums of money to unsuccessful contestants for seats in that body; and the Senate, at the same session during which the allowance was made to Segar, also paid Messrs. Ray and McMillen although neither of them were allowed to occupy their seats in the Senate. The valuable services rendered by said Underwood to the Government in its struggle for national supremacy are matters of history and need not here be repeated. We think the sum allowed and paid to Mr. Segar is a precedent which should be followed in this case, and recommend the passage of the accompanying resolution:

Resolved, That there be allowed and paid out of the contingent fund of the Senate to Maria G. Underwood, administratrix of John C. Underwood, deceased, the sum of $5,000, in full compensation for the time and expenses of the said John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia.

SATURDAY, *July* 5, 1884.

On motion by Mr. Lapham, the Senate proceeded to consider the resolution reported from the Committee on Privileges and Elections June 20, 1884, to pay Maria G. Under-

wood, widow of John C. Underwood, the sum of $5,000, in full compensation for expenses of said John C. Underwood in prosecuting his claim to a seat in the Senate.

After debate,

On motion by Mr. Plumb, the Senate proceeded to consider bill S. 2203, &c.

[The debate is found on pages 6067–6070 of the Congressional Record, vol. xv, part 6.]

[Second session of the Forty-eighth Congress.]

FRIDAY, *February* 20, 1885.

Mr. Lapham submitted the following resolution for consideration:

"*Resolved*, That there be paid out of the contingent fund of the Senate to Alice E. Underwood, executrix of the last will and testament of Maria G. Underwood, administratrix of John C. Underwood, deceased, the sum of $5,000, in full compensation for the time and expense of the said John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia."

SATURDAY, *February* 21, 1885.

The Presiding Officer (Mr. Allison in the chair) laid before the Senate the resolution yesterday submitted by Mr. Lapham, to pay the executrix of the widow of John C. Underwood his expenses in prosecuting his claim to a seat in the Senate; and the resolution was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

THURSDAY, *February* 26, 1885.

Mr. Jones, of Nevada, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted by Mr. Lapham on the 20th instant, to pay the heirs of John C. Underwood the amount of his expenses in contesting his right to a seat in the Senate, reported it without amendment.

[Special session of Senate, March, 1885.]

TUESDAY, *March* 10, 1885.

Mr. Hoar submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That there be allowed and paid out of the contingent fund of the Senate, to Alice G. Underwood, executrix of the last will and testament of Maria G. Underwood, administratrix of John C. Underwood, deceased, the sum of $5,000, in full compensation for the time and expenses of the said John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia."

THURSDAY, *March* 19, 1885.

Mr. Chace, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted by Mr. Hoar on the 10th instant, to pay the expenses of the late John C. Underwood in prosecuting his claim to a seat in the Senate, reported it without amendment.

[First session of the Forty-ninth Congress.]

APRIL 21, 1886.

On motion by Mr. Hoar,

The Senate proceeded to consider the resolution submitted by him March 10, 1885, to pay the expenses of John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia; and

Resolved, That there be allowed and paid out of the contingent fund of the Senate, to Alice C. Underwood, executrix of the last will and testament of Maria G. Underwood, administratrix of John C. Underwood, deceased, the sum of $5,000, in full compensation for the time and expenses of the said John C. Underwood in prosecuting his claim to a seat in the Senate as a Senator from the State of Virginia.

[Thirty-ninth Congress—First session.]

JOHN P. STOCKTON,

Senator from New Jersey from March 4, 1865, till March 27, 1866, and from March 4, 1869, till March 3, 1875.

Mr. Stockton's credentials were presented and he took his seat in the Senate December 4, 1865 At the same time a memorial of members of the legislature protesting against his admission to a seat in the Senate was presented and ordered to lie on the table. January 8, 1866, the credentials and memorial were referred to the Committee on the Judiciary. January 30 the committee reported that the facts in regard to Mr. Stockton's election were as follows: There was no law in New Jersey prescribing the "manner" of electing Senators, other than that they "shall be appointed by the senate and general assembly in joint meeting assembled." The joint meeting electing Mr. Stockton passed a resolution that the candidate receiving a plurality of votes of the members present should be declared duly elected. The joint assembly consisted of eighty-one members. All were present when the vote for Senator took place. Mr. Stockton received 40 votes and Mr. Ten Eyck and other persons 41. The question before the Senate was whether a joint convention could prescribe a plurality rule. The committee reported that for the purpose of choosing Senators the joint convention is regarded as the legislature, so that it is vested by the Constitution of the United States with authority to prescribe the manner of electing Senators; and recommended the adoption of a resolution that Mr. Stockton was entitled to his seat. Some Senators maintained that in the absence of any law a majority was by the parliamentary law of the land necessary to constitute a valid election, and that the legislature alone, acting in a legislative capacity through its two branches separately, was competent to prescribe that a plurality should elect. March 23 the resolution reported by the committee passed the Senate, Mr. Stockton voting, by a vote of 22 yeas to 21 nays. March 26 the Senate voted to reconsider the vote agreeing to the resolution. It then resolved "that the vote of Mr. Stockton be not received in determining the question of his seat in the Senate." March 27 the Senate resolved by a vote of 23 yeas to 20 nays that Mr. Stockton was not entitled to his seat.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 1st sess. 39th Cong., and the report of the committee, with the exception of certain accompanying documents, from Senate Reports, 1st sess 39th Cong., No. 4.

Special references to the debates of each day, which are found in the Congressional Globe, part 1 1st sess. 39th Cong., are inserted below.

MONDAY, *December* 4, 1865.

Mr. Wright presented the credentials of the Hon. John P. Stockton, elected a Senator by the legislature of the State of New Jersey for the term of six years commencing on the 4th day of March, A. D. 1865.

The credentials were read and the oaths prescribed by law were administered to Mr. Stockton, and he took his seat in the Senate.

Mr. Cowan presented a memorial of members of the senate and house of representatives of the State of New Jersey protesting against the admission of the Hon. John P. Stockton to a seat in the Senate as a Senator from that State.

Ordered, That it lie on the table.

MONDAY, *January* 8, 1866.

On motion by Mr. Cowan,

Ordered, That the credentials of the Hon. John P. Stockton, United States Senator from the State of New Jersey, together with the memorial of the members of the senate and house of assembly of the State of New Jersey protesting against the admission of the Hon. John P. Stockton to a seat in the United States Senate as a Senator from that State, be referred to the Committee on the Judiciary.

TUESDAY, *January* 30, 1866.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. John P. Stockton, elected a Senator by the legislature of the State of New Jersey, and the protest of certain members of the legislature of the said State against the validity of his election, submitted a report (No. 4), accompanied by the following resolution:

"*Resolved*, That John P. Stockton was duly elected, and is entitled to his seat, as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865."

Ordered, That the report, with the accompanying credentials and protest, be printed.

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Trumbull (chairman), Harris, Clark, Johnson, Poland, Stewart, and Hendricks.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 30, 1866.—Ordered to be printed.

Mr. Trumbull submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of John P. Stockton, claiming to have been elected a Senator from the State of New Jersey for six years from the 4th day of March, 1865, together with the protest of certain members of the legislature of said State against the validity of his election, submit the following report:

The only question involved in the decision of Mr. Stockton's right to a seat is whether an election by a plurality of votes of the members of the legislature of New Jersey in joint meeting assembled, in pursuance of a rule adopted by the joint meeting itself, is valid. The protestants insist that it is not, and they deny Mr. Stockton's right to a seat, because, as they say, he was not appointed by a majority of the votes of the joint meeting of the legislature.

The legislative power of the State of New Jersey is vested by the State constitution in a senate and general assembly, which are required, for legislative purposes, to meet separately, but which, for the appointment of various officers, are required to assemble in joint meeting; and when so assembled, are, by the constitution itself, styled the "legislature in joint meeting."

The constitution of New Jersey does not prescribe the manner of choosing United States Senators; as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature; but it does constitute the two houses one body for the purpose of appointing certain State officers. The statute of New Jersey declares that "United State Senators, on the part of that State, shall be appointed by the senate and general assembly in joint meeting assembled;" but it does not prescribe any rules for the government of the joint meeting, nor declare the manner of election.

The practice in New Jersey has been for the joint meeting to prescribe the rules for its own government.

In 1794 fifteen rules were adopted, the first two of which are as follows:

"1. That the election of State officers during the present session be *viva voce*, unless when otherwise ordered; and that all officers be put in nomination at least one day before their election.

"2. That the chairman shall not be entitled to vote except in case of a tie, and then to have a casting vote."

The other thirteen rules related chiefly to the method of conducting the proceedings. Each joint meeting which has since assembled has adopted its own rules, usually those of the preceding joint meeting, sometimes, however, with additions or exceptions.

In 1851 the following additional rule was adopted:

"*Resolved*, That no person shall be elected to any office, at any joint meeting during the present session, unless there be a majority of all the members elected personally present, and agreeing thereto."

In 1855 the joint meeting, after adopting the fifteen rules of the preceding joint meeting, added the following:

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

The joint meeting of 1861 adopted the rules of the preceding joint meeting for its own government, among which were the following:

"1. That the election of State officers during the present session be *viva voce*, unless when otherwise ordered.

"15. That in all questions the chairman of the joint meeting be called upon to vote in his turn as one of the representatives in the senate or assembly; but that he have no casting vote as chairman.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared to be duly elected."

The same rules were adopted by each joint meeting from 1861 to 1865.

The joint meeting which assembled February 15, 1865, and at an adjourned session of which Mr. Stockton was appointed Senator, adopted, at its first meeting, the rules of

* A reference to the documents accompanying the report is given in the head-note.

the preceding joint meeting, except the sixteenth rule, in lieu of which the following was adopted:

"*Resolved*, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature."

After having appointed various officers under the rules which had been adopted at the assembling of the joint meeting, the following rule was adopted:

"*Resolved*, That the vote for county judges and commissioners of deeds be taken by acclamation, and that the counties in which vacancies exist be called in alphabetical order."

Acting under this rule, quite a number of officers were appointed by acclamation. Not completing its business the joint meeting adjourned from time to time till March 15, when the following rule was adopted:

"*Resolved*, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature be rescinded, and that any candidate receiving a plurality of votes of the members present shall be declared duly elected."

Every member of both houses, eighty-one in all, was present and voting when the above resolution was passed, and it was carried by a vote of 41 in the affirmative, of whom eleven were senators and thirty representatives, to 40 in the negative, of whom ten were senators and thirty representatives. The joint meeting then proceeded to the election of a United States Senator, with the following result:

Hon. John P. Stockton, 40 votes; Hon. J. C. Ten Eyck, 37 votes; J. W. Wall, 1 vote; P. D. Vroom, 1 vote; F. T. Frelinghuysen, 1 vote; H. S. Little, 1 vote.

Whereupon John P. Stockton, having received a plurality of all the votes cast, was declared duly elected. The joint meeting then proceeded to the election of various other officers, having completed which, it rose.

The credentials of Mr. Stockton are under the great seal of state, signed by the governor and in due form. No objection appears to have been made at the time to the election. Its validity is now called in question by a protest dated March 20, 1865, and signed by eight senators and thirty members of the general assembly. The Constitution of the United States declares that the Senate of the United States "shall be composed of two Senators from each State, chosen by the legislature thereof," and that "the times, places, and manner of holding election for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The right to choose United States Senators in a joint meeting of the two houses which compose the legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning, and is now the manner in most of them.

For the purpose of choosing United States Senators the joint meeting of the two houses is regarded as the legislature, and especially would this be so in New Jersey, where the joint meeting is by the constitution of the State denominated a legislature. It has uniformly been held that when the two branches of a legislature meet in joint convention to elect a United States Senator they are merged into one and act as one body, so that an election may be effected against the entire vote of the members of one house if the person voted for receive the requisite number of votes from members of the other. It being, then, settled that the two houses of a legislature in joint meeting assembled constitute the legislature, vested by the Constitution of the United States with authority, acting as one body, to elect a Senator, the question is: Did the joint meeting of the senate and general assembly of New Jersey, duly convened in pursuance of a resolution previously concurred in by each house separately, choose John P. Stockton United States Senator?

That it was competent for a plurality to elect, if a law to that effect had been prescribed by competent authority, will hardly be questioned. This is the rule very generally, if not universally, adopted in the election of members of the House of Representatives, who are "chosen every second year by the people of the several States," and no one questions the validity of the election of a Representative by a plurality vote when the law authorizes a plurality to elect. It is however insisted, and truly, that no law of New Jersey authorizes a plurality to elect. The laws of New Jersey are silent on this subject, but they do authorize a joint meeting of the two houses of the legislature to appoint a Senator, and it has been the uniform practice of this joint meeting since the foundation of the Government to prescribe the rules for its own government. These rules as to the number of votes necessary to effect an election have varied at different times, sometimes requiring a majority of all the members elected to both houses of the legislature, sometimes a majority only of those present, and in the case under consideration only a plurality.

Suppose, under the rule first stated, but seventy-nine members had been present in the joint meeting, and forty had voted for the same person, would he have been elected; and

if not, why not? Seventy-nine out of eighty-one would have constituted a quorum, and forty would have been a majority of those present. The only reason why such a vote would not have made an election would be the existence of the rule adopted by the joint meeting, declaring that "no candidate should be elected unless receiving a majority of the votes of all the members elected to both houses of the legislature." While that rule was in force no presiding officer would have thought of declaring a candidate elected, nor would any candidate have supposed himself elected because he received a majority of the votes cast, unless such majority was a majority of all the members elected to the legislature. Under the other rule, "that a person receiving a majority of the votes of those present should be declared elected," who would doubt the validity of an election by 31 out of 60 votes if only so many had been cast? If the joint meeting had the right to prescribe at one time that it should require a majority of all elected to the legislature to elect, at another time that a majority of those present might elect, and at still another time that elections might be had by acclamation, it had the right to prescribe that a plurality should elect; and when any candidate received a plurality he thereupon became elected, not simply by the will of those who voted for him, but by the will of the joint meeting, which had previously, by a majority vote, resolved that such plurality should elect.

It might be urged in this case, with much plausibility, that inasmuch as the constitution of New Jersey recognizes the two houses in joint meeting as a legislature, that such joint meeting was the very body on whom the Constitution of the United States had conferred the power to prescribe "the times, places, and manner of holding elections for Senators;" but your committee prefer placing the authority of the joint meeting to prescribe the plurality rule on the broader ground that in the absence of any law, either of Congress or the State, on the subject, a joint meeting of the two houses of a legislature, duly assembled and vested with authority to elect a United States Senator, has a right to prescribe that a plurality may elect, on the principle that the adoption of such a rule by a majority vote in the first instance makes the act, subsequently done in pursuance of such majority vote, its own.

The committee recommend for adoption the following resolution:

Resolved, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865.

THURSDAY, *March* 22, 1866.

On motion by Mr. Trumbull, the Senate proceeded to consider the resolution reported by the Committee on the Judiciary on the 30th of January, on the right of the Hon. John P. Stockton to a seat in the Senate of the United States as a Senator from the State of New Jersey; which resolution is as follows:

"*Resolved*, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865."

On motion by Mr. Clark to amend the resolution in line 1, by inserting after the word "was" the word "not," and after the word "is" the word "not," and,

After debate and the consideration of executive business, the Senate adjourned.

[The debate is found on pages 1564–1573 of the Congressional Globe referred to in the head-note.]

FRIDAY, *March* 23, 1866.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary on the 30th of January, on the right of the Hon. John P. Stockton to a seat in the Senate of the United States as a Senator from the State of New Jersey; which resolution is as follows:

"*Resolved*, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865."

After debate, on the question to agree to the amendment proposed by Mr. Clark to the resolution, to wit, in line 1 insert after the word "was" the word "not," and after the word "is" the word not," it was determined in the negative—yeas 19, nays 21.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, and Yates.

Those who voted in the negative are Messrs. Anthony, Buckalew, Cowan, Davis, Foster, Guthrie, Harris, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Riddle, Saulsbury, Stewart, Trumbull, and Willey.

So the amendment was not agreed to.

On the question to agree to the resolution, it was determined in the affirmative—yeas 22, nays 21.

On motion by Mr. Fessenden, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Cowan, Davis, Foster, Guthrie, Harris, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Riddle, Saulsbury, Stewart, Stockton, Trumbull, and Willey.

Those who voted in the negative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Howe, Kirkwood, Lane of Indiana, Morrill, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, Wilson, and Yates.

So it was

Resolved, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865.

[The debate is found on pages 1589–1602 of the Congressional Globe referred to in the head-note.]

MONDAY, *March* 26, 1866.

A motion was made by Mr. Sumner that the Journal of Friday, 23d March, 1866, be amended by striking out the vote of Mr. Stockton on the question of his right to a seat in the Senate.

Pending debate thereon, the following message was received, &c.

* * * * * * *

After further debate,

Mr. Sumner asked and obtained leave of the Senate to withdraw his motion; and,

The motion having been withdrawn,

On motion by Mr. Poland that the Senate reconsider its vote on Friday last agreeing to the following resolution:

"*Resolved*, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865,"

It was determined in the affirmative; and

The question recurring upon said resolution,

Mr. Sumner, by unanimous consent, submitted the following resolution:

"*Resolved*, That the vote of Mr. Stockton be not received in determining the question of his seat in the Senate."

The Senate proceeded, by unanimous consent, to consider the said resolution; and

On motion by Mr. Sumner that the resolution be referred to the Committee on the Judiciary, with instructions to report on Thursday next, it was determined in the negative—yeas 18, nays 22.

On motion by Mr. Johnson, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Cowan, Davis, Guthrie, Harris, Hendricks, Johnson, Lane of Kansas, McDougall, Nesmith, Norton, Riddle, Saulsbury, Sherman, Trumbull, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Foster, Grimes, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Poland, Pomeroy, Ramsey, Sprague, Sumner, Wade, Wilson, and Yates.

On the question to agree to the resolution, it was determined in the affirmative.

So it was

Resolved, That the vote of Mr. Stockton be not received in determining the question of his seat in the Senate.

The question again recurring upon the resolution affirming the right of the Hon. John P. Stockton to his seat in the Senate,

On motion by Mr. Johnson that the further consideration of the resolution be postponed to Thursday next,

After debate,

On motion by Mr. Trumbull, the Senate adjourned.

[The debate is found on pages 1635–1648 of the Congressional Globe referred to in the head-note.]

TUESDAY, *March* 27, 1866.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, affirming the right of the Hon. John P. Stockton to his seat as a Senator rom the State of New Jersey; and

After debate,

On the question to agree to the motion, yesterday submitted by Mr. Johnson, that the

further consideration of the resolution be postponed to Thursday next, it was determined in the negative—yeas 18, nays 23.

On motion by Mr. Johnson, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Cowan, Davis, Guthrie, Harris, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Riddle, Saulsbury, Trumbull, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Foster, Grimes, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, Wilson, and Yates.

So the motion was not agreed to.

The question recurring on the resolution,

On motion by Mr. Clark to amend the resolution by striking out after the word "Stockton," in line 1, the words "was duly elected, and is entitled to his seat as a Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865," and in lieu thereof inserting, "is not entitled to a seat as Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865,"

Mr. Saulsbury raised a question of order, to wit, that the proposed amendment is in effect the same proposition which the Senate had once rejected, and was therefore not in order.

The President *pro tempore* decided that the proposed amendment, being a proposition different in its terms from that upon which the Senate had voted, was not open to the objection raised, and was in order.

After debate,

On motion by Mr. Davis to amend the amendment proposed by Mr. Clark by striking out all after the word ——— in the first line, and in lieu thereof inserting,

"That the legislature of New Jersey having convened in joint meeting to choose a Senator to the Congress of the United States for six years from the 4th of March, 1865, and said legislature in such joint meeting having passed an order that such election should be made by a plurality vote of that joint meeting; and on the first ballot taken by said meeting, John P. Stockton having received 40 out of the 81 votes of the members of both houses of the legislature constituting such legislature in such joint meeting, and every other person voted for a less number, and the presiding officer of said joint meeting having then announced to it that the said John P. Stockton was elected Senator to Congress, and there being no objection or dissent expressed to said annunciation, the said John P. Stockton was duly elected a Senator from said State, and is entitled to hold his seat as such from the 4th of March, 1865,"

It was determined in the negative—yeas 15, nays 27.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Buckalew, Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Morgan, Nesmith, Norton, Riddle, Saulsbury, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Anthony, Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Poland, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Trumbull, Wade, Williams, Wilson, and Yates.

The question recurring on the amendment proposed by Mr. Clark,

On motion by Mr. McDougall that the further consideration of the resolution be postponed to Wednesday next at 1 o'clock, it was determined in the negative—yeas 15, nays 28.

On motion by Mr. McDougall, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Buckalew, Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, McDougall, Morgan, Nesmith, Norton, Riddle, Saulsbury, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Anthony, Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Foster, Grimes, Harris, Henderson, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Poland, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Trumbull, Wade, Williams, Wilson, and Yates.

On the question to agree to the amendment, it was determined in the affirmative—yeas 22, nays 21.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Anthony, Buckalew, Cowan, Davis, Doo-

little, Guthrie, Harris, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Riddle, Saulsbury, Trumbull, Van Winkle, and Willey.

So the amendment was agreed to; and

On the question to agree to the resolution as amended, it was determined in the affirmative—yeas 23, nays 20.

On motion by Mr. Hendricks, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Riddle, Sherman, Sprague, Sumner, Wade, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Anthony, Buckalew, Cowan, Davis, Doolittle, Guthrie, Harris, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Saulsbury, Trumbull, Van Winkle, and Willey.

So it was

Resolved, That John P. Stockton is not entitled to a seat as Senator from the State of New Jersey for the term of six years from the 4th day of March, 1865.

On motion by Mr. Clark that the vote on the passage of the said resolution be reconsidered,

On motion by Mr. Hendricks that the further consideration of the motion to reconsider be postponed to to-morrow at 1 o'clock, it was determined in the negative—yeas 21, nays 22.

On motion by Mr. Hendricks, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Cowan, Davis, Doolittle, Guthrie, Harris, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Riddle, Saulsbury, Trumbull, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, Williams, Wilson, and Yates.

On the question to agree to the motion of Mr. Clark, to reconsider the vote on the passage of the resolution, it was determined in the negative—yeas 20, nays 22.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Cowan, Davis, Doolittle, Guthrie, Henderson, Hendricks, Johnson, Lane of Kansas, McDougall, Morgan, Nesmith, Norton, Poland, Riddle, Saulsbury, Trumbull, Van Winkle, and Willey.

Those who voted in the negative are Messrs. Brown, Chandler, Clark, Conness, Cragin, Creswell, Fessenden, Grimes, Harris, Howard, Howe, Kirkwood, Lane of Indiana, Nye, Pomeroy, Ramsey, Sherman, Sprague, Sumner, Wade, Williams, Wilson, and Yates.

So the Senate refused to reconsider its vote on the passage of the resolution.

[The debate is found on pages 1666–1679 of the Congressional Globe referred to in the head-note.]

[Thirty-ninth Congress—First session.]

DAVID T. PATTERSON,

Senator from Tennessee from July 28, 1866, to March 3, 1869.

July 26, 1866, the credentials of Mr. Patterson, elected to fill the unexpired portion of the term beginning March 4, 1863, were presented and referred to the Committee on the Judiciary, who were instructed to inquire into his qualifications. The following day the committee reported that the only question in relation to his qualifications arose from the fact of his having held the office of circuit judge in the State of Tennessee after that State had passed an ordinance of secession; that his first term of said office having expired after the ordinance of secession was passed, he was induced by Union men to become a candidate for re-election, and was re-elected in May, 1862; that he was himself a "firm, avowed, and influential Union man;" that he allowed himself to become a candidate for re-election "solely upon the motive that he could thereby afford some aid and protection to the Union people;" that the constitution and judicial system of Tennessee remained the same after the secession of the State as before, and that no law was enforced by him as judge except such as were in force before the secession of the State. The committee recommend the adoption of a resolution that Mr. Patterson was duly qualified and entitled to hold the seat. During debate on the adoption of the resolution reported by the committee, a joint resolution was introduced in the Senate that Mr. Patterson be admitted upon his taking so much of the oath prescribed by the act of July 2, 1862, as is not included in the words, "that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States." This joint resolution passed the Senate, but was laid on the table in the House the same day. The Senate then passed the resolution reported by the committee, it having been amended so as to read, "*Resolved*, That the Hon. David T. Patterson, upon taking the oaths required by the Constitution and laws, be admitted to a seat in the Senate of the United States."

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 1st sess. 39th Cong., and the report of the committee, from Senate Reports, 1st sess. 39th Cong., volume 1, No. 139.

Special references to the debates of each day are inserted below.

THURSDAY, *July* 26, 1866.

Mr. Fowler presented the credentials of the Hon. David T. Patterson, elected a Senator by the legislature of the State of Tennessee for the unexpired term of six years commencing on the 4th day of March, 1863.

The credentials were read.

On motion by Mr. Sumner that the credentials be referred to the Committee on the Judiciary with instructions to inquire into the qualifications of Mr. Patterson,

After debate, it was determined in the affirmative—yeas 26, nays 14.

On motion by Mr. Sumner, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Brown, Chandler, Conness, Creswell, Edmunds, Fessenden, Foster, Harris, Henderson, Howard, Howe, Kirkwood, Morgan, Morrill, Nye, Poland, Pomeroy, Ramsey, Ross, Sprague, Stewart, Sumner, Trumbull, Wade, Williams, and Wilson.

Those who voted in the negative are Messrs. Buckalew, Cowan, Davis, Doolittle, Guthrie, Hendricks, Johnson, Lane, McDougall, Nesmith, Norton, Sherman, Van Winkle, and Willey.

So it was

Ordered, That the credentials be referred to the Committee on the Judiciary with instructions to inquire into the qualifications of Mr. Patterson.

[The debate is found on pages 4162–4169 of the Congressional Globe referred to in the head-note.]

FRIDAY, *July* 27, 1866.

Mr. Poland, from the Committee on the Judiciary, to whom were referred the credentials of the Hon. David T. Patterson, elected a Senator by the legislature of the State of Tennessee, with instructions to inquire into the qualifications of Mr. Patterson, submitted a report (No. 139) accompanied by the following resolution:

"*Resolved*, That the Hon. David T. Patterson is duly qualified and entitled to hold a seat in the Senate of the United States from the State of Tennessee."

The Senate proceeded to consider the said resolution; and,

On motion by Mr. Clark to amend the resolution by striking out all after the word "resolved," and inserting in lieu thereof the following:

"That the Hon. David T. Patterson, upon taking the oaths required by the Constitution and laws, be admitted to a seat in the Senate of the United States,"

It was determined in the affirmative; and,

After debate,

Ordered, That the further consideration of the resolution be postponed to to-morrow.

Ordered, That the report be printed.

[The debate is found on pages 4213–4216 of the Congressional Globe referred to in the head-note.]

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Mr. Trumbull asked, and by unanimous consent obtained, leave to bring in a joint resolution (S. 144) in relation to the admission of the Hon. David T. Patterson to a seat in the Senate; which was read the first and second times by unanimous consent, and considered as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That the resolution be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

On the question, Shall the resolution pass? it was determined in the affirmative—yeas 35, nays 2.

On motion by Mr. Wade, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Clark, Conness, Cowan, Creswell, Davis, Doolittle, Edmunds, Foster, Fowler, Guthrie, Harris, Henderson, Hendricks, Howe, Johnson, Kirkwood, Lane, Morgan, Nesmith, Norton, Nye, Poland, Pomeroy, Ramsey, Riddle, Sherman, Stewart, Trumbull, Van Winkle, Willey, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Chandler and Wade.

So it was

Resolved, That the resolution pass, and that the title thereof be as aforesaid.

[This joint resolution was laid on the table in the House.]

[The debate and joint resolution are found on page 4219 of the Congressional Globe referred to in the head-note.]

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On motion by Mr. Poland, the Senate resumed the consideration of the resolution reported by the Committee on the Judiciary for the admission of the Hon. David T. Patterson to a seat in the Senate from the State of Tennessee; and,

On the question to agree to the resolution as amended, on the motion of Mr. Clark,

After debate, it was determined in the affirmative—yeas 21, nays 11.

On motion by Mr. Sumner, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Buckalew, Cowan, Davis, Doolittle, Edmunds, Fessenden, Foster, Guthrie, Harris, Henderson, Howe, Johnson, Kirkwood, Lane, Norton, Poland, Riddle, Sherman, Van Winkle, Willey, and Williams.

Those who voted in the negative are Messrs. Chandler, Creswell, Howard, Nye, Pomeroy, Ramsey, Ross, Sumner, Trumbull, Wade, and Yates.

So it was

Resolved, That the Hon. David T. Patterson, upon taking the oaths required by the Constitution and laws, be admitted to a seat in the Senate of the United States.

[The debate is found on pages 4242–4245 of the Congressional Globe referred to in the head-note.]

SATURDAY, *July* 28, 1866.

The Hon. David T. Patterson, elected a Senator by the legislature of the State of Tennessee for the unexpired term ending March 3, 1869, appeared, and the oaths prescribed by law being administered by the President *pro tempore* to Mr. Patterson, he took his seat in the Senate.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Harris, Clark, Johnson, Poland, Stewart, and Hendricks.]

IN THE SENATE OF THE UNITED STATES.

JULY 27, 1866.—Submitted.

JULY 28, 1866.—Ordered to be printed.

Mr. Poland submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of Hon. David T. Patterson, Senator-elect from the State of Tennessee, with instructions to report whether said Patterson is legally qualified to hold the office of United States Senator

from said State, have had the same under consideration, and respectfully report as follows:

The only question in relation to the qualifications of Mr. Patterson, or his right to hold his seat in the Senate, arises from the fact of his having held the office of circuit judge in the State of Tennessee after that State had passed an ordinance of secession and become a member of the confederacy.

Circuit judges in Tennessee are elected by the people of the several circuits, and hold their offices for the term of eight years.

Judge Patterson was elected judge in one of the circuits in Eastern Tennessee in May, 1854, and his term of office had not expired when the State passed the ordinance of secession. The constitution of the State of Tennessee remained the same after the secession of the State as before, and there was no change made in the form of the State government, or in their judicial system. A large majority of the people of East Tennessee were ardently devoted to the Union and deemed it very important for their interest and that of the Union cause that the civil offices in that section of the State should be filled with Union men.

Judge Patterson was a firm, avowed, and influential Union man, and he was urgently pressed by the Union men of that circuit to run as a candidate for re-election as circuit judge, and he finally, though reluctantly, consented to do so. The opposing candidate was an avowed secessionist, and the issue in the election was between Union and secession. The election was held in May, 1862, and Judge Patterson was elected over his rebel competitor by a large majority. At the same election most of the local offices in that section were filled by the election of Union men. At that time it was believed by the Union men of East Tennessee that they would soon be relieved from rebel military rule by the arrival of Union forces; and they desired also to retain the civil power in their own hands. In this expectation they were disappointed, and soon rebel bands were scattered through that region, and the Union people were subjected to great hardships and cruel oppression. When Judge Patterson was thus re-elected judge he did not suppose he would be commissioned by the governor of the State, who was a secessionist; but, after some considerable delay, a commission was sent to him with peremptory orders to take the oath. On the receipt of his commission and order to take the oath, Judge Patterson delayed and hesitated, and consulted other leading Union men as to the proper course for him to take. They advised and urged him to take the oath; that he could thereby afford protection to some extent to Union men against acts of lawless violence on the part of the rebels, and that if he did not accept the office and take the oath the office would be filled by a rebel, and they would then be oppressed by the civil as well as the military power of the rebels. Judge Patterson yielded to their urgency and arguments, and went before a magistrate and took the oath which the Tennessee legislature had prescribed, which, in substance, was that he would support the constitution of Tennessee and the constitution of the Confederate States. Judge Patterson declared at the time to the magistrate that he owed no allegiance to the confederate government, and that he did not consider that part of the oath as binding him at all. At this time there were rebel troops in the neighborhood, and Judge Patterson had good reason to believe that his refusal to take the oath would subject him to arrest and imprisonment, if not worse treatment; but we do not find that he was actuated at all by personal considerations, but acted solely upon the motive that he could thereby afford some aid and protection to the Union people, and also prevent the office from falling into hands that would use it to oppress them.

East Tennessee at this time was in a very disturbed and distracted condition. The country was full of bands of armed rebels, and lawless violence held sway. Business was nearly suspended, and no civil business was done in the courts. Judge Patterson held a few terms of court in counties where he could organize grand juries of Union men, and in this way did something toward preserving peace and order in the community. No other business was done by him as judge after his election in 1862.

During all this time Judge Patterson was an open, avowed, and devoted adherent to the Union. He was in constant communication with the officers of the Federal troops nearest that vicinity, and obtained and furnished to them information as to the movements of the rebels. He aided in concealing Union men, and in facilitating their escape to the Union lines, when they generally entered the Union service. He aided the Union people and the Union cause in every way open to him, and too numerous for detail. By these means he became amenable to the hostility of the secessionists, and was subjected to great difficulty and danger. He was several times arrested and held for some time in custody. At times he was obliged to conceal himself for safety, and spent nights in outbuildings and in the woods to avoid their vengeance.

In September, 1863, the Federal troops reached Knoxville, and Judge Patterson succeeded in escaping with his family to that place, and did not return to his home until after the close of the rebellion.

As before stated, the constitution and election laws and judicial system of Tennessee remained the same after the secession of the State as before, and Judge Patterson was elected judge the last time under the same State constitution and laws as existed at his first election, and no laws were enforced by him as judge except such as were in force before the secession of the State.

The committee are all satisfied that during the entire rebellion Judge Patterson was an earnest, firm, and devoted Union man, and suffered severely in support of his principles. In accepting the office of judge, and taking the official oath, he did not intend any hostility to the authority or Government of the United States, nor did he intend to acknowlege any allegiance to, or any friendship for, the confederate government, but acted throughout with a sincere desire to benefit and preserve the Union and the Government of the United States. He always denied the authority of the confederate government over him, and feels an entire willingness and ability to take the oath required upon his admission to a seat in the Senate. The committee recommend the following resolution:

Resolved, That the Hon. David T. Patterson is duly qualified and entitled to hold a seat in the Senate of the United States as a Senator from the State of Tennessee.

[Fortieth Congress—First and second sessions.]

PHILIP F. THOMAS,

of Maryland.

March 18, 1867, the credentials of Mr. Thomas, elected for the term beginning March 4, 1867, were presented. The following day the credentials were referred to the Committee on the Judiciary, who were authorized by a resolution of March 20 to send for persons and papers. December 18, the committee submitted the evidence taken, and reported that they found nothing sufficient to debar Mr. Thomas from his seat unless it be found in the fact of his son having entered the service of the confederacy, and in the circumstances connected therewith, in regard to which point the committee express no opinion. A resolution was then submitted that Mr. Thomas be admitted to the seat. February 20, 1868, the Senate resolved that Mr. Thomas "having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States" was not entitled to take the oath of office or hold the seat. Some Senators maintained that in a case of doubt, where there is absence of evidence showing conclusively that a person had thus voluntarily given aid, &c., the person should be admitted if willing to take the oath of office. Extracts from speeches given below show the conduct of Mr. Thomas which was claimed to be "voluntarily giving aid," &c.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 40th Cong.; the report of the committee from Senate Reports, 40th Cong., 2d sess., No. 5, with the exception of the evidence and documents printed with it; and extracts from speeches from Congressional Globe, 2d sess. 40th Cong., part 1, page 679, and part 2, page 1145.

Special references to the debates of each day are inserted below.

MONDAY, *March* 18, 1867.

Mr. Johnson presented the credentials of the Hon. Philip F. Thomas, elected a Senator by the legislature of the State of Maryland for the term of six years commencing on the 4th day of March, 1867; which were read.

On motion by Mr. Howard that the credentials be referred to the Committee on the Judiciary,

After debate,

On motion by Mr. Grimes,

Ordered, That the further consideration of the motion be postponed to to-morrow.

[The debate is found on pages 171–180 of the Congressional Globe, 1st sess. 40th Cong.]

TUESDAY, *March* 19, 1867.

The Senate resumed the consideration of the motion of Mr. Howard of yesterday, to refer the credentials of the Hon. Philip Francis Thomas, elected a Senator by the legislature of the State of Maryland, for the term commencing on the 4th day of March, 1867, to the Committee on the Judiciary; and the motion was agreed to.

WEDNESDAY, *March* 20, 1867.

Mr. Howard submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on the Judiciary, to whom have been referred the credentials of Hon. P. F. Thomas, lately chosen a Senator of the United States by the legislature of Maryland, be authorized to send for persons and papers for the purposes of said reference."

WEDNESDAY, *March* 27, 1867.

Mr. Howard presented a letter from the president of the National Bank of Commerce of New York, addressed to him, accompanied by the annual statement to the shareholders of the Bank of Commerce, in New York, May 12, 1862; which was referred to the Committee on the Judiciary.

[A statement by Mr. Howard is found on page 372 of the Congressional Globe, 1st sess. 40th Cong.]

TUESDAY, *April* 2, 1867.

Mr. Johnson presented a letter addressed to him by the Hon. Philip F. Thomas, Senator-elect from the State of Maryland, relating to a report of the Bank of Commerce to their shareholders, dated March 12, 1862, and presented to the Senate on the 27th of March last by the Hon. Mr. Howard; which, with the accompanying papers, was referred to the Committee on the Judiciary.

[The debate is found on pages 821–824 of the Congressional Globe, 1st sess. 40th Cong.]

WEDNESDAY, *December* 18, 1867.

Mr. Johnson, from the Committee on the Judiciary, to whom were referred on the 20th of March last the credentials of Philip F. Thomas, Senator-elect from the State of Maryland, beg leave to report:

That they have taken the evidence submitted herewith, and that they find nothing sufficient, in the opinion of the committee, to debar said Thomas from taking his seat, unless it be found in the fact of the son of said Thomas having entered the military service of the confederacy, and in the circumstances connected with that fact or relating to it, and without the expression of an opinion in regard to this point, they report the whole evidence to the Senate.

[The committee consisted of Messrs. Trumbull, Stewart, Frelinghuysen, Edmunds, Conkling, Johnson, and Hendricks.]

On motion by Mr. Johnson,

Ordered, That the report and accompanying evidence be printed.

Mr. Johnson submitted the following resolution for consideration:

"*Resolved*, That the Hon. Philip F. Thomas, Senator-elect from Maryland, be admitted to his seat on his taking the oaths prescribed by the Constitution and laws of the United States."

Ordered, That it lie on the table, and be printed.

MONDAY, *January* 6, 1868.

On motion by Mr. Johnson, the Senate proceeded to consider the resolution submitted by him on the 18th of December, to admit Philip F. Thomas, a Senator-elect from the State of Maryland, to his seat in the Senate; and,

After debate,

Ordered, That the further consideration of the resolution be postponed to to-morrow.

[The debate is found on pages 320–330 of the Congressional Globe, part 1, 2d sess. 40th Cong.]

MONDAY, *January* 20, 1868.

The Senate resumed the consideration of the resolution submitted by Mr. Johnson on the 18th of December, to admit Philip F. Thomas, Senator-elect from the State of Maryland, to his seat in the Senate; and,

After debate, and the consideration of executive business, the Senate adjourned.

[The debate is found on pages 632–635 of the Congressional Globe, part 1, 2d sess. 40th Cong.]

TUESDAY, *January* 21, 1868.

The Senate resumed, &c.

[The debate is found on pages 653–662 of the Congressional Globe, part 1, 2d sess. 40th Cong.]

WEDNESDAY, *January* 22, 1868.

The Senate resumed, &c.

[The debate is found on pages 678–686 of the Congressional Globe, part 1, 2d sess. 40th Cong.]

WEDNESDAY, *February* 12, 1868.

The Senate resumed, &c.

THURSDAY, *February* 13, 1868.

The Senate resumed the consideration of the resolution submitted by Mr. Johnson on the 18th December last, to admit Philip F. Thomas, Senator-elect from the State of Maryland, to his seat in the Senate.

On motion by Mr. Sumner to amend the resolution by striking out all after the word "resolved," and inserting in lieu thereof the following:

"That Philip F. Thomas, Senator-elect from Maryland, cannot be admitted to take the oath of office required by the Constitution and laws, inasmuch as he allowed his minor son to leave the paternal house to serve as a rebel soldier, and gave him at the time $100 in money, all of which was 'aid,' 'countenance,' or 'encouragement' to the rebellion, which he was forbidden to give; and further, inasmuch as in forbearing to disclose and make known the treason of his son to the President, or other proper authorities, according to the requirement of the statute in such cases, he was guilty of misprision of treason as defined by existing law,"

After debate, the Senate adjourned.

[The debate is found on pages 1144–1156 of the Congressional Globe, part 2, 2d sess. 40th Cong.]

FRIDAY, *February* 14, 1868.

The Senate resumed, &c.

[The debate is found on pages 1165–1177 of the Congressional Globe, part 2, 2d sess. 40th Cong.]

MONDAY, *February* 17, 1868.

The Senate resumed, &c.

[The debate is found on pages 1205–1210 of the Congressional Globe, part 2, 2d sess. 40th Cong.]

TUESDAY, *February* 18, 1868

The Senate resumed, &c.

[The debate is found on pages 1232–1243 of the Congressional Globe, 2d sess. 40th Cong.]

WEDNESDAY, *February* 19, 1868.

The Senate resumed the consideration of the resolution submitted by Mr. Johnson, on the 18th of December last, to admit Philip F. Thomas, Senator-elect from the State of Maryland, to his seat in the Senate; and the question being on the amendment proposed by Mr. Sumner to the resolution,

After debate,

Mr. Sumner withdrew his amendment to the said resolution.

On motion by Mr. Conkling to amend the resolution by striking out all after the word "resolved," and inserting in lieu thereof:

"That, in the judgment of the Senate, Philip F. Thomas, Senator-elect from Maryland, cannot with truth take the oath prescribed by the act of Congress approved July 2, 1862, and that therefore he be not allowed to take said oath,"

After further debate,

Mr. Conkling withdrew his amendment to the said resolution; and

The question then recurred on agreeing to the resolution submitted by Mr. Johnson; and

After further debate, it was determined in the negative—yeas 21, nays 28.

On motion by Mr. Drake, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Fessenden, Frelinghuysen, Grimes, Hendricks, Johnson, Norton, Patterson of Tennessee, Ross, Saulsbury, Tipton, Trumbull, Van Winkle, Willey, and Williams.

Those who voted in the negative are Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Fowler, Harlan, Henderson, Howard, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Wade, Wilson, and Yates.

So the resolution was not agreed to; and

Thereupon

Mr. Drake submitted the following resolution for consideration:

"*Resolved*, That Philip F. Thomas, having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator; and that the President *pro tempore* of the Senate inform the governor of the State of Maryland of the action of the Senate in the premises."

The Senate proceeded to consider the said resolution; and

On the question to agree thereto, it was determined in the affirmative—yeas 27, nays 20.

On motion by Mr. Drake, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cameron, Cattell, Chandler, Conkling, Conness, Corbett, Drake, Ferry, Fowler, Harlan, Henderson, Howard, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Wade, Wilson, and Yates.

Those who voted in the negative are Messrs. Anthony, Bayard, Buckalew, Cole, Davis, Dixon, Doolittle, Fessenden, Frelinghuysen, Hendricks, Johnson, Norton, Patterson of Tennessee, Ross, Saulsbury, Tipton, Trumbull, Van Winkle, Willey, and Williams.

So it was

Resolved, That Philip F. Thomas, having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States, is not entitled to take the oath of office as a Senator of the United States from the State of Maryland, or to hold a seat in this body as such Senator; and that the President *pro tempore* of the

Senate inform the governor of the State of Maryland of the action of the Senate in the premises.

[The debate is found on pages 1260–1271 of the Congressional Globe, part 2, 2d sess. 40th Cong.]

[Extract from remarks of Mr. Doolittle, of Wisconsin, in support of the right of Mr. Thomas, delivered in the Senate January 22, 1868, and found on page 679 of the Congressional Globe, part 1, 2d sess. 40th Cong.]

"Now, Mr. President, the two facts which are relied upon by those who oppose the admission of Mr. Thomas are these: First, that he resigned his office in the Cabinet of Mr. Buchanan; and second, that when his son left him to join the rebellion, he gave his son $100 in money. I maintain that both of those facts are susceptible of a double construction. I admit you may give a construction to either of them which would tend to show his guilt, that he sympathized with or countenanced the rebellion; but I maintain, on the other hand, that both of those facts are entirely consistent with his innocence. Take the first fact, the fact of his resignation. It is said that he resigned his position in the Cabinet of Mr. Buchanan because he did not believe with Mr. Buchanan that he had a right to maintain a military force in the harbor of Charleston. That is what is alleged. Suppose that to be true; does that show that Mr. Thomas was in favor of the rebellion? It shows that Mr. Thomas had a wrong opinion as to the power of this Government. It shows that Mr. Thomas was of opinion that the Government either had not the power or that it would be against good policy for the Government to exert the power by force to hold the harbor of Charleston.

"Do we not know it to be a fact that hundreds and thousands of men from their education were led to believe and did believe that the Government of the United States had not the power by force of arms to hold a State in the Union? The great mass, I may say, of the Southern people were educated in that belief. I have no doubt that a great many persons in the State of Maryland were educated in that belief, and had been for a whole generation. The right of a State to separate from the Union was a doctrine which had been inculcated in all the States of the South, in the universities of the South, in the pulpits of the South, in the press of the South. I may say that a whole generation had been reared under the trainings and teachings of that very doctrine, that a State had a right to withdraw itself from the Union, and that the allegiance which the citizen owed in any State was an allegiance to the State first, and to the Union afterward. I agree that this is a most fatal heresy, a heresy which led to this rebellion, and which bathed the whole land in blood, costing the South two hundred thousand or three hundred thousand of the lives of their ablest and strongest and best, and costing us half a million more. But, sir, it was an opinion entertained by many, and even if Mr. Thomas entertained that opinion I maintain that the holding of that opinion was not of itself treasonable. It did not make him guilty in any respect of the crime of treason, unless he gave his countenance and support to the rebellion.

"What does he say in this letter of resignation? He says that he is not able to concur in the views entertained by President Buchanan 'touching the authority, under existing laws, to enforce the collection of the customs at the port of Charleston.' He states to Mr. Buchanan that he does not agree with him in opinion, and for that reason he proposes to withdraw from the Cabinet. Is there in that fact anything which goes to show that Mr. Thomas was in favor of the rebellion? No, sir. It may show that Mr. Thomas did not believe that we had the power by force of arms then to enforce the collection of the revenues in the harbor of Charleston. You remember that as long ago as 1833 a question arose about enforcing the revenue laws in the harbor of Charleston, and the celebrated force bill was brought forward and passed in 1832 or 1833, I believe. But that law was not standing upon the statute-book in 1860. That law was only temporary, and Mr. Thomas may have been of the opinion that it required new legislation on the part of Congress before you could resort to force to collect the duties in the harbor of Charleston; and because he disagreed with Mr. Buchanan, rather than embarrass him he tendered his resignation and retired from the Cabinet. I insist that this act of Mr. Thomas is susceptible of a construction in accordance with his entire innocence of any connection with the rebellion.

"Then, as to the other fact—the fact that he gave to his son on the morning when he left home $100 in money—I agree that if he gave that money to his son with a view to aid him on his way to the rebellion it would be susceptible of a construction which would make him guilty of aiding the rebellion. But, sir, what are the facts stated? His son states that he had made his arrangements to go, that he had determined to go, that he informed his father that he was then ready to go, and would go. The father told him the ground, and the only ground, upon which he gave him this money. It was not to aid him to go to the rebellion, but that in case he was imprisoned or in suffering he might have a sum of money with him. It was the prompting of his paternal heart,

while with tears in his eyes he was protesting against his son going. I submit that this is susceptible of two constructions; and if it be susceptible of two constructions, one of which is consistent with his innocence, we are bound, in the ordinary charity which administers justice among men, to give to it the innocent rather than the guilty construction.

"Mr. President, we may establish here a precedent of the most dangerous character. When the person elected, against whose veracity I believe no one has ever raised a question, whose private character as an individual stands above reproach, comes here and is ready in the presence of this Senate and of Almighty God to put his hands upon the Gospels and take the oath that he never did countenance or aid the rebellion in any way whatever, I say, in the absence of any evidence which goes to show conclusively, against any reasonable doubt, that he is guilty, we are bound to receive him. We tender this oath to him; we make him the witness in the case. In equitable proceedings, if a party chooses to make the other party his witness, he is bound by his testimony. And I say if we choose to put this oath to the applicant and call him here to swear whether he is loyal to the Government of the United States or not, and if he is willing to do it, knowing him as we do, his character as it stands before us being above reproach as an individual, what right have we not to believe the statement which he makes if the facts which appear are susceptible of a construction in accordance with innocence rather than with guilt?"

[Extract from remarks of Mr. Sumner, of Massachusetts, against the right of Mr. Thomas, delivered in the Senate February 13, 1868, and found in the Congressional Globe, part 2, 2d sess. 40th Cong., page 1145.]

"A great debate on the question how loyalty shall be secured in the rebel States is for the time silenced in order to consider how loyalty shall be secured in this Chamber Everywhere in the rebel States disloyal persons are struggling for power; and now at the door of the Senate we witness a similar struggle. If disloyalty cannot be shut out of this Chamber, how can we hope to overcome it elsewhere?

"More than once at other times I have discussed the question of loyalty in the Senate. But this was anterior to the adoption of the fourteenth constitutional amendment. The case is plainer now than then, inasmuch as there is now an explicit text requiring loyalty as a 'qualification.' Formerly we were left to something in the nature of inference; now the requirement is plain as language can make it. By the new amendment it is provided that 'no person shall be a Senator or Representative in Congress who, having previously taken an oath as a member of Congress, or as an officer of the United States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.'

"These words are precisely applicable to the present case. They lay down a rule from which there is no appeal; and this rule is not merely in the statutes, but in the Constitution. It is the plain declaration that loyalty is a requirement in a Senator and Representative. If we do not apply it to ourselves now it is difficult to see with what consistency we can apply it to others. Your course here will affect the meaning of this constitutional amendment, if not its validity for the future.

"I do not stop to argue the question, if that amendment is now a part of the Constitution; for I would not unnecessarily occupy your time, nor direct attention from the case which you are to decide. For the present I content myself with two remarks: first, the amendment has already been adopted by three-fourths of the States that took part in proposing it, and this is enough, for the spirit of the Constitution is thus satisfied; and, secondly, it has already been adopted by 'the *legislatures* of three-fourths of the several States' which have legislatures, thus complying with the letter of the Constitution. Therefore by the spirit of the Constitution, and also by its letter, this amendment is now a part of the Constitution, binding on all of us. As such I invoke its application to this case. In face of this positive peremptory requirement it is impossible to see how loyalty can be other than a 'qualification.' In denying it you practically set aside this amendment.

"But even without this amendment, I cannot doubt that the original text is sufficiently clear and explicit. It is nowhere said in the Constitution that certain specified requirements and none others shall be 'qualifications' of Senators. The word 'qualifications,' which plays such a part in this case, occurs in another connection, where it is provided that 'each House shall be the judge of the elections, returns, and *qualifications* of its own members.' What these 'qualifications' may be is to be found elsewhere. Searching the Constitution from beginning to end we find three 'qualifications,' which come under the head of *form*, being (1) age, (2) citizenship, and (3) inhabitancy in the State. But behind and above these is another 'qualification,' which is of *substance*, in contradiction to *form* only. So supreme is this that it is placed under the safeguard of an oath. This is loyalty. It is easy to see how infinitely more important is this than either of the others—

than age, than citizenship, or than inhabitancy in the State. A Senator failing in either of these would be incompetent by the letter of the Constitution; but the Republic might not suffer from his presence. On the other hand, a Senator failing in loyalty is a public enemy, whose presence in this council Chamber would be a certain peril to the Republic.

"It is vain to say that loyalty is not declared to be a 'qualification.' I deny it. Loyalty is made a 'qualification' in the amendment to the Constitution; and then again in the original text, when in the most solemn way possible it is distinguished and guarded by an oath. Men are familiarly said to 'qualify' when they take the oath of office, and thus the language of common life furnishes an authentic interpretation to the Constitution.

"But no man can be allowed to take the oath as Senator when, on the evidence before the Senate, he is not competent. If it appear that he is not of sufficient age, or of the required citizenship or inhabitancy, he cannot be allowed to go to that desk. Especially if it appear that he fails in the all-important 'qualification' of loyalty, he cannot be allowed to go to that desk. A false oath, taken with our knowledge, would compromise the Senate. We who consent will become parties to the falsehood. We shall be parties in the offense. It is futile to say that the oath is one of purgation only, and that it is for him who takes it to determine on his conscience if he can take it. The Senate cannot forget the evidence; nor can its responsibility in the case be swallowed up in any process of individual purgation. On the evidence we must act and judge accordingly. The 'open sesame' of this Chamber must be something more than the oath of a suspected applicant.

"According to Lord Coke, 'an infidel cannot be sworn' as a witness. This was an early rule which has since been softened in our courts. But under the Constitution of the United States and existing statutes a '*political infidel* cannot be sworn' as a Senator. Whatever may be his inclination or motive he must not be allowed to approach your desk. The country has a right to expect that all who enter here shall have a sure and well-founded loyalty, above all question or 'suspicion.' And such I insist is the rule of the Constitution and of Congress.

"As if to place the question beyond all doubt, Congress by positive enactment requires that every Senator, before admission to his seat, shall swear that he has 'voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility' to the United States. Here is little more than an interpretation of the Constitution. The conclusion is plain. No person who has voluntarily given even 'countenance' or 'encouragement' to another engaged in the rebellion can be allowed to take that oath.

"After this statement of the rule, the question arises, if Philip F. Thomas can be permitted to take the oath at your desk, or, in other words, to 'qualify' as a Senator of the United States. Is he competent? This is a question of evidence.

"The ample discussion of the facts in this case, and their singular plainness, supersede the necessity of all details. The atmosphere about Mr. Thomas and his acts are harmonious. From the beginning we find him enveloped in coldness and indifference while his country was in peril. But, observing him more closely, we are shocked by two acts of positive disloyalty, one of which is the natural prelude of the other. The first muttering of the rebellion found him a member of the Cabinet of Mr. Buchanan; but when this uncertain President proposed the succor of our troops at Charleston, already menaced with war, Mr. Thomas withdrew from the patriotic service. He resigned his seat, following the lead of Cobb, Thompson, and Floyd. A man is known by the company he keeps. His company at this time were traitors. And the act they united in doing was essentially disloyal. As the rebellion assumed the front of war they all abandoned their posts—some to join the rebellion and mingle with its armies; Mr. Thomas more prudently to watch the course of events in Maryland, ready to lift his arm also if his State pronounced the word. This concerted desertion was in itself a conspiracy against the Government; and, in the case of Mr. Thomas, who was Secretary of the Treasury, it was a blow at the national credit, which it was his special duty to guard. It was an act of disloyalty to be blasted by indignant history, even if your judgment fails now. And this was the first stage in this record.

"Meanwhile the war rages. Armies are marshaled. Battles ensue. Washington itself is beleaguered. The Republic trembles with peril. But Mr. Thomas continues in the seclusion of his home, enveloped in the same disloyal atmosphere, and refusing always the oath of allegiance. At last in 1863 an only son arrives at the age of eighteen. Though still a minor he is already of the military age. Naturally filled with the sentiments of his father's fireside, he seeks to maintain them by military service. He is like his father, but with the ardor of youth instead of the caution of years. He avows his purpose to enlist in the rebel army, thus to levy war against his country and adhere to its enemies. All this was treason—plain, palpable, unquestionable, downright treason. Instead of detaining his son; instead of keeping him back; instead of interposing a paternal veto; instead of laying hands gently upon him; instead of denouncing him to the

magistrate, all of which the father might have done, he deliberately lets him go, and then, to cap the climax of criminal complicity, furnishes the means for his journey and his equipment. He gives $100. The father is not rich, and yet he gives this considerable sum. Few soldiers started with such ample allowance. Thus it stands. The father, who has already deserted his post in the Cabinet and has refused to take the oath of allegiance to his country, contributes a soldier to the rebellion, and that soldier is his only son. To complete and assure the great contribution, he contributes a sum of money also. If all this accumulated disloyalty, beginning in a total renunciation of every patriotic duty, and finally consummated by an act of flagrant, unblushing enormity, is not 'aid and comfort' or 'countenance' or 'encouragement' to the rebellion, it is difficult to say what can be. There must be new dictionaries for these familiar words, and they must receive a definition down to this day unknown. They must be treated as thread or gossamer, when they should be links of iron.

[Fortieth Congress—Second session.]

JOHN T. JONES AND AUGUSTUS H. GARLAND VS. ALEXANDER McDONALD AND BENJAMIN F. RICE,

of Arkansas.

Arkansas had been without representation in Congress from 1861. June 23, 1868, the credentials of Mr. McDonald and Mr. Rice, elected April 15, 1868, to fill the unexpired terms ending March 3, 1871 and 1873, were presented. On the same day there were presented from the files of the Senate credentials of Mr. Jones and Mr. Garland, purporting to be certificates of their elections for the same terms. The two latter credentials had been originally presented to the Senate and ordered to lie on the table in the years 1866 and 1867, soon after the respective elections. They were again ordered to lie on the table. It appears from the debate that the elections of Messrs. Jones and Garland took place when a provisional government existed in Arkansas. A motion was then made that the credentials of Messrs. McDonald and Rice be referred to the Committee on the Judiciary. The motion was determined in the negative, and Messrs. McDonald and Rice took their seats. It appears from the debate on their credentials that some Senators were of opinion that the credentials should be referred to a committee for the reasons that they did not in some particulars conform to the act of July 25, 1866, regulating the election of Senators, and that the election had taken place before the passage of the act declaring Arkansas entitled to representation in Congress.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 40th Cong., 2d sess.

The debate is found on pages 3384–3389 of the Congressional Globe, part 4, 2d sess. 40th Cong.

TUESDAY, *June* 23, 1868.

Mr. Thayer presented the credentials of Benjamin F. Rice, elected a Senator by the legislature of the State of Arkansas for the unexpired term commencing on the 4th day of March, 1867; which were read.

Mr. Thayer presented the credentials of Alexander McDonald, elected a Senator by the legislature of the State of Arkansas for the unexpired term commencing on the 4th day of March, 1865; which were read.

Mr. Davis presented from the files of the Senate papers purporting to be the credentials of John T. Jones and Augustus H. Garland, chosen Senators by the legislature of the State of Arkansas for the unexpired terms commencing on the 4th day of March, 1865, and on the 4th day of March, 1867.

Mr. Howard submitted a motion that the papers presented by Mr. Davis lie on the table.

Mr. Hendricks asked to have the papers read; and

Objection being made thereto,

The President *pro tempore* submitted the question to the Senate, to wit: Shall the papers be read? and it was determined in the affirmative—yeas 30, nays 16.

On motion by Mr. Hendricks, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Cole, Conkling, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Fessenden, Fowler, Harlan, Henderson, Hendricks, Johnson, McCreery, Morgan, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Ramsey, Ross, Sherman, Sprague, Trumbull, Van Winkle, Willey, and Yates.

Those who voted in the negative are Messrs. Cattell, Chandler, Conness, Ferry, Frelinghuysen, Howard, Howe, Morrill of Maine, Nye, Pomeroy, Stewart, Sumner, Thayer, Tipton, Wade, and Wilson.

So it was decided that the papers be read; and

The Secretary having read the same, the question recurred on the motion of Mr. Howard that the papers presented by Mr. Davis lie on the table; and

On the question to agree thereto, it was determined in the affirmative.

A motion was then submitted by Mr. Davis that the credentials of Benjamin F. Rice and the credentials of Alexander McDonald be referred to the Committee on the Judiciary; and

On the question to agree thereto, it was determined in the negative; and

The oaths prescribed by law were administered to Mr. Rice and Mr. McDonald by the President *pro tempore*, and they took their seats in the Senate.

[Fortieth Congress—Second session.]

WILLIAM MARVIN vs. THOMAS W. OSBORN, *of Florida.*

Florida had been without representation in Congress from 1861. June 30, 1868, the credentials of Mr. Osborn, elected to fill the unexpired term ending March 3, 1873, were presented. They were signed by Harrison Reed, governor, and certified that he had been elected June 18, 1868. A motion was made that the credentials be referred to the Committee on the Judiciary. It appears from the debate that by a resolution of the Florida legislature the thirteenth and fourteenth amendments had been "adopted." It was maintained by some that this was not a sufficient "ratification" of the amendments. Pending debate on the motion to refer Mr. Osborn's credentials, the credentials of Mr. Marvin, claiming to have been elected for the same term, were presented. They were signed by David S. Walker as governor, and certified that Mr. Marvin had been elected November 28, 1866. The motion to refer Mr. Osborn's credentials to a committee was determined in the negative, and Mr. Osborn was admitted to the seat. No further action was taken on Mr. Marvin's credentials. It appears from the debate on them that Mr. Marvin had been elected before Congress had declared that Florida was entitled to representation in Congress, it having declared that Florida was not entitled to appoint electors for President and Vice-President.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 40th Cong., 2d sess.

The debates are found on pages 3598–3607 of the Congressional Globe, part 4, 2d sess. 40th Cong.

TUESDAY, *June* 30, 1868.

Mr. Howe presented a resolution of the legislature of the State of Florida ratifying the amendments to the Constitution of the United States known as Articles XIII and XIV; which was read.

Mr. Howe presented the credentials of Thomas Ward Osborn, elected a Senator of the United States by the legislature of the State of Florida for the unexpired term commencing March 4, 1867; which were read.

A motion was made by Mr. Drake that the resolution of ratification of the legislature of Florida and the credentials of Mr. Osborn be referred to the Committee on the Judiciary.

After debate,

Mr. Doolittle presented a paper purporting to be the credentials of William Marvin, elected a Senator of the United States by the legislature of the State of Florida on the 28th of November, 1866, for the term of six years commencing on the 4th day of March, 1867, and asked that the paper be read.

Objection to the reading of the paper having been made by Mr. Howe,

The President *pro tempore* submitted the question to the Senate, Shall the paper be read? and it was determined in the affirmative; and

The said paper having been read, the question recurred on the motion of Mr. Drake to refer the resolution of the legislature of Florida and the credentials of Mr. Osborn to the Committee on the Judiciary.

On the question to agree thereto, it was determined in the negative—yeas 16, nays 30.

On motion by Mr. Conness, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Davis, Doolittle, Drake, Edmunds, Fessenden, Hendricks, Howard, Johnson, McCreery, Morrill of Maine, Morrill of Vermont, Norton, Patterson of New Hampshire, and Vickers.

Those who voted in the negative are Messrs. Cameron, Cattell, Chandler, Cole, Conness, Corbett, Cragin, Ferry, Frelinghuysen, Harlan, Howe, McDonald, Morgan, Morton, Nye, Pomeroy, Ramsey, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Trumbull, Van Winkle, Wade, Willey, Williams, Wilson, and Yates.

So the motion of Mr. Drake was not agreed to.

Mr. Howe submitted a motion that the oaths prescribed by law be now administered to Mr. Osborn.

A motion was made by Mr. Drake that the credentials of Mr. Osborn lie on the table, and that the resolution of the legislature of Florida ratifying the amendments to the Constitution of the United States be referred to the Committee on the Judiciary.

Mr. Conness raised the question of order, to wit, that the motion to administer the oaths of office to Mr. Osborn having been first made, and being in the nature of a privileged question, had precedence over the motion of Mr. Drake.

The President *pro tempore* sustained the question of order raised by Mr. Conness, and decided the motion of Mr. Drake not in order; and

On the question, Shall the oaths prescribed by law be now administered to Mr. Osborn?

On motion by Mr. Drake that the further consideration of said question be postponed to to-morrow, it was determined in the negative—yeas 13, nays 31.

On motion by Mr. Conness, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Buckalew, Corbett, Davis, Doolittle, Drake, Edmunds, Fessenden, Hendricks, McCreery, Morrill of Vermont, Norton, and Vickers.

Those who voted in the negative are Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Cragin, Ferry, Frelinghuysen, Harlan, Howard, Howe, McDonald, Morgan, Morrill of Maine, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Trumbull, Wade, Willey, Williams, Wilson, and Yates.

So the motion to postpone the further consideration of the question to administer the oaths to Mr. Osborn was not agreed to; and

On the question, Shall the oaths prescribed by law be now administered to Mr. Osborn? it was determined in the affirmative—yeas 33, nays 6.

On motion by Mr. Drake, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Ferry, Frelinghuysen, Harlan, Howard, McDonald, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Ross, Stewart, Sumner, Thayer, Tipton, Trumbull, Wade, Willey, Williams, Wilson, and Yates.

Those who voted in the negative are Messrs. Buckalew, Davis, Doolittle, Johnson, McCreery, and Vickers.

So the motion was agreed to; and

The oaths prescribed by law were administered to Mr. Osborn by the President *pro tempore*, and he took his seat in the Senate.

[Third session, Fortieth Congress, and Forty-first Congress.]

JOSHUA HILL AND H. V. M. MILLER.

WHITELEY AND FARROW VS. HILL AND MILLER,

Of Georgia.

December 7, 1868, the credentials of Joshua Hill, elected for the unexpired portion of the term beginning March 4, 1867, were presented. December 10, his credentials were referred to the Committee on the Judiciary. January 11, 1869, the credentials of H. V. M. Miller, elected for the unexpired portion of the term beginning March 4, 1865, were presented and referred to the same committee. January 25, 1869, the committee reported on the credentials of Mr. Hill. The chief question to be decided was whether Georgia had complied with the conditions of an act providing for her admission to representation. This act provided that "no person prohibited from holding office under the United States or any State by section 3 of the proposed amendment to the Constitution of the United States, known as article 14, shall be deemed eligible to any office in said State unless relieved from disability as provided in said amendment." The committee reported that some of the members composing the legislature electing Mr. Hill were disqualified under the above provision; that the legislature had gone through with the forms of an investigation which did "not appear to have been conducted in good faith," and had found none of the members disqualified; that "the election and qualification of members of the legislature, where the existence of any legislature authorized to act as such is not involved, cannot be inquired into by the Senate in determining the right of a Senator to his seat;" but that "the question involved in this case is not whether persons not entitled to seats in the legislature were received by that body and allowed to vote upon the election of a Senator, but whether the body assuming to be the legislature violated the conditions upon which it was allowed to organize by permitting disloyal persons to participate in its proceedings." The committee submitted a resolution that Mr. Hill "ought not now to be admitted" to take his seat. There was a minority report. February 17, 1869, the committee reported against admitting Mr. Miller to his seat. There was no written report. In the next session of Congress the credentials of Messrs. Hill and Miller were again referred to the committee, who reported them back, and they were laid on the table. February 14, 1870, in the next session, the credentials were again referred to the committee. A new election having been held, the credentials of Richard H. Whiteley, elected for the unexpired portion of the term beginning March 4, 1865, and the credentials of Henry P. Farrow, elected for the unexpired portion of the term beginning March 4, 1867, were presented July 15, 1870, and ordered to lie on the table. No reports were made during this session on the credentials; but an act was passed (approved December 22, 1869) to promote the reconstruction of Georgia; a report was made March 2, 1870 (No. 58), on the question whether the legislature had been reorganized in accordance with the provisions of this act; and an act was passed (approved July 15, 1870) declaring that the State was entitled to representation in Congress. The proceedings of the Senate relating to these acts are not included in the proceedings given below. December 3, 1870, in the next session of Congress, the credentials of Messrs. Whiteley and Farrow were referred to the committee. January 23, 1871, the committee reported on the credentials of the four claimants that Messrs. Hill and Miller, elected under the organization of 1868, were duly elected, but that Mr. Miller, having acted as a surgeon in the rebel army, could not take the oath required by the act of July 2, 1862. They recommended the adoption of the resolution that Mr. Hill was entitled to his seat. There was a minority report recommending the adoption of a resolution declaring Messrs. Whiteley and Farrow (who had been elected under the organization of 1870) entitled to seats. February 1, 1871, the resolution reported by the committee was agreed to and Mr. Hill took his seat in the Senate. February 24, 1871, a joint resolution prescribing an oath to be taken by Mr. Miller was approved, and Mr. Miller took his seat.

The proceedings of the Senate relating to this joint resolution are not included in theextr acts given below.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to the case from Senate Journals, 3d sess. 40th Cong., and 1st, 2d, and 3d sess. 41st Cong., with extracts from the reports. A portion of report No. 58, 2d sess. 41st Cong., referred to above, is included in the report made January 23, 1871, given below.

Special references to the debates of each day are inserted below, and references to the reports are given in foot-notes.

[Third sesson of the Fortieth Congress.]

CREDENTIALS OF MR. HILL.

MONDAY, *December* 7, 1868.

Mr. Sherman presented the credentials of Joshua Hill, elected a Senator by the general assembly of the State of Georgia for the unexpired portion of the term commencing on the 4th day of March, 1867; which were read.

Mr. Drake moved that the said credentials be referred to the Committee on the Judiciary when said committee shall have been appointed.

Pending debate,

Mr. Wilson presented a memorial of the representatives of the colored voters of the State of Georgia, in convention assembled, in relation to the action of the legislature of that State in expelling twenty-nine colored members from the said legislature; which was read; and,

After further debate,

On motion by Mr. Sherman,

Ordered, That the credentials of Mr. Joshua Hill lie on the table.

[The debate is found on pages 1–5 of Congressional Globe, part 1, 3d sess. 40h Cong.]

THURSDAY, *December* 10, 1868.

On motion by Mr. Sherman,

Ordered, That the credentials of Joshua Hill, a Senator-elect from the State of Georgia, together with the letter of the governor of the State of Georgia in relation to the execution of the laws known as the reconstruction laws, and the memorial of the representatives of the colored voters of Georgia in convention assembled, in relation to the expulsion of certain members from the legislature of that State, be referred to the Committee on the Judiciary.

MONDAY, *January* 25, 1869.

Mr. Stewart, from the Committee on the Judiciary, to whom were referred the credentials of Joshua Hill, elected a Senator by the legislature of Georgia for the unexpired portion of the term commencing on the 4th day of March, 1867, submitted a report (No. 192), accompanied by the following resolution:

"*Resolved*, That Joshua Hill, claiming to be Senator-elect from Georgia, ought not now to be permitted to take a seat in this body."

Mr. Trumbull asked and obtained leave of the Senate to present the views of the minority of the Committee on the Judiciary in relation to the right of Joshua Hill, Senator-elect from the State of Georgia, to a seat in the Senate; which were ordered to be printed with the report of the committee submitted by Mr. Stewart.

REPORT OF COMMITTEE ON CREDENTIALS OF MR. HILL—MAJORITY AND MINORITY.*

[The committee consisted of Messrs. Trumbull (chairman), Stewart, Frelinghuysen, Edmunds, Conkling, Rice, Carpenter, and Hendricks.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 25, 1869.—Ordered to be printed.

Mr. Stewart, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of Joshua Hill, claiming to be Senator-elect from Georgia, beg leave to submit the following report:

The credentials referred to your committee are in the usual form, and if the State of Georgia is entitled to representation in Congress, Mr. Hill ought to be permitted to take his seat.

From the fact of the reference, your committee feel called upon to go behind the credentials to ascertain if any reasons exist why Mr. Hill should not be admitted to the Senate.

On the 21st of May, 1868, the President transmitted to Congress a proposed constitution for the State of Georgia which had been framed by a convention assembled under the reconstruction acts of Congress and ratified by the people. On the 25th June, following, Congress passed an act which, among other things, provided for the admission of Georgia to representation upon compliance with certain conditions therein named, the most important of which was that the legislature of Georgia should duly ratify the amendment to the Constitution of the United States known as the fourteenth amendment. The act further provides that after compliance with the required conditions "the officers of said State duly elected and qualified under the constitution hereof shall be inaugurated without delay; but no person prohibited from holding office under the United States or any State by section 3 of the proposed amendment to the Constitution of the United States known as article 14 shall be deemed eligible to any office in said State unless relieved from disability as provided in said amendment."

The obvious design of this provision was to prevent the new organization from falling under the control of enemies of the United States, so as to defeat the reconstruction of the State.

The right of Mr. Hill (if regularly elected) to a seat in the Senate depends upon three important considerations:

First. Did the legislature of Georgia, regularly organized in accordance with the Constitution of the United States, the laws of Congress, and the constitution of Georgia, *duly* ratify the fourteenth amendment, and comply with the various conditions imposed by the act of June 25, 1868?

Second. Have the legislature and people of Georgia, subsequent to such compliance with said acts of Congress, committed such acts of usurpation and outrage as to place the State in a condition unfit to be represented in Congress?

Third. Whether, on the whole case, taking the action of Georgia both before and since the pretended ratification of the fourteenth amendment, a civil government has been established in that State which Congress ought to recognize?

These questions must be answered by the law and the facts.

* Taken from Senate Reports, 3d sess. 40th Cong., No. 192. The accompanying documents, making pages 5–31 and 38–40 of the report, are omitted.

The district commander, General Meade, by a general order dated June 25, 1868, declared the result of the election; Rufus B. Bullock being elected governor, and among the members elected to the legislature in that order were thirty-one colored men—three senators and twenty-eight representatives. (See Exhibit No. 1.) By a proclamation of the governor-elect, in pursuance of the act of June 25, 1868, the legislature of Georgia convened on the 4th July following. On the 8th July the organization of the two houses was effected, and all persons declared elected were allowed to take their seats.

When the governor-elect was notified of the action of the two houses, he addressed a communication to General Meade, commander of the district, informing him of the fact, and also that it was alleged that a number of the members of the general assembly who had taken their seats, and one or more officers of that body, were not eligible under the act of June 25, 1868, by reason of their having taken an official oath to support the Constitution of the United States, and subsequently had given aid and comfort to the enemies thereof. General Meade on the same day replied to the communication, and among other things desired the governor-elect to communicate to the legislature that he could not recognize any act of that body as valid or allow the same to be executed until satisfactory evidence was produced that all persons excluded by the fourteenth amendment were deprived of their seats in both houses. Whereupon the two houses went through the form of an investigation. But from the evidence before your committee the investigation does not appear to have been conducted in good faith, or with any intention either of finding the facts or of excluding persons known to be disqualified. A committee was appointed in each house. In the senate the majority of the committee found all the members qualified; but there was a minority report which gave an abstract of the evidence and found four senators disqualified. The evidence consisted of the admissions of the senators themselves; which if true, they should have been excluded. Yet the senate passed a resolution, under the operation of the previous question, admitting them all. These facts appear in the official correspondence between Governor Bullock and General Meade in regard to the organization of the Georgia legislature. (See Exhibit A.) There were three reports in the house. The majority report found two members disqualified; one of the minority reports found still another member disqualified, but the other minority report found that all were qualified. The last report was adopted by the house under the operation of the previous question. To illustrate the manner in which the investigation was conducted, a copy of the proceedings of the legislature on the 16th, 17th, and 18th days of July, 1868, as reported in the Atlanta Daily Era, and forwarded to the State Department, is attached to this report. (See Exhibits A, B, and C.) It is alleged that an impartial investigation would have shown from thirty to forty members of the legislature disqualified under the fourteenth amendment; and although your committee have not been able to fully investigate this matter, but, from the evidence before them, they have little doubt that the number was large, as the exhibit hereto attached will tend to establish. For the purposes of this report, however, your committee did not deem it necessary to ascertain the number of disqualified persons admitted. But the fact that any were knowingly admitted was not only a violation of the fourteenth amendment, and a failure to comply with the requirements of Congress, but manifests a disposition to disobey and defy the authority of the United States. If one could be admitted why not all? And will it be contended that if the entire body had been composed of men who had usurped the functions of the legislature, against the express provisions of the reconstruction acts, they could have complied with the provisions of those acts so as to create any obligation on the part of Congress to receive their Senators and Representatives?

Your committee are of opinion that the act of June 25, 1868, which required that the constitutional amendment should be duly ratified, must be held to mean that it must be ratified by a legislature which has in good faith substantially complied with all the requirements of law providing for its organization. It is true that after this pretended investigation by the two houses of the eligibility of their members the district commander recognized the validity of their proceedings, and permitted the State officers to be inaugurated and the State government to go into operation. On the 21st day of July the legislature passed a resolution of ratification of the fourteenth amendment and the other resolution required by the act of June 25, 1868.

On the 28th of July, 1868, the legislature went into joint convention for the election of United States Senators. Joshua Hill received 110 votes; Joseph E. Brown, 94 votes, and A. H. Stevens, 3 votes, whereupon Mr. Hill was declared elected United States Senator for the term ending March 3, 1873.

It is quite probable that Mr. Hill received votes of persons who were not qualified to hold seats in the legislature more than sufficient to constitute his majority and secure his election, but your committee do not propose to investigate that question. The election and qualification of members of the legislature, where the existence of any legislature authorized to act as such is not involved, cannot be inquired into by the Senate in determining the right of a Senator to his seat. Your committee hold that the question

involved in this case is not whether persons not entitled to seats in the legislature were received by that body and allowed to vote upon the election of a Senator, but whether the body assuming to be the legislature violated the conditions upon which it was allowed to organize by permitting disloyal persons to participate in its proceedings. It may be contended that although the matters hereinbefore set forth constitute a failure on the part of the State of Georgia to comply in every respect with the reconstruction acts, yet Congress ought to waive these slight departures and admit their representatives. But an examination into the subsequent proceedings of the legislature of Georgia, and the disorganized condition of society in that State, leads your committee to the conclusion that all these violations of law were in pursuance of a common purpose to evade the law and resist the authority of the United States.

The colored members in the organization of the legislature, as has been stated, were allowed to take their seats. On the 9th of July, 1868, the day after such organization, the following action was had in regard to the three colored senators:

"Mr. Welch moved that the action taken on yesterday, in regard to the eligibility of certain members, be reconsidered. Agreed to.

"Mr. Sherman moved to strike out that portion of Mr. Candler's resolution which refers to the eligibility of Messrs. Campbell, Wallace, and Bradley.

"Mr. Candler moved to lay the resolution and amendment on the table.

"Mr. Bradley, being entitled to the floor, resumed his speech of yesterday, in opposition to the amendment of Mr. Candler, and was followed by Mr. Campbell.

"The matter was finally referred to the committee on privileges and elections."

Thus this vexed question was quietly smothered for the time. But Mr. Candler, on the 25th of July (a few days before the Senatorial election), offered the following resolution, which was laid on the table:

"Whereas ex-Governor Joseph E. Brown, one of the ablest lawyers in the Republican party of Georgia, as well as other persons, distinguished for their knowledge of constitutional law, held, during the late canvass, that persons of color were not entitled to hold office under the existing constitution; and

"Whereas such persons hold seats as senators on this floor; and

"Whereas there are laws of vital importance to the people of Georgia to be enacted by the general assembly, the validity of which should not be made uncertain because of a participation of their enactment by persons not entitled, under the constitution, to so participate: Therefore,

"*Be it resolved*, That the committee on privileges and elections be directed to inquire into the eligibility of the several persons of color holding seats as senators and report at the earliest day practicable."

Mr. Hungerford moved to lay the resolution on the table.

The motion prevailed.

The question remained unsettled until after the Senatorial election and the adjournment of Congress. But on the 3d of September, 1868, the house of representatives of Georgia expelled twenty-four of its members on account of color, and subsequently expelled two more for the same reason, and on the 11th day of same month the senate expelled two of its members for a like reason, making twenty-eight members of the legislature that were expelled by the two houses without authority of law. For a full account of these proceedings see Exhibit D.

After the expulsion of the colored members the persons who received the next highest number of votes for their places, under what is known in Georgia as the Irwin code, were permitted to take their seats. But no investigation as to their eligibility under the fourteenth amendment appears to have been had. (See Exhibit D.)

Your committee are of opinion that under the constitution of Georgia there is no distinction in the right to hold office on account of race or color, and they are quite confident that such was the opinion of Congress at the time it approved that constitution.

This act of injustice and oppression denied the right of representation of a whole race, constituting nearly one-half of the people of Georgia. It will not be contended that there is no power in this Government to restrain in some form an outrage of this character. It certainly furnishes a strong reason why Congress should not at this time overlook the irregularities in the organization of the legislature of Georgia, and admit her Senators to representation. And this is not all. Your committee have examined the official reports of the various officers connected with the Freedmen's Bureau in Georgia, and find reported 336 cases of murders and assaults with intent to murder upon colored persons by the whites, from January 1, 1868, to November 15 of same year. For all of which there has been no legal redress and scarcely any effort whatever on the part of the authorities to punish the criminals. And it is stated by these officers that they are unable to report fully as to the number and character of these outrages on account of intimidation of witnesses, which is practiced by the perpetrators of crime. Your committee have no source of official information as to outrages committed upon loyal whites, but it is

represented by various and numerously signed petitions and memorials from the loyal people of Georgia that they are constantly exposed to violence, and are without protection of law. It is a matter of public notoriety that loyal white men are persecuted, murdered, and driven from their homes. Several members of the legislature have been compelled to take refuge at the capital of the State where the national troops are stationed to avoid the violence of the enemies of the United States. The unlawful and vindictive conduct of the legislature tend to confirm these statements and reports, and exclude all hope that the new civil government will afford adequate protection to life and property. Since the withdrawal of the military crime has greatly increased, while punishment for crime has diminished. Wherefore your committee feel called upon to recommend that Mr. Hill be not allowed to take a seat in the Senate for the reason that Georgia is not entitled to representation in Congress, and submit the accompanying resolution.

Resolved, That Joshua Hill, claiming to be Senator-elect from Georgia, ought not now to be permitted to take a seat in this body.

I concur in the conclusion of the report that Mr. Hill ought not to be admitted, and agree that the report be made.

ROSCOE CONKLING.

I concur in the conclusion of the report that Mr. Hill ought not now to be admitted, and agree that the report be made.

FRED'K T. FRELINGHUYSEN.

VIEWS OF THE MINORITY.

Mr. Trumbull asked and obtained leave to submit the following as the views of the minority; which were ordered to be printed with the report of the Committee on the Judiciary on the credentials of Joshua Hill, Senator-elect from Georgia:

The undersigned, being unable to agree with the majority of the committee in their report upon the credentials of Joshua Hill, claiming to have been duly elected and entitled to a seat in the Senate from the State of Georgia, begs leave to present the reasons for his dissent. That Hill possesses all the qualifications for a member of the Senate of the United States required by the Constitution; that he is one of the few prominent men residing in a rebel State who remained true to the Union during the war; that he is now and has been at all times thoroughly loyal to the Union; that he is in every respect personally unobjectionable; that he was duly elected by the legislature of Georgia, and that his credentials are in due form is not questioned by any one. If he is not entitled to his seat, it must be either because the State of Georgia was not in a condition to entitle her to representation at the time of his election, or because the body which elected him was not the legislature of that State.

The former of these propositions, whether Georgia was or is in a condition to entitle her to representation, is not a question for the Senate to decide. The unfortunate disagreement which has existed for some years between the President and Congress has, in part, been owing to a disagreement upon this very point; the President insisting that it was for each House of Congress to determine for itself in the admission of members whether a State was entitled to representation, and Congress insisting that it was for Congress to determine in the first instance whether a State was entitled to representation, and that question being affirmatively settled, it was then for each House to judge for itself of the election, returns, and qualifications of its own members. This controverted point was settled by Congress in March, 1866, by the passage through both Houses of the following concurrent resolution:

"*Resolved by the House of Representatives* (*the Senate concurring*), That, in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States until Congress shall have declared such State entitled to such representation."

The reconstruction acts, since indorsed by the people at a popular election, declare that "until the people of said rebel States shall be by *law*—not by the action of each House—admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only;" which is equivalent to a declaration that when admitted to representation *by law* they shall be no longer provisional.

The supplementary act of March 23, 1867, declares that when the requirements of the reconstruction acts shall have been complied with by any of the rebel States in the formation of a constitution, and "said constitution shall be approved by Congress, the State shall be declared entitled to representation, and Senators and Representatives

shall be admitted therefrom, as therein provided." This action of Congress, indorsed by the people, determined that neither House of Congress was authorized by itself to admit Senators or Representatives from any of the rebel States till Congress should determine by law that such State was entitled to representation. The converse of the proposition was also equally determined, that it would be the duty of each House to admit duly elected and qualified Senators and Representatives from each of said States whenever Congress shall have determined by law that such State was entitled to representation.

On the 25th of June, 1868, Congress passed the following act:

"AN ACT to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to representation in Congress.

"Whereas the people of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida have, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel States,' passed March 2, 1867, and the acts supplementary thereto, framed constitutions of State government which are republican, and have adopted said constitutions by large majorities of the votes cast at the elections held for the ratification or rejection of the same: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida shall be entitled and admitted to representation in Congress as a State of the Union when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article 14, upon the following fundamental conditions: That the constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said constitution may be made with regard to the time and place of residence of voters; and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section 17 of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition.

"SEC. 2. *And be it further enacted*, That if the day fixed for the first meeting of the legislature of either of said States by the constitution or ordinance thereof shall have passed or have so nearly arrived before the passage of this act that there shall not be time for the legislature to assemble at the period fixed, such legislature shall convene at the end of twenty days from the time this act takes effect, unless the governor-elect shall sooner convene the same.

"SEC. 3. *And be it further enacted*, That the first section of this act shall take effect as to each State, except Georgia, when such State shall, by its legislature, duly ratify article 14 of the amendments to the Constitution of the United States, proposed by the Thirty-ninth Congress, and as to the State of Georgia when it shall in addition give the assent of said State to the fundamental condition hereinbefore imposed upon the same; and thereupon the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay; but no person prohibited from holding office under the United States, or under any State, by section 3 of the proposed amendment to the Constitution of the United States, known as article 14, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided in said amendment; and it is hereby made the duty of the President within ten days after receiving official information of the ratification of said amendment by the legislature of either of said States to issue a proclamation announcing that fact."

On the very day of the passage of the foregoing act Rufus B. Bullock, governor-elect of Georgia, issued his proclamation convening the legislature of that State on the 4th of July following. The manner in which the legislature was organized will fully appear from the following extract, taken from the official report of Major-General Meade:

"The convention in Georgia, after being in session several months, finally, in March, adopted a constitution, which together with a State ticket was submitted to the people in April, and ratified by a very handsome majority of the registered vote—all parties taking part in the election. This constitution, with some modifications, was adopted by Congress, and the legislature, which convened in July, making these modifications and otherwise complying with the requirements of the reconstruction laws, the State, together with Alabama and Florida, were, by act of Congress, formally admitted to representation.

"There is one point in regard to the admission of the State of Georgia to which I feel called upon to make special allusion. When the legislature was convened by the pro-

visional governor and governor-elect, the question arose whether, as military commander, I was called on to inquire into the eligibility of the members, either under the United States laws or the constitution of Georgia. The convention of Georgia had, in its ordinance calling an election, directed that all returns should be sent to the military commander of the district, who was requested to issue the necessary certificates of election In carrying out this request of the convention I deemed my duty simply required that I should give the member having the greatest number of votes the ordinary certificate of election, and that it would be for each house to decide on the eligibility of those members whose seats were on any grounds contested. Whilst I admitted, as district commander, executing the law, I was to see that no one ineligible to office under the fourteenth article constitutional amendment should be allowed to take office, I did not see that in the case of a parliamentary body I was called on to decide on the qualifications of the members. In this view I was sustained by a telegram sent to me for my information from the War Department, which had been sent to the governor of Louisiana and the military commander of the fifth district, and which I quote:

"'WASHINGTON, *June* 30, 1868.

"'To Governor WARMOUTH, *New Orleans*:

"'We think the persons disqualified under the fourteenth article of the amendment to the Constitution of the United States are not eligible to your legislature. This is to be determined by the respective houses; but no oath can be imposed except the oath prescribed by the State constitution.

"'JAMES WILSON,
"'*Chairman Judiciary Committee.*
"'GEORGE F. BOUTWELL,
"'J. F. FARNSWORTH,
"'H. E. PAINE,
"'*Reconstruction Committee.*'

"It will be seen by the above telegram that the distinguished gentlemen whose names were attached were of the opinion, first, that no one ineligible to office under the fourteenth article could take a seat in the legislature; second, that the respective houses were to judge of the question; third, that no oath testing this eligibility could or should be prescribed in advance of the meeting of the legislature. These views being in accordance with my own, I acted on them, and was present at the organization of the two houses of the Georgia legislature; to the members declared in my order as having the highest number of votes, there being administered only the oath prescribed by the State constitution. After these houses were organized, the provisional governor informed me officially of their organization, but that, as far as he could learn, no steps had been taken to test the question of the eligibility of members under the fourteenth article. I replied to the governor that until the State was admitted to representation the legislature and all the officers were only provisional, and subject to the paramount authority of the district commander, and that in the exercise of this power I should consider all acts of the legislature null and void until satisfactory evidence was presented to me that each house had purged itself of ineligible members under the fourteenth article, provided there were any such in either house; and I desired the provisional governor to communicate these views to each house. On the receipt of this letter, each house at once ordered an investigating committee and inquired into the qualification of each member, and duly reported this fact through the provisional governor, stating at the same time that neither house had found any member ineligible.

"The provisional governor, in transmitting these communications, expressed the opinion, founded on evidence presented to him, that several members in both houses were ineligible, and called on me to exercise my power and require said members to vacate their seats. On reflecting upon this subject, I could not see how I was to take the individual judgment of the provisional governor in the face of a solemn act of a parliamentary body, especially as, from the testimony presented, I did not, in several cases, agree with the judgment of the provisional governor. The question was simply whether, in the construction of a law, and in considering the facts of individual cases, I should make myself the judge, or take the opinion of the provisional governor, in the face of the official information that a parliamentary body had gravely and formally, through a committee, examined, reported, and acted on these cases. My judgment was decidedly that I had fulfilled my duty in compelling the houses to take the action they had, and that having thus acted, I had neither the authority, nor was it politic or expedient, to overrule their action, and set up my individual judgment in opposition. By an inspection of the telegram sent July 18, and the reply of the General-in-chief, July 23, it will be seen that my views and actions were approved. I allude thus *in extenso* to this subject, because his excellency the governor of Georgia, in a public speech recently delivered at

Albion, N. Y., is pleased to attribute the failure of Georgia to be properly reconstructed to my action in failing to purge the legislature of his political opponents, he having advised me, when he urged such action, that his friends had been relieved of their disability by Congress.

"The States being admitted to representation, the civil power vested in the military commander by the reconstruction acts ceased, and civil authority resumed its sway."

The foregoing extract, together with copies of official correspondence between Major-General Meade and General Grant, hereto attached, establish the fact that the legislature of Georgia fully complied with the requisitions of the act of June 25, 1868; and the fact of her ratification of the fourteenth amendment was duly proclaimed by the President, as also appears by a copy of the proclamation hereto attached.

Congress having decided that Georgia was entitled to representation through the State government organized under the reconstruction acts, on complying with the conditions therein named, it is not competent for either house, now that the conditions have been complied with, to refuse admission to members on the ground that the State is not entitled to representation. For either House to do so would be for such House to set aside a solemn act of Congress, passed by both Houses, and to repudiate the principle on which it differed with the President and went before the people in the popular elections. The House of Representatives, conforming to the law of Congress, has admitted to seats the Representatives from Georgia against whom no personal objection was made, without any further inquiry than whether Georgia had complied with the conditions of the act of June 25, 1868. No attempt was made in that body to revise the decision of Congress.

The assumption that the constitutional amendment was not adopted in good faith is not sustained by a particle of evidence before the committee, and is contradicted by the official report of Governor Bullock to General Meade, by the orders of General Meade, and those emanating from the General-in-chief, by the proclamation of the President, made in pursuance of law, by the action of the House of Representatives in passing upon the admission of members to that body, and by the acquiescence of all the departments of Government from July until now. If one branch of Congress is at liberty to deny a State representation on the ground that it did not act in good faith in agreeing to the conditions prescribed by Congress, what is to prevent either House of any other Congress, acting on a like assumption, from denying admission to members from any other of the reconstructed States? It is well known that a large political party in the country believe the reconstruction acts unconstitutional. Should that party hereafter obtain ascendency in either House of Congress, is it to be at liberty to overturn the State governments which have been established in pursuance of law and to quote as a precedent the action of the Senate in this case? When are we to have peace and civil governments established in the late rebel States under such a policy? The question has been asked if one person disqualified by the fourteenth amendment could be permitted to act as a member of the Georgia legislature, why not all; and if all, would it be pretended that it was a legislature organized in accordance with the reconstruction acts? Probably not; and the same question, with the same force, may be asked in reference to Congress or any other legislative body in the land. If a disqualified person or several such were permitted to act as members of Congress or a State legislature, does anybody pretend that the action of the body would be vitiated thereby, and yet who would not admit that if a body of men were to assemble and undertake to act as the Congress or the legislature of a State, all of whom were disqualified from acting as such, that their action would have any validity? No such case is to be presumed, and no legislative body is justified or safe in basing its action on suppositious cases which never have and are not likely ever to occur. No such state of facts is presented in the case of Georgia. Not one in ten of the members of the senate, after deducting those from whom the disabilities had been removed by Congress, and not one in fifty of the members of the house were found disqualified by even the minority of the committee who investigated this subject, and each house decided all its members to be qualified. The constitution of Georgia, which was accepted by Congress, like that in all the other States, and like the Constitution of the United States, in regard to Congress, leaves to each house the exclusive right to judge for itself of the election and returns of its own members, and that judgment, when pronounced, is conclusive everywhere. There was not a shadow of anything deserving the name of evidence before the committee to show that either house of the legislature of Georgia acted corruptly or fraudulently in passing upon the right of members to their seats under the fourteenth amendment.

The Senate has no right, in the opinion of the undersigned, to revise the action of Congress, disregard its laws, and refuse Hill his seat, because in its opinion Georgia is not entitled to representation, when Congress has decided otherwise, and the Executive and the General-in-chief have acted on that decision. It being admitted that Hill is entitled to his seat if Georgia is entitled to be represented in the Senate, and it being shown that Georgia has been declared by law to be entitled to representation on certain conditions,

which are shown to have been complied with, the conclusion would seem to be irresistible that Hill was entitled to take his seat. That it is competent for the Senate, in passing upon the elections, returns, and qualifications of its members, to inquire whether the body by which a Senator was elected was the legislature of the State is not disputed; but it is not pretended that Georgia had any other legislative assembly than the one which elected Mr. Hill claiming to be a legislature. The legislative body which elected him was the one which was convened by the governor in pursuance of an act of Congress; the one which ratified the fourteenth amendment to the Constitution as proclaimed both by the President and Secretary of State, in accordance with the requirements of law; and the one, and the only one, which has been elected and assembled in said State under the constitution formed in pursuance of the reconstruction acts and approved by Congress. The legislature of Georgia, under its constitution, consists of forty-four senators and one hundred and seventy-five representatives, and the complaint is, not that the persons properly chosen and qualified would not and did not constitute the legislature, but that "there were a number of persons holding seats in both branches of the legislature that were and are not eligible under the fourteenth constitutional amendment."

Each house appointed committees, who investigated the question of the eligibility of the members of their respective houses under that amendment; and, on their report, each house decided that all its sitting members were entitled to seats. Whether these decisions were correct or not is not material to Hill's right to a seat, as it is not pretended, even by the minority of the committees appointed to investigate, that more than four senators out of forty-four, omitting those whose disabilities had been removed by act of Congress, and three representatives, out of one hundred and seventy-five, were disqualified by the fourteenth amendment.

No evidence was taken by the Judiciary Committee to ascertain how many or whether any of the members of either house were ineligible.

The statements of letter-writers and memorialists cannot surely be treated as evidence upon which to overthrow a State government. The only reliable information the committee had on that subject is contained in the official report of Major-General Meade, and the journal of the legislature, as published in a newspaper. From these it appears that only four senators and three representatives were complained against by any one in the legislature as disqualified by the fourteenth amendment.

If it were admitted that the decision of each house was wrong in regard to the eligibility of the members complained against it would not vitiate the proceedings of the legislature. Scarcely a legislature assembles in any of the States in which there are not controversies in regard to seats, and it often happens that these are not settled till near the close of the session, when, perhaps, sitting members are turned out; and yet, who ever supposed that the proceedings of a legislative body were vitiated because they were participated in by persons whom it afterwards turned out were not entitled to seats? But whether each house of the legislature of Georgia decided rightly or not as to the eligibility of its members is not a question for the Senate to review. The Senate has no jurisdiction to inquire whether the members of a State legislature are properly elected and qualified.

If it could make this inquiry in regard to the members of the legislature of Georgia, which had been declared entitled to representation, it could make it in regard to the legislature of Illinois, or any other State. No one, I apprehend, would contend for such a power in Congress. It does not follow that Congress may not provide the means for executing the fourteenth amendment. There can be no question of its power to pass a law making it a penal offense for any person to take or hold office contrary to the provisions of that amendment. Another objection made to the organization of the Georgia legislature is that its members did not take the test oath required by the ninth section of the act of July 19, 1867, to be administered to all persons appointed to office under any of the so-called State governments in the rebel States; but obviously that requirement did not apply to members of a legislature elected under a constitution formed in pursuance of the reconstruction acts, and so General Grant, Major-General Meade, and the Judiciary Committee of the House decided. Another objection urged against Mr. Hill's right to a seat is the fact that the legislature of Georgia unjustly denied the right of certain colored members to seats. However unjust this denial may have been, it did not take place till more than a month after Hill's election. He was elected July 28, and the colored members participated in all legislation till September 3.

It is difficult to perceive how an act subsequent to the election could affect its validity. If the legislature was properly organized when it elected Hill, the fact that it subsequently became disorganized ought not to affect his election.

There is great diversity of opinion as to the condition of affairs in Georgia at this time. The committee have taken no testimony on that subject, but it is understood that a committee of the House of Representatives have taken a large mass of evidence as to the present state of affairs in Georgia, which will soon be printed.

Time and the salutary influence of the incoming administration, it is believed, will soon correct whatever of lawlessness and disorder now remain in the State. If, however, they should not, some way will doubtless be found by which Congress and the Executive, acting in harmony, and not the Senate alone, will be able to preserve the peace and protect all the citizens of Georgia in the enjoyment of all their rights. These considerations, however, should not affect the right of Mr. Hill to his seat in the Senate, and are only alluded to because of the importance attached to the present condition of affairs in Georgia by the majority of the committee. The undersigned, believing Mr. Hill to have been duly elected Senator by the legislature of a State entitled to representation, and that he possesses all the qualifications required by the Constitution, recommends striking out of the resolution reported by the committee all after the word "resolved," and the insertion of the following:

"That Joshua Hill is entitled to take his seat in the Senate on taking the oath prescribed by the Constitution and laws."

LYMAN TRUMBULL.

CREDENTIALS OF MR. MILLER.

MONDAY, *January* 11, 1869.

Mr. Trumbull presented the credentials of H. V. M. Miller, elected a Senator by the legislature of the State of Georgia, for the unexpired portion of the term commencing on the 4th day of March, 1865; which were read.

Ordered, That they be referred to the Committee on the Judiciary.

THURSDAY, *February* 4, 1869.

The President *pro tempore* presented resolutions adopted by the National Union Republican Association of Georgia, approving the platform and action of the Republican party and the policy of Governor Bullock; condemning the expulsion of colored members from the legislature of Georgia, and praying that Joshua Hill and H. V. M. Miller may not be admitted to the Senate as Senators from Georgia; which were referred to the Committee on the Judiciary.

WEDNESDAY, *February* 17, 1869.

Mr. Stewart, from the Committee on the Judiciary, to whom were referred the credentials of Hon. H. V. M. Miller, elected a Senator by the legislature of Georgia, reported against admitting him to a seat in the Senate.

[First session of the Forty-first Congress.]

CREDENTIALS OF MESSRS. HILL AND MILLER.

TUESDAY, *March* 9, 1869.

On motion by Mr. Trumbull,

Ordered, That the credentials of Joshua Hill and H. V. M. Miller, Senators-elect from the State of Georgia, on the files of the Senate, with the accompanying papers, be referred to the Committee on the Judiciary.

WEDNESDAY, *May* 17, 1869.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of Joshua Hill and H. V. M. Miller, elected Senators by the legislature of the State of Georgia, reported them back to the Senate and moved that they lie on the table; which motion was agreed to.

[Mr. Trumbull stated (Congressional Globe, 1st sess. 41st Cong., page 102) that the committee were of opinion that the credentials should lie upon the table until action had been taken upon the bill in regard to the State of Georgia; that he was opposed to that recommendation and believed it the duty of the Senate to act upon the credentials at once.]

CREDENTIALS OF MESSRS. HILL AND MILLER, AND WHITELEY AND FARROW.

[Second session of the Forty-first Congress.]

MONDAY, *February* 14, 1870.

On motion by Mr. Trumbull,

Ordered, That the credentials of H. V. M. Miller and Joshua Hill, as Senators from the State of Georgia, on the files of the Senate, be referred to the Committee on the Judiciary.

FRIDAY, *July* 15, 1870.

Mr. Stewart presented the credentials of Richard H. Whiteley, elected a Senator by the legislature of the State of Georgia for the unexpired portion of the term ending March 3, 1871; which were read.

Ordered, That they lie on the table.

Mr. Stewart presented the credentials of Henry P. Farrow, elected a Senator by the legislature of the State of Georgia for the unexpired portion of the term ending March 3, 1873; which were read.

Ordered, That they lie on the table.

[Third session of the Forty-first Congress.]

TUESDAY, *December* 13, 1870.

On motion by Mr. Stewart,

Ordered, That the credentials of Richard H. Whiteley and Henry P. Farrow, Senators-elect from the State of Georgia, presented at the last session, be referred to the Committee on the Judiciary.

MONDAY, *January* 23, 1871.

Mr. Trumbull, from the Committee on the Judiciary, to whom were referred the credentials of Joshua Hill, H. V. M. Miller, Henry P. Farrow, and Richard H. Whiteley, claiming to be Senators-elect from the State of Georgia, submitted a report (No. 308), accompanied by the following resolution:

"*Resolved*, That Joshua Hill has been duly elected Senator of the United States by the legislature of the State of Georgia, and is entitled to take his seat on taking the oaths required by the Constitution and laws."

Mr. Stewart asked, and obtained, leave of the Senate to submit the views of a minority of the Committee on the Judiciary in reference to the election of Senators from the State of Georgia.

Ordered, That they be printed to accompany the report of the Committee of the Judiciary thereon.

REPORT OF COMMITTEE—MAJORITY AND MINORITY.*

[The committee consisted of Messrs. Trumbull (chairman), Stewart, Edmunds, Conkling, Rice, Carpenter, and Thurman.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 23, 1871.—Ordered to be printed.

Mr. Trumbull, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of Joshua Hill, H. V. M. Miller, Henry P. Farrow, and Richard H. Whiteley, claiming to have been elected Senators from the State of Georgia, submit the following report:

The credentials of all four of the claimants are sufficiently formal to entitle them to seats if they were otherwise entitled, but it is manifest that only two can be admitted under any circumstances. The Constitution declares that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof."

The history of the reconstruction of the State of Georgia is succinctly set forth in a report made to the Senate by the Judiciary Committee on the 2d of March last, from which the following are extracts:

"The acts of Congress of March 2, 1867, and March 23, 1867, called the reconstruction acts, made all existing government in that State provisional, and subject to the paramount authority of Congress. That paramount authority, by the same act, confided to the military arm of the executive department certain specified powers and duties for the preservation of peace and order in the State, until the people of this State should frame a new government and elect public officers under it, and be admitted again into full relation with the Union.

"Under these acts, and particularly that of June 25, 1868, a form of government was adopted by the people of Georgia, and they elected under it a legislature and governor. And in July, 1868, after sundry difficulties touching the eligibility of certain members of the legislature had been disposed of by the legislature, with the approval of the general in command of the district, the new government was by him declared duly

* Taken from Senate Reports, 3d sess. 41st Cong., No. 308. The accompanying documents making pages 8–16, 21–36, and 43–65, are omitted.

organized, and the governor was inaugurated, and the conduct of affairs was thereupon by the military commander turned over to the civil officers, and the military authority ceased.

"The culmination of this action is found in the following orders of General Meade, commanding the district:

"'[General Orders No. 101.]

"'HEADQUARTERS THIRD MILITARY DISTRICT,
"'DEPARTMENT OF GEORGIA, FLORIDA, AND ALABAMA,
"'*Atlanta, Ga., July* 14, 1868.

"'Whereas official information has been received at these headquarters from the governor-elect of the State of Alabama that the legislature of said State, elected under the provisions of General Orders No. 101, series of 1867, from these headquarters, had assembled and complied with the requisitions of the act of Congress, which became a law June 25, 1868, entitled "An act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress;" and whereas said act states that on compliance with the conditions therein set forth by any State the officers of said State, duly elected and qualified under the constitution thereof, shall be inaugurated without delay: It is therefore ordered—

"'I. That all civil officers holding office in this State, whether by military appointment or by failure to have successors qualified, shall promptly yield their offices and turn over to their properly elected and qualified successors all public property, archives, books, records, &c., belonging to the same.

"'II. Whenever the military commander of the subdistrict of Alabama is officially notified of the inauguration of the State government-elect, military authority, under the acts of Congress known as the reconstruction laws, will be at an end in said State; and it is made the duty of the subdistrict commander to transfer everything appertaining to the government of said State to the proper civil officers, and to abstain in future, upon any pretext whatever, from any interference with, or control over, the civil authorities of the State, or the persons and property of the citizens thereof.

"'III. On the inauguration of the civil government all prisoners held in custody or by bonds for offenses against the civil law will be turned over to the proper civil authority. In the mean time writs of habeas corpus from the United States courts will be respectfully obeyed, and the decisions conformed to. Writs from State courts will have respectful returns made, stating prisoners are held by authority of the United States, and can only be released by writs issued by United States courts.

"'By order of Major-General Meade.

"'R. C. DRUM,
"'*Assistant Adjutant-General.*'

(Similar orders were given with reference to the States of Georgia and Florida.)

"'HEADQUARTERS THIRD MILITARY DISTRICT,
"'*Atlanta, Ga., July* 20, 1868.

"'GOVERNOR: I have the honor to acknowledge the receipt of your letter of the 18th instant, advising me that a committee of the house of representatives had waited on you and verbally informed you "that the house, having made a careful investigation into the eligibility of its members, have decided, by a vote of the house, that all persons now in their seats are eligible."

"'I have already acknowledged the receipt of your letter of the 17th, reporting the action of the senate on the same subject.

"'I have now to advise and instruct you that each house having complied with the requisitions of my communication of the 18th instant, by examining into and deciding on the eligibility of their members, under the acts of Congress and the fourteenth article constitutional amendment, I have no further opposition to make to their proceeding to the business for which they were called together, as I consider them legally organized from the 18th instant, the date of the action of the house.

"'Very respectfully, your obedient servant,

"'GEORGE G. MEADE,
"'*Major-General, U. S. A.*

"'Hon. R. BULLOCK, *Provisional Governor of Georgia.*

"'A true copy:

"'R. C. DRUM,
"'*Assistant Adjutant-General.*'

"'HEADQUARTERS THIRD MILITARY DISTRICT,
"'*Atlanta, Ga., July* 21, 1868.

"'Civil government being established in Florida and Alabama, and the Georgia legislature having to-day passed the fourteenth article constitutional amendment, indicating that in a few days this State will have civil government re-established, I am prepared to dispense with one of the regiments of infantry in this district, and would recommend the withdrawal of the Fifteenth regiment, now in Alabama. Please notify me at the earliest moment, that I may make the proper arrangements for relieving it.

"'GEORGE G. MEADE,
"'*Major-General, U. S. A.*

"'Brevet Major-General SCHRIVER,
"'*War Department, Washington, D. C.*

"'A true copy:

"'R. C. DRUM,
"'*Assistant Adjutant-General.*'

"'HEADQUARTERS THIRD MILITARY DISTRICT,
"'*Atlanta, Ga., July* 21, 1868.

"'Both houses of the legislature of Georgia having examined into and decided upon the qualifications of their respective members, under fourteenth article constitutional amendment, I yesterday instructed the provisional governor to communicate to each house that I considered their organization legal, and withdrew any opposition to their proceeding to the business which had called them together. To-day both houses, by decided majorities, have passed the constitutional amendment known as article 14, and will, without doubt, at once otherwise comply with the requisition of the act of June 25, 1868.

"'GEORGE G. MEADE,
"'*Major-General.*

"'General U. S. GRANT, *Washington, D. C.*'

"'HEADQUARTERS THIRD MILITARY DISTRICT,
"'*Atlanta, Ga., July* 22, 1868.

"'Yesterday the governor-elect of Georgia notified me officially that both houses of the general assembly of Georgia had by solemn act complied with the requisitions of the act of Congress which became a law June 25, 1868; and to-day I have witnessed the inauguration of the governor-elect. The State of Georgia is therefore, under the act of Congress, entitled to representation. The official document will be carried to-day by Bvt. Brig. Gen. R. C. Drum, sent to Washington for this purpose.

"'GEORGE G. MEADE,
"'*Major-General, U. S. A.*

"'A true copy:

"'R. C. DRUM,
"'*Assistant Adjutant-General.*

"'General U. S. GRANT, *Washington, D. C.*'

"The State being then in fact relieved from military government, proceeded, in the manner provided by its constitution, to appoint judges and other officers of justice, and to fill up completely its organization of State government.

"The legislature, in the forms prescribed by the laws of the United States, proceeded to elect Senators to represent the State in Congress, and it also passed many laws.

"During all this time, however, certain persons—variously claimed to number from ten to twenty-five, but not so numerous as to affect the organization of the legislature in respect to a constitutional quorum of legal members—held seats in the legislature under the forms of election, but who were or are understood to have been disqualified therefor by force of the fourteenth amendment of the Constitution of the United States.

"After these events, and in September, 1868, a majority of the senate and house of representatives, respectively, including the persons so claimed to have been disqualified, proceeded to decide that persons of African descent (of whom there were several in each house) could not, for that cause, hold seats in the legislature, and to exclude them therefrom in a body, without giving them any voice in deciding the question; and thereupon they filled up the seats so made vacant by the admission of the white per-

sons having the next largest number of votes at the election for members of the legislature.

"These events last named, and the circumstances existing in connection with them, led to the passage of the act of December 22, 1869.

"The first section of that act made it the duty of 'the governor of the State of Georgia to summon all persons elected to the general assembly of said State, as appears by the proclamation of George G. Meade, general,' &c., dated June 25, 1868, to appear at the capitol on a day named.

"And it further directed that 'thereupon the said general assembly of said State shall proceed to perfect its organization in conformity with the Constitution and laws of the United States, according to the provisions of this act.'

"The persons named in this act, and in the proclamation, were those only who had received a majority of the votes at the election; and they were, in the aggregate, the same body of men who had composed the legislature at its organization, and thenceforth, until the exclusion of the negro members and the introduction of minority candidates into their places.

"The law, thus ascertaining the persons who were to assemble, then proceeds to direct that 'the said general assembly shall proceed to perfect its organization,' &c. No authority is conferred upon the governor to do it, nor upon the military commander. The power and duty to perfect its organization is conferred on the assembly exclusively by the very words of the act. There is no room for inference or construction.

"The next three sections provide the method by which the houses are to perfect their organization, *i. e.*, by taking certain oaths and by the election of officers, and they also provide that the neglect to take such oaths shall disqualify the persons so neglecting and make them ineligible to seats, and that false swearing in taking such oaths shall be perjury, and be punished as such.

"The next section (5th) provides severe penalties for any interference with the taking of such oaths and participation in the proceedings.

"The seventh section requires the President to employ the military forces of the United States so far 'as may be necessary to enforce and execute the preceding provisions of this act.'

"Under this act the governor of Georgia did summon the persons elected to the legislature, as named in the proclamation of General Meade, to assemble at the State-house in Atlanta on the 10th day of January, 1870.

"In pursuance of this proclamation the geater part, and nearly all the persons named, assembled at the time and place named.

"A quorum of the Senate took the oaths prescribed, and organized as provided for in the act.

"The members of the house of representatives were called to order by one Harris, not a member or officer, but who had been designated for that purpose by the governor. Some of the members protested against this and attempted to elect a speaker *pro tempore*, but were prevented by said Harris and his assistants; and thenceforth, until the final organization of the house, Harris continued to preside and to adjourn the body from time to time, according to his own pleasure, without consulting the house, and to determine what persons who had appeared as members should be permitted, from day to day, to take the prescribed oaths, and take their seats.

"This proceeding was in substance ratified by the general in command at Atlanta, who had been, after the passage of the act of December 22, 1869, appointed to the command of Georgia, as a military district under the act of March 2, 1867.

"It having been suggested to the general in command that sundry persons had taken or were about to take the oaths prescribed in the act of December 22, 1869, falsely, he directed that those accused of such improper conduct or purpose should, for the time being, be excluded from participation in the proceedings, and thereupon organized a board of military officers for the purposes set forth in the following general orders:

"'[General Orders No. 3.]

"'HEADQUARTERS MILITARY DISTRICT OF GEORGIA,
"'*Atlanta, Ga., January* 13, 1870.

"'In pursuance of instructions received from the headquarters of the Army, a board is hereby appointed to inquire into the eligibility of W. T. Winn, of Cobb County; John J. Collier, of Dooly County; A. W. Holcomb, of Milton County; W. J. Anderson, of Houston County; B. B. Hinton, of Marion County; and C. J. Welborn, of Union County, to seats in the legislature of Georgia, under the reconstruction acts.

"'The board will meet and organize at once, and will have power to administer oaths and send for persons and papers. They will permit the persons whose eligibility is in question to appear before them either in person or by attorney, and will also permit the

appearance before them of persons who deny the eligibility of said W. T. Winn, J. J. Collier, A. W. Holcomb, W. J. Anderson, B. B. Hinton, and C. J. Welborn.

"'The board will keep a complete and accurate record of the proceedings and of all testimony which may be given before them, and will transmit the same to these headquarters with its report.

"'*Detail for the board.*—Bvt. Maj. Gen. T. H. Ruger, United States Army; Bvt. Brig. Gen. T. J. Haines, United States Army; Maj. Henry Goodfellow, judge-advocate, United States Army.

"'By order of Brevet Major-General Terry:

"'J. H. TAYLOR.
"'*Assistant Adjutant-General.*

"'Official:

"'R. P. HUGHES,
"'*Acting Assistant Adjutant-General.*'

"'[General Orders No. 4.]

"'HEADQUARTERS MILITARY DISTRICT OF GEORGIA,
"'*Atlanta, Ga., January* 15, 1870.

"'The board of officers convened by General Orders No. 3, current series, from these headquarters, is hereby directed, in addition to the duty assigned to them by that order, to inquire into the eligibility under the reconstruction acts of the following-named members-elect of the house of representatives, viz:

"'Isham Raddish, of Appling County; R. W. Phillips, of Echols County; E. M. Taliaferro, of Fulton County; J. H. Nunn, of Glascock County; R. A. Donaldson, of Gordon County; W. P. Price, of Lumpkin County; J. N. Harris, of Murray County; L. H. Walthall, of Polk County; L. C. A. Warren, of Quitman County; Thomas F. Rainey, of Schley County; C. C. Humber, of Stewart County; G. N. Harper, of Sumter; Frank Wilchar, of Taylor County; John B. Sorrells, of Walton County; J. D. Smith, of Ware County.

"By order of Brevet Major-General Terry:

"'J. H. TAYLOR,
"'*Assistant Adjutant-General.*'

"The board proceeded to discharge its duties, and on the 25th day of January, 1870 the result of its action was promulgated as follows:

"'[General Orders No. 9.]

"'HEADQUARTERS MILITARY DISTRICT OF GEORGIA,
"'*Atlanta, Ga., January* 25, 1870.

"'Whereas the board convened by General Orders No. 3, current series, from these headquarters, consisting of Bvt. Maj. Gen. T. H. Ruger, colonel Eighteenth United States Infantry; Bvt. Brig. Gen. T. J. Haines, commissary of subsistence; and Maj. Henry Goodfellow, judge advocate, United States Army, has made its report in writing, by which it appears that R. A. Donaldson, of Gordon County; E. M. Taliaferro, of Fulton County, and J. H. Nunn, of Glascock County, members-elect of the house of representatives of Georgia, are not eligible to seats therein under the laws of the United States: Therefore it is hereby ordered that the said R. A. Donaldson, E. M. Taliaferro, and J. H. Nunn be, and they hereby are, prohibited from taking part in the organization of said house, or from attempting to exercise the functions of a member thereof; and

"'Whereas the said board have found that Thomas F. Rainey, of Schley County; J. N. Harris, of Murray County; R. W. Phillips, of Echols County; L. C. A. Warren, of Quitman County; Joseph D. Smith, of Ware County; W. P. Price, of Lumpkin County; J. B. Sorrels, of Walton County; G. N. Harper, of Sumter County; C. C. Humber, of Stewart County; L. H. Walthall, of Polk County; and Isham Raddish, of Appling County, are eligible to seats in the said house under the laws of the United States, no objections will be made to their participating as members in the organization of the house; and

"'Whereas it appears that Frank Wilchar, of Taylor County, has since the commencement of the session of the board been, and is now reported to be, absent from the city, so that the board has not been able to determine in his case, it is therefore ordered that the said board still hold his case under consideration, and that in the mean time, and

until his case be heard and determined, said Wilchar be prohibited from taking any part in the organization or participating in the proceedings of the house; and

"'Whereas J. B. Burtz, of Mitchell County; J. A. Brinson, of Emanuel County; A. T. Bennett, of Jackson County; A. M. George, of Baker County; David Goff, of Randolph County; William J. Hudson, of Harris County; D. Johnson, of Wilcox County; Henry C. Kellogg, of Forsyth County; J. W. Meadows, of Johnson County; J. H. Penland, of Union County; Robert C. Surrency, of Tatnall County; J. R. Smith, of Coffee County; Hiram Williams, of Dooly County; John C. Drake, of Upson County; J. T. Ellis, of Spalding County; J. M. Routh, of Worth County, persons elected to said house, have refused, declined, neglected, or been unable to take one of the oaths prescribed by the act of December 22, 1869, although ample opportunity so to do has been given them, and have thus by the terms of said act become ineligible to seats in said house, and have also filed with the Hon. R. B. Bullock, governor, their applications to the Congress of the United States for relief from their disabilities, thus admitting their ineligibility to hold the offices to which they were elected: It is therefore ordered that the said persons be, and they hereby are, prohibited from taking seats in said house or participating in the organization or proceedings thereof.

"'By order of Brevet Major-General Terry:

"'J. H. TAYLOR,
"'*Assistant Adjutant-General.*'

"By this action three of the members-elect of the house were excluded on proof of their ineligibility, and eleven admitted on proof of their being eligible.

"One person was prohibited from participating until the further order of the general, he not having arrived at Atlanta, and his case not having been disposed of.

"And it was further declared that sixteen other members-elect were excluded from participating in the proceedings, as having refused, declined, neglected, or been unable to take the oaths, although ample opportunity so to do had been afforded them, and because they had applied for relief from disabilities.

"These steps having been taken, the persons admitted to seats proceeded to elect a speaker on the 26th of January, 1870, and the result was officially communicated to headquarters at Washington, as follows:

"'ATLANTA, *Ga.*, *January* 26, 1870.

"'House organized this morning by electing McWhorter, Republican candidate, as speaker. On report of board three persons were excluded as ineligible; eleven of those inquired into were pronounced eligible; sixteen who refused to take oath were declared to have become ineligible by their refusal; and one, whose case was sent to the board, having failed to appear, and being absent from the city, was forbidden to take part in organization. After careful examination of act of December 22, I decided that the fourth section would not permit me to seat the next highest candidates in place of ineligible persons.

"'ALFRED H. TERRY,
"'*Brevet Major-General.*

"'General E. D. TOWNSEND.'

"The intervening action of the military commander terminated at this time.

"Upon this history the committee are constrained to say that, in their opinion, the before-stated action of the military authorities was not authorized by law.

"The legislature elected in Georgia under the acts of Congress authorizing it was not a part of the government declared by the law not to be legal and to be provisional; but it was a part of the new government designed by Congress to take the place of the provisional government, as a permanent one. This seems perfectly clear from the words of the law; and this view of the subject was taken by the General of the Army by his order to General Meade, of March 2, 1868 (Meade's Rep., page 24), and again in the same way on the 29th of April, 1868 (Meade's Rep., page 30), as follows:

"'WASHINGTON, D. C., *March* 2, 1868.

"'The election proposed by the convention for officers under the new constitution I do not consider as an election for officers under the provisional government, referred to in section 6 of the act approved March 2, 1867. It is clear to my mind that a proper construction of section 4 of act approved March 23, 1867, does not authorize district commanders to fix or change the day of election after it has been designated by the convention.

"'U. S. GRANT, *General.*

"'Maj. Gen. GEORGE G. MEADE,
"'*Commanding Third Military District.*'

"'HEADQUARTERS WAR DEPARTMENT,
"'*Washington, D. C., April* 29, 1868.

"'I have carefully read your letter of 16th April, and its inclosures. I see nothing in them to change my opinion as expressed to you in my dispatch of March 2, 1868.

"'The officers elected under the new constitution of Georgia are not officers of the provisional government referred to in the reconstruction acts, nor are they officers elected under any so-called State authority, and are not therefore required to take the oath prescribed in section 9, act of July 19, 1867. The eligibility to hold office must be determined by the new constitution, and the amendment to the Constitution of the United States designated as article 14.

"'U. S. GRANT, *General.*

"'Maj. Gen. GEORGE G. MEADE,
"'*Commanding Third Military District.*'

"It does not follow from this that a legislature thus situated, and before the admission of the State, is independent of the laws of Congress. It is not; but it is thought that the correction of any misbehavior of it or its members rests with Congress, and not with the military.

"But however this might have been under the acts of March, 1867, the act of December 22, 1869, must be the special guide for the present purpose. It must be supposed that it speaks the will of Congress, even though that will may not accord with the acts of 1867, and even though it should be conceded (as it is not) that it would have been better had full discretion over the seating of the members of the Georgia legislature been left to the general in command. The question is what the law is, not what it might have been, or what it might be wished to be.

"The act only invokes military action in aid of what it provides shall be done; no more.

"The act, as has been seen, is clear and simple in its provisions. The governor was empowered to do one thing only, *i. e.*, summon the members-elect.

"That being done, the next duty was imposed in express terms on the general assembly of Georgia and its several members. The consequences of a failure to perform that duty were next pointed out in explicit language, *i. e.*, those who should neglect to qualify should not have seats, and those who should falsely obtain them should be punished by a specified civil tribunal in a specified way. And for these purposes, and subject to these conditions, it was provided, in order to secure the free and full compliance with the act, that any interference with members in their attempt to swear in, or in sitting, should be criminal.

"It has been suggested that the words in section 4, 'entitled to compose such legislature,' might be construed to vest in the military commander the power to decide what persons were entitled to sit; but it does not appear possible to do this in the face of the express prior provisions of the act giving every member the right of his own will to take one of the oaths prescribed, and in the face of the subsequent provisions declaring the interruption of any person 'elected as aforesaid' in taking the oaths and his seat to be criminal and punishable. But the clause in question does not look to conferring any authority, but is only a definition or description of the persons upon whom the law conferred the power to act, *i. e.*, those who by Meade's proclamation were elected and who should swear in.

"It has been seen that the legislature, as originally elected and organized in 186–, was not a 'provisional' legislature within the purview of the acts of reconstruction, but that it was a State legislature authorized by Congress to be elected and assembled, but not having *absolute* legislative power until the admission of the State to representation. And in this condition it is worthy of notice that when the act of December 22, 1869, was under consideration, this committee reported it with a provision making the legislature 'provisional' until the further action of Congress, and that provision *was rejected by the Senate.*

"For these reasons the committee is of opinion that the acts of Harris beforementioned, and the action of the general in command in excluding the persons who either had taken or were willing to take the oaths provided were not warranted by law.

"The order excluding those who confessedly declined to take the oaths was purely ministerial, and may be regarded as in proper compliance with the seventh section of the act.

"It is due to the general in command to say that the circumstances justify the committee in reporting that his whole conduct in the affair was under the sincere belief that he was acting within the limits of his lawful authority, and that under circumstances of much difficulty and delicacy he conducted affairs (although outside of the law) in such a manner as to command the personal confidence and respect of all parties and persons concerned. And the committee is also of opinion that the three persons

excluded, who desired to qualify, were persons who would have violated the act by taking the oath, so that in respect to them there was no actual injustice done.

"After the house of representatives had thus organized, it admitted to seats several persons who, in the elections, had been candidates against the persons so excluded, but had been beaten, receiving only a minority of the votes cast.

"On the hearing before the committee it was conceded that there was nothing in the constitution or laws of Georgia which would warrant such a proceeding, but it was contended that this action was warranted by the general principles of parliamentary law, which, it was claimed, authorized the body charged with deciding who is elected to treat as not cast all votes given for an ineligible candidate, and so to conclude that the eligible candidate having the greatest number of votes is the choice of the majority of the electors, although he in fact received only the votes of a minority.

"However this may be in cases in which a plurality elects, or in which the want of capacity in the candidate is of such a manifest and indisputable and notorious character as to warrant the presumption that the electors in voting for him intended to throw away their votes (which the committee do not decide), it is clear that no such rule can be applied to cases of the nature now under consideration, in which the test of eligibility is somewhat broader than the one existing at the time of the election, and in which, in either case, the question depends on the true application of the law to conclusions of facts to be drawn from various circumstances, not necessarily notorious or indisputable in their character.

"The committee are, therefore, obliged to conclude that the persons thus admitted were not lawfully entitled to seats in the Georgia legislature. And it should, perhaps, be mentioned that on the hearing before the committee on the occasion of the consideration of the act of December 22, 1869, it was contended by the persons asking congressional intervention in the affairs of Georgia that there was no authority for the seating of minority candidates by the legislature, as had been done on the expulsion of the negro members; and that one distinct ground upon which the passage of that act was rested as illegal and revolutionary was that fact. The interpretation of the law cannot be made to change according to the changing wishes of those who invoke its assistance.

"The committee, then, report, under the first-named resolution, that in the following respects the organization of said legislature has not been warranted by law:

"1. In the control and direction of its proceedings by Harris.

"2. In the exclusion from taking the oaths and from seats of the three members-elect who offered to swear in.

"3. In the seating of the persons not having a majority of the votes of the electors.

"In respect to the second resolution before recited, calling upon the committee to report whether any further legislation is necessary in respect to the organization of the legislature in Georgia, the committee report that a full hearing was given to both sides of the controversy there, and that the representatives of the great body of those who contended that the proceedings aforesaid had been illegal and irregular expressed their willingness that Congress should refrain from further interference with the organization and composition of the legislature, and leave it to proceed in the exercise of legislative functions, notwithstanding the matters before mentioned, if the provisions of the constitution of Georgia and the ordinance of its convention could be carried out, providing for a fresh election of one-half the senators and all of the members of the house of representatives in November, 1870. The other party justifies what has taken place, and of course objects to any action on the subject.

"In this condition of affairs, inasmuch as the errors of the general in command, before stated, do not appear to have worked any serious injustice in point of fact, and as the error in seating the minority candidates was committed by the house of representatives in the exercise of a right ordinarily belonging to it in the first instance; and inasmuch as it appears certain that the term of office of the members of the Georgia legislature and of its State government will expire at the same time that it would have done had the State been fully restored to its place in the Union in July, 1868, and do not commence or run from the date of her future admission to representation, and that without reference to what might be the legal or literal construction of the last clause of the second subdivision of the first section of the third article of the constitution of Georgia, in the following words: 'The general assembly may by law change the time of election, and the members shall hold until their successors are elected and qualified,' any interpretation of this constitution which should have the effect to allow the extension of the term of office of the members of its general assembly at their own will and pleasure, and without a fresh expression of the will of the people, would be contrary to the essential principles of free institutions, and, if carried into practice, subversive of a republican form of government in that State, which would authorize the constitutional intervention of the United States to correct it; and it could not have been the intention of the people,

from whose adoption that constitution derives its authority, to confer such a power as this construction would give, nor could such have been the understanding of Congress when it passed the act of June 25, 1868; and inasmuch as the chief body of those aggrieved by the wrongs before stated is, upon the faith of this conclusion of the committee in the respects last mentioned, willing to accept the existing state of things; and as it appears to be of much importance to the people of the whole country as well as to the people of Georgia that the final and harmonious restoration of all the States lately in rebellion to full representation, privileges, and responsibilities as members of the Union should be accomplished at the earliest practicable moment, in order that the united and friendly efforts of the whole people may be given to the arts of peace and the means of true progress, the committee feel justified in omitting to recommend any further legislation on the subject of the organization of the legislature in Georgia."

Under the act of June 25, 1868, the legislature of Georgia, consisting by the constitution of that State of forty-four senators and one hundred and seventy-five representatives, was convened on the 4th of July, 1868, and, after having, so far as formality of procedure is concerned, complied with the provisions of that act, proceeded on the 28th of July, 1868, to the election of persons to represent said State in the Senate of the United States. The election was consummated in joint meeting of the two houses on the next day by the following vote: For Senator for the term ending March 4, 1873, Joshua Hill received 110 votes; Joseph E. Brown received 94 votes; Alex. H. Stephens received 1 vote; C. W. Styles received 1 vote; and Hill was declared duly elected. For Senator for the term ending March 4, 1871, the vote was as follows: H. V. M. Miller, according to the table as it appears in the journal, received 120 votes, but on counting the names of the persons recorded as voting, Miller received 117 votes; Foster Blodgett received 72 votes; J. L. Seward received 13 votes; A. T. Akerman received 6 votes; and Miller was declared duly elected. The colored members of the legislature, as well as those alleged to be disqualified, were present and participated in this election. It was not till September 3, more than a month afterward, that the legislature refused to recognize colored persons as members. Appended is a copy of the order of Major-General Meade, giving a list of the persons elected to the senate and house of representatives of Georgia, marked Exhibit A; also a copy of the vote in detail for Senators at the time Hill and Miller were elected, showing for whom each member voted, marked Exhibit B. Three of the members who voted for Hill, to wit, Donaldson, Taliaferro, and Nunn, after having taken the oaths required by the act of December 22, 1869, were, on investigation of a military commission, declared ineligible, and prohibited by military order from further participation in the reorganized legislature; and sixteen others, eleven of whom, to wit, Burtz, Drake, Ellis of Spalding County, George, Goff, Hudson, Johnson of Wilcox, Kellogg, Meadows, Penland, and Williams of Dooly, voted for Hill, and one of whom, Surrency, voted for Brown, were, by a like order, excluded from participating in said reorganization, as having refused or been unable to take the oaths required, and because they had applied for relief from political disabilities.

No inquiry into the eligibility of any of the sixteen thus excluded was made, and the order excluding two of them, to wit, Wilchar and Bennett, was subsequently revoked. Two others, M. J. Crawford and John C. Drake, have made affidavit that they were entitled to seats in the reorganized legislature, which by threats of prosecution they were deterred from occupying at the time. Their affidavits are appended, marked Exhibits C and D. Another of the sixteen, J. H. Penland, states as follows: "I was induced to sign an application for pardon through mistake, and did not mean thereby to admit that I labored under any disability to take the necessary oaths, and resume my seat in the house as a member from the county of Union." A copy of Penland's statement from the journal of the house is appended, marked Exhibit E.

The journal shows that Bradley, one of the senators who voted for Brown, was subsequently, on the 13th of August, 1868, declared to have been ineligible at the time of his election, in consequence of having been convicted of a penitentiary offense, the constitution of the State declaring any person ineligible who has been convicted of a crime punishable by imprisonment in the penitentiary. Before the vote was taken declaring Bradley ineligible, he resigned his seat in the senate.

Deducting those who were excluded by military order from taking part in the reorganized legislature, the result would be as follows: Hill, 96 votes; Brown, 93 votes; Stephens, 1 vote; Styles, 1 vote.

If the votes of Crawford, Drake, and Penland, who claim that they were improperly deterred from taking part in the reorganized legislature, be counted, then Hill's vote would be 99; and if Bradley's vote be deducted, Brown would have but 92 votes. Seventeen of those who voted for Miller, namely, Donaldson, Mason, Taliaferro, Burtz, Drake, Ellis, George, Goff, Hudson, Johnson, Kellogg, Meadows, Penland, Rouse, Smith of Coffee, Surrency, and Williams, were excluded by military order from taking part in the reorganized legislature. Deducting these from the votes cast when he was elected, the

result would be as follows: Miller, 100 votes; Blodgett, 72 votes; Seward, 13 votes, Akerman, 6 votes.

Besides the persons excluded by military order from taking part in the reorganized legislature, six senators, namely, Graham, Moore, Collier, Wynne, Anderson, and McCutchen, and four representatives, namely, Crawford, Long, Taliaferro, and McCullough, took no part in the legislature as reorganized, and minority candidates were seated in their places. No investigation into the eligibility of these six senators and four representatives appears to have been had. One of them (McCutchen) deceased about the time of the reorganization. The act of December 22, 1869, did not specify any time within which the persons declared elected by General Meade's proclamation should appear and qualify in the legislature as directed to be reorganized. Of the above senators and representatives, six, namely, Anderson, Moore, McCutchen, Crawford, Long, and Smith, voted for Hill, and one, Graham, voted for Styles.

The proceedings in the election of H. P. Farrow and R. H. Whiteley took place in the reorganized legislature, February 15 and 16, 1870. In the proceedings of Tuesday, February 15, in the house of representatives, the vote for Senator for the term ending March 4, 1873, was as follows: Henry P. Farrow, 80 votes; scattering, 2 votes. And for Senator for the term ending March 4, 1871, Richard H. Whiteley, 82 votes; scattering, 1 vote.

The constitution of Georgia declares that the senate shall consist of forty-four senators, and the house of representatives of one hundred and seventy-five representatives, and requires a majority of each house to constitute a quorum to do business. At the time of the election of the Senators last named one hundred and fifty-seven persons, of whom three were prohibited by military order from participating in the proceedings, and thirteen were minority candidates, whose names do not appear as elected by the proclamation of General Meade, had been sworn in as members of the house of representatives; and one of the sworn members, Robert Lumpkin, is said to have deceased before the Senatorial election. Deducting the thirteen minority members from the one hundred and fifty-seven, would leave one hundred and forty-four qualified members, of whom the journal shows but seventy-one to have been present at the time of Farrow's election by the house. If the three members excluded by military order, and the one said to have deceased, in addition to the minority members, be deducted, it would leave but one hundred and forty subsisting members; eleven of the thirteen voted for Farrow. February 2, 1870, on the question of the ratification of the fourteenth amendment to the Constitution of the United States, only seventy-one, out of one hundred and fifty-two sworn members of which the house then consisted, cast their votes, six of which were given by minority members.

The journal of the proceedings of the joint assembly of the two houses on Wednesday, February 16, shows that at 12 o'clock the senate attended in the hall of the house of representatives, and then follow the following entries: "The general assembly then proceeded to consolidate the vote of the two houses cast on yesterday for a United States Senator for the term ending March 4, 1873, and on consolidating the same it appeared that the Hon. Henry P. Farrow had received 109 votes; scattering, 2 votes." Then follows a list of the names of the senators, twenty-nine in all, and of the representatives, eighty in all, who voted for Mr. Farrow, and "scattering two," and Henry P. Farrow "was declared duly elected United States Senator for the term ending March 4, 1873."

A similar entry is made in the journal as to the election of R. H. Whiteley for the term ending March 4, 1871, except that Whiteley received 110 votes, and there was scattering 1 vote. (A copy of the journal of the house of representatives showing the proceedings in full upon the election of Farrow and Whitely in that body on the 15th, and of the joint assembly on the 16th of February, is hereto appended, marked Exhibit F.) Bradley, who had been declared ineligible by the senate in consequence of his conviction of a penitentiary offense, and had also resigned in August, 1868, without a re-election, appeared in the reorganized legislature of 1870, and voted for Farrow and Whiteley. It appears that no vote was taken in the joint assembly, as required by the act of Congress, when either house shall have failed to take proceedings as required by the act; but the fact that Farrow and Whiteley had received a majority of all the votes cast in each house, on the day previous, without inquiry whether a quorum of each house was present at the time, seems to have been regarded as sufficient to perfect their election.

Of the 109 votes cast for Farrow in both houses, 16 were given by persons not embraced in the list of persons named in General Meade's proclamation as elected, but by minority candidates, who had been seated in the places of those elected by the people, and who had not qualified in the second instance as members. The names of the minority members who voted for Farrow are: Crayton, Dunning, Henderson, Mathews, Traywick, of the senate; and Guilford, Goodwin, Hutchings, Holcomb, Harris of Glascock, Johnson of Forsythe, Johnson of Spalding, Jackson, Nesbit of Gordon, Rogers, and Thomason, of the house.

Mathews did not vote for Whiteley, but Armstrong, another minority member, did,

so that Farrow and Whiteley each received the votes of sixteen minority members, some of whom received less than half the number of votes cast for the majority candidate in whose place they were substituted, and all of whom, according to the unanimous report of this committee made at a former session, were admitted to seats in the legislature without authority of law. Deducting the 16 votes cast by minority members, and Farrow received in both houses the votes of ninety-three and Whiteley of ninety-four qualified members.

Deducting these sixteen minority members from the whole number, one hundred and eleven, present in the joint meeting of the general assembly, and it would leave but ninety-five present, considerably less than a "majority of all the members elected to both houses," as required by the act of Congress, but more than a majority of the persons who had qualified as members in the reorganized legislature.

The general assembly was organized in July, 1868, in *prima facie* accordance with the constitution of the State, the reconstruction acts of Congress, and the orders of the military department. It complied in form with all the requirements necessary to entitle the State to representation in Congress, and members were accordingly admitted into the House of Representatives of the United States in 1868. Whether either or both houses of the general assembly of Georgia admitted persons to sit as members in their respective bodies who were disqualified by the third section of the fourteenth article of the Constitution was at the time a disputed question; but each house appointed a committee to consider that question, after whose report it was voted by each house that all its members were qualified. These reports and the action upon the same appear in the appendix to the report made to the Senate by this committee, by Mr. Stewart, at the third session of the Fortieth Congress, and are hereto annexed, marked Exhibit G. The general assembly thus organized not only elected Senators of the United States, but it also elected, as required by the State constitution, State officers, to wit, a secretary of state, a comptroller-general, and a State treasurer, all of whom have since been discharging the duties of their respective offices without question. At the same session judges of the various courts throughout the State were appointed by the governor, by and with the advice and consent of the senate, who have since been and are now presiding in the various courts of the State. The legislature thus organized passed laws authorizing the borrowing of money and affecting the general interests of the State, none of which have ever been held or supposed to be invalid for the reason that the legislature which enacted them was not properly organized. The reason for the passage of the act of Congress of December 22, 1869, requiring a reorganization of the general assembly is to be found in the wrongful expulsion by the general assembly in September, 1868, of its colored members, in the seating of the minority candidates in their places, and in continuing in their seats members believed to be disqualified, and in the general disorder and violence which prevailed in the State. That act did not declare the general assembly as organized in July, 1868, to have been illegal, or its acts, other than those referred to in the act itself, invalid; but it provided for correcting the wrongful and revolutionary acts which had been done by it as organized in July, 1868. It is not believed that the act of December 22, 1869, would ever have been passed had the colored members been permitted to retain their seats and the peace of the State been preserved.

The body of the general assembly as organized in July, 1868, and as reorganized in January, 1870, is not essentially different. Of the forty-four senators and one hundred and seventy-three members declared elected by General Meade, only five senators and nineteen representatives who participated in the organization of July, 1868, were excluded or failed to participate in the reorganization in January, 1870, and twenty-one minority candidates were improperly admitted to seats in the general assembly, as reorganized, in their places. The general assembly as organized in July, 1868, and at the time of the election of Hill and Miller, contained in each house a constitutional quorum of legal members. All the contestants maintained the position before the committee that the ineligibility or disqualification of individual members of either house, not sufficiently numerous to affect its constitutional quorum, was an immaterial issue. Your committee have not, therefore, deemed it necessary to discuss that question further than to state the facts in regard to it. Three of the claimants—Joshua Hill, W. P. Farrow, and R. H. Whiteley—have had their political disabilities removed by act of Congress of June 25 and July 20, 1868. H. V. M. Miller never labored under any of the political disabilities imposed by the third section of the fourteenth amendment to the Constitution of the United States; but it is admitted that he acted as a surgeon in the rebel army under an appointment from a colonel of a rebel regiment, and having thus given aid to persons in hostility to the United States, cannot take the oath required by the act of July 2, 1862.

The act of July 11, 1868, prescribes a qualified oath to be taken by persons elected or appointed to office from whom political disabilities have been removed. Your committee are of opinion that Joshua Hill was duly elected by a legislature having authority

to elect Senators, and is entitled to take his seat on taking the oaths required by the Constitution and laws. Miller, however, is not relieved from taking the oath prescribed by the act of July 2, 1862, and in the opinion of your committee is not entitled to take his seat; and it follows from the conclusion of the committee as to the proceedings in the election of Hill and Miller that neither Farrow nor Whiteley is entitled to a seat.

The committee recommend for adoption the following resolution:

Resolved, That Joshua Hill has been duly elected Senator of the United States by the legislature of the State of Georgia, and is entitled to take his seat on taking the oaths required by the Constitution and laws.

I agree that Joshua Hill is entitled to take his seat; and I hold that H. V. M. Miller is entitled to take his seat on taking the oath prescribed by the Constitution.

A. G. THURMAN.

Mr. Stewart asked and obtained leave to submit the following as the views of the minority:

The undersigned, being unable to agree with the report of the majority of the committee, beg leave to submit the following:

The main question at issue is, which election shall be held valid; that of Hill and Miller, in July, 1868, or that of Farrow and Whiteley, in January, 1870? In the determination of this question much depends upon the point of time when Georgia became entitled to representation in Congress.

The ground assigned for the exclusion of Senators from the rebel States after the fall of the rebellion was that those States were not entitled to representation.

The report of the Reconstruction Committee, made at the first session of the Thirty ninth Congress, on the 8th of June, 1866, reviewed the condition of these States, and proclaimed the doctrine that further guarantees were necessary for protection, peace, and union, and that it was the duty of Congress to exercise a legislative control over the whole subject until these objects were secured, and that neither House should pass upon the election and qualifications of its members until Congress had declared the State entitled to representation.

This report has formed the basis of the reconstruction policy of Congress, both in submitting constitutional amendments and in its legislative action.

We have been able to find no case in the history of the Government where Senators have been admitted from a State not entitled to representation in Congress at the time of their election.

There are many cases in which this legislative declaration was not made until after the election of Senators. This has occurred in the admission of new States where the organization of the State and the election of Senators had occurred previous to the admission. But in those cases the act of admission was an approval of the organization that had preceded it, and amounted to a legislative declaration that the State at the time of the election of Senators was entitled to representation. In each of these cases the loyal status of the State was unquestioned, and the act of Congress admitting such State was construed to relate back to the election of Senators, and to amount to a legislative declaration that the State at the time of the election was entitled to representation. This principle cannot help the case of Hill and Miller, for at the time the declaration was made by the act of July 15, 1870, that the State of Georgia was entitled to representation, the status of things had been changed in Georgia by the reorganization of the legislature. This declaration related to the then existing condition of the State.

Congress has already in effect decided that the necessary legislative declaration that Georgia was entitled to representation was not made prior to the election of Hill and Miller. The act of December 22, 1869, "to promote the reconstruction of Georgia," can be justified upon no other theory than that reconstruction in that State was not then an accomplished fact. After a compliance with this act, and not before, we have the declaration in the act of July 15, 1870, that "it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." If this act relates back to the date of the election of Hill and Miller, their exclusion from seats in this body from July, 1868, until now is wholly without justification, and the act of December 22, 1869, was an exercise of power over a State entitled to representation for which there is no precedent; and which, if exercised in the case of Massachusetts or Ohio, would, to say the least, be open to grave constitutional doubts. It directs the governor to convene the persons originally elected to the legislature, and requires those persons, as a qualification for seats in that body, to take and subscribe to an oath hitherto unknown to the laws of the State of Georgia or of the United States; and it also required them to reorganize the legislature by electing officers, who shall also be required to take the same oath. It requires the legislature to ratify the fifteenth amendment before Senators and Representatives shall be admitted to seats in Congress, and prescribes

various other matters, all pertaining to the reconstruction of a rebel State, and never applied to a loyal State whose practical relations to the Union were not disturbed. We venture to affirm that the Senate and House of Representatives in voting for that act did so upon the theory that they were reconstructing a rebel State, and not upon the theory that they were dealing with a State whose practical relations with the United States had never been disturbed, or which, having been disturbed, were then fully restored. It seems clear that the requirement alone that the legislature should ratify the fifteenth amendment before Senators and Representatives should be admitted from Georgia was in itself a declaration that Georgia was not on the 22d of December, 1869, entitled to representation. But after the reorganization of the legislature under this act, the whole matter was again submitted to Congress, and Congress accepted the State as then organized. The act of July 15, 1870, was a legislative declaration that the State was then entitled to representation under the organization of the legislature as then existing, and related back to the commencement of the then existing state of things, namely, the reorganization of the legislature in January, 1870. This was a declaration that Georgia was entitled to representation at the time of the election of Farrow and Whiteley.

The language of the act of July, 1870, is "that the State of Georgia, having complied with the reconstruction acts, and the fourteenth and fifteenth articles of amendments to the Constitution of the United States having been ratified in good faith by a legal legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States."

How can it be claimed that this language refers to the organization in 1868, in view of the facts in this case? Had the State of Georgia complied with the reconstruction acts at that date?

If this be so, Congress stultified itself in passing the act of the 22d of December, 1869, to promote the reconstruction of Georgia, eighteen months after she had fully complied with the reconstruction acts under which the other States were admitted.

It seems clear that this language embraced all the reconstruction laws with which Georgia was required to comply, including the act of December, 1869. It is evident that Congress intended to declare, and did declare, that after the compliance with the last-named act, and not before, Georgia was entitled to representation.

It is too late to question the propriety of these acts by either House acting separately upon the credentials of its members, for it is too well established that Congress must determine when a State is entitled to representation. After that determination has been made, neither House, acting alone, can question its validity, but each House is confined, in passing upon the credentials of its members, to matters of election and qualification.

We have shown that Hill and Miller were not elected from a State which, at the time, was entitled to representation by any act of Congress, from which it follows that they are not entitled to seats in the Senate.

We have also shown that Farrow and Whiteley were elected by a legislature of a State which Congress recognized as duly organized by declaring the State entitled to representation.

The election of these gentlemen seems to have been regular and a substantial compliance with law, and we therefore conclude that they are entitled to their seats.

We might stop here, resting the whole case on these acts of Congress, but it seems proper to embody in these views a more full history of the transaction.

The credentials of Mr. Hill were referred to the Committee on the Judiciary at the third session of the Fortieth Congress, and that committee, after a careful examination of the whole case, submitted a report, which, for convenience of reference, is hereto appended.

The committee which made this report was composed of Messrs. Trumbull, Stewart, Frelinghuysen, Edmunds, Conkling, Rice, and Hendricks. The report was made by Mr. Stewart, and concurred in by Messrs. Edmunds and Rice. Mr. Conkling concurred in the conclusion, and agreed that the report be made. Mr. Frelinghuysen signed the report with a further qualification, using the word "now," which, it must be admitted, makes it difficult to determine what he really meant.

Four of the committee, however, constituting a majority, concurred in the conclusion of the report.

We call especial attention to that conclusion, which is in the following significant language:

"Wherefore your committee feel called upon to recommend that Mr. Hill be not allowed to take his seat in the Senate for the reason that Georgia is not entitled to representation in Congress."

The four Senators who arrived at this conclusion are still members of the Senate and of the Judiciary Committee, and constitute a majority of that committee.

If Georgia was not entitled to representation, by what authority did she elect Senators? The right of representation cannot exist in a State without the right to elect per-

sons to represent such State. The converse of this proposition seems equally true, that where the right of representation does not exist there can be no right of election.

A point is made on the following language in the report of the committee made by Mr. Edmunds at the last session:

"It has been seen that the legislature, as originally elected and organized in 1868, was not a 'provisional' legislature within the purview of the acts of reconstruction, but that it was a State legislature authorized by Congress to be elected and assembled, but not having absolute legislative power until the admission of the State to representation."

We are unable to see clearly the distinction between a provisional legislature and a State legislature not having absolute legislative power. This seems to be a controversy about terms, not substance. The fact that Congress continued its legislative control is conclusive as to the status of the State, and the fact that Congress recognized and confirmed certain acts done by the legislature of Georgia is answered by the further fact that Congress also refused to sanction many other important acts of that same legislature. It refused to sanction the receiving and retaining of a large number of disqualified persons under the proposed fourteenth amendment. It refused to sanction the act of that legislature in expelling the colored members. It even refused to sanction the authority of the legislature, as then organized, to elect its own officers, and required an organization to be commenced *de novo*.

Notwithstanding all this it is maintained that this State, which was not entitled to representation, whose legislature had no power to elect a clerk or sergeant-at-arms, was clothed with all necessary power to elect a Senator of the United States.

Our opinion is that there was no legal organization of the legislature, by reason of a refusal to comply with the act of June, 1868, which says: * * * "But no person prohibited from holding office under the United States, or any State, by section 3 of the proposed amendment to the Constitution of the United States, known as article 14, shall be deemed eligible to any office in either of said States, unless relieved from disability, as provided in said amendment."

But it is said that whether the legislature did admit and retain disqualified persons is a disputed question. We never saw any reason for disputing that fact, nor the fact that it was done knowingly and willfully.

It seems, however, that if any doubt ever existed on that question, that the fact that on the reorganization a large number were either excluded or failed to qualify has settled all reasonable doubts. Who can doubt that of the large number who failed to qualify under the reorganization there were many ineligible persons?

But we will not differ about terms in this controversy. It may be called a State legislature without absolute power of legislation, a provisional legislature, or an illegally organized legislature.

We have shown that it did not have all the power of the legislature of a State whose practical relations with the Union were intact, but on the contrary that Congress continued to legislate to promote the reconstruction of Georgia long after the election of Hill and Miller, with the declared purpose of restoring the practical relations of that State to the Union. It is true that this legislature was not in existence at the time of the passage of the original reconstruction acts, and probably was not one of the provisional governments referred to in those acts. Nevertheless, Congress continued its legislative authority over the State, and practically treated the government therein as provisional. The fact that it was organized under the new constitution of Georgia did not of itself deprive it of its provisional character. It did not cease to be provisional until Congress declared the State entitled to representation. All the provisional governments in the South were organized under State constitutions, but Congress refused to regard them as legal State governments, and subjected them to the paramount authority of the United States. When the credentials of Mr. Hill were before this committee on a former occasion, the position taken by the report submitted to the Senate was that the legislature had failed to comply with the act of Congress providing for its organization, and that the existence of any legislature authorized to act as such was the issue involved.

They say: "For the purposes of this report, however, your committee did not deem it necessary to ascertain the number of disqualified persons admitted. But the fact that any were knowingly admitted was not only a violation of the fourteenth amendment, and a failure to comply with the requirements of Congress, but manifests a disposition to disobey and defy the authority of the United States. If one could be admitted why not all? And will it be contended that if the entire body had been composed of men who had usurped the functions of the legislature against the express provisions of the reconstruction acts, they could have complied with the provisions of those acts so as to create any obligation on the part of Congress to receive their Senators and Representatives?

* * * * * * *

"It is quite probable that Mr. Hill received votes of persons who were not qualified to hold seats in the legislature more than sufficient to constitute his majority and secure

his election, but your committee do not propose to investigate that question. The election and qualification of members of the legislature where the existence of any legislature authorized to act as such is not involved cannot be inquired into by the Senate in determining the right of a Senator to his seat. Your committee hold that the question involved in this case is not whether persons not entitled to seats in the legislature were received by that body and allowed to vote upon the election of a Senator, but whether the body assuming to be the legislature violated the conditions upon which it was allowed to organize by permitting disloyal persons to participate in its proceedings. It may be contended that although the matters hereinbefore set forth constitute a failure on the part of the State of Georgia to comply in every respect with the reconstruction acts, yet Congress ought to waive these slight departures and admit their representatives. But an examination into the subsequent proceedings of the legislature of Georgia, and the disorganized condition of society in that State, leads your committee to the conclusion that all these violations of law were in pursuance of a common purpose to evade the law and resist the authority of the United States."

It is now contended that the Senate should waive the rebellious acts of this pretended legislature and accept the Senators it elected while it was knowingly and willfully defying the authority of the United States; and this, too, after Congress in its legislative capacity has, in effect, declared this organization illegal by ordering a reorganization to be made. So radical had been the legislation of Congress in respect to Georgia that it was deemed necessary in the act admitting the State, passed on the 15th of July last, to expressly ratify certain things that had been done to avoid the conclusion that Congress intended to annul all the acts of this pretended State government. The language of that law is as follows:

"But nothing in this act contained shall be construed to deprive the people of Georgia of the right to an election for members of the general assembly of said State, as provided for in the constitution thereof; and nothing in this or any other act of Congress shall be construed to affect the term to which any officer has been appointed or any member of the general assembly elected as prescribed by the constitution of the State of Georgia."

Why say that this act should not deprive the people of Georgia of an election under their constitution at the time fixed therein, if the act itself was an approval of what they had done and related back to the organization of the State? Why say that nothing in this or any other act of Congress shall affect the term to which any officer has been appointed, or any member of the general assembly elected, if the act itself was to be construed to relate back to the first organization and amount to a legislative declaration that Congress approved of that organization? The fact is, that these acts of Congress had treated the State as not yet fully reconstructed, and it was thought necessary to expressly approve certain important matters, to the end that it might not be claimed that they were disapproved.

If Congress had intended to approve of the election of Senators, it seems natural that such intention should have appeared in the list of those things which were not to be affected or disturbed.

It is suggested that there is some doubt about the regularity of the election of Mr. Farrow, for the reason that there was no quorum present in the house of representatives at the time of his election. The records show that the house, when reorganized and disloyal members excluded, consisted of one hundred and fifty-four members, and Mr. Farrow alleges that one member, Robert Lumpkin, who had been sworn in, died before the Senatorial election, leaving the number one hundred and fifty-three. A quorum of this number would be seventy-seven. The number of persons present and voting was eighty-two, of which Mr. Farrow received eighty. But it is said that minority men were improperly admitted. We might answer this by saying they were admitted by the legislature, and that the Senate will not ordinarily review the action of that body in deciding upon the qualification of its own members.

But if the Senate would enter upon such an investigation under any circumstances (which on mature reflection we now think may be open to some doubt) it cannot be called upon to do so in this case. The question of the proper organization of the legislature in January, 1870, was, at the last session, under investigation in both Houses, on the passage of the act of July 15, 1870. The report of the Judiciary Committee of the 2d of March last, printed as a part of the majority report, recommends that no further legislation be had to perfect the organization of the legislature of Georgia as it then existed, and Congress, acting on that report, decided it to be a legal legislature.

But admitting that the minority men were improperly received, the result would be the same.

The number of members declared elected in General Meade's order, who were allowed to qualify and retain their seats, leaving out of the calculation those who are known as "minority men," was one hundred and forty-one.

Deducting Mr. Lumpkin, who is alleged to have died before the Senatorial election,

and we have one hundred and forty. Necessary to a quorum, seventy-one. Number of persons present and voting on the election of Mr. Farrow, seventy-one. Of this number Mr. Farrow received sixty-nine. Thus it appears in either case a quorum was present, and Mr. Farrow had a majority of that quorum.

All other matters in regard to the election of Messrs. Farrow and Whiteley, we believe, are admitted to have been regular.

We therefore recommend for adoption a resolution declaring Henry P. Farrow and Richard H. Whiteley elected, and entitled to seats in the Senate on taking the oaths required by law.

WM. M. STEWART.
B. F. RICE.

The following is the resolution proposed:

Resolved, That Henry P. Farrow and Richard H. Whiteley are entitled to take their seats in the Senate, upon taking the oath prescribed by law.

MONDAY, *January* 30, 1871.

On motion by Mr. Trumbull, that the further consideration of the said bill be postponed, and that the Senate proceed to the consideration of the resolution reported by the Committee on the Judiciary, declaring that Joshua Hill has been duly elected a Senator by the legislature of the State of Georgia, and is entitled to take his seat on taking the oaths required by the Constitution and laws, it was determined in the affirmative; and the Senate proceeded to consider the said resolution.

After debate,

On motion by Mr. Stewart to amend the resolution by striking out all after the word "resolved," and inserting in lieu thereof the words,

"That Henry P. Farrow and Richard H. Whiteley are entitled to take their seats in the Senate, upon taking the oath prescribed by law,"

It was determined in the negative—yeas 19, nays 36.

On motion by Mr. Stewart, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Abbott, Ames, Boreman, Brownlow, Gilbert, Hamilton of Texas, McDonald, Nye, Osborn, Pomeroy, Pool, Pratt, Ramsey, Rice, Stearns, Stewart, Sumner, Thayer, and Wilson.

Those who voted in the negative are Messrs. Bayard, Blair, Buckingham, Carpenter, Casserly, Chandler, Conkling, Corbett, Cragin, Davis, Edmunds, Fenton, Flanagan, Fowler, Hamilton of Maryland, Hamlin, Harlan, Howard, Howe, Johnston, Kellogg, McCreery, Morrill of Vermont, Patterson, Ross, Schurz, Sherman, Sprague, Stockton, Thurman, Tipton, Trumbull, Vickers, Warner, Willey, and Williams.

So the amendment was not agreed to.

On motion by Mr. Stewart to amend the resolution by striking out the name "Joshua Hill" and inserting the name "Henry P. Farrow,"

After debate,

On motion by Mr. Chandler (at 5 o'clock and 5 minutes p. m.), the Senate adjourned.

[The debate is found on page 816 of the Congressional Globe, part 1, 3d sess. 41st Cong., and on pages 817–830 in part 2 of the same.]

TUESDAY, *January* 31, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, declaring Joshua Hill duly elected a Senator of the United States by the legislature of the State of Georgia and entitled to take his seat in the Senate upon taking the oaths required by the Constitution and laws; and

Pending debate thereon, the following message was received, &c.

[The debate is found on pages 848–851 of the Congressional Globe, part 2, 3d sess. 41st Cong.]

WEDNESDAY, *February* 1, 1871.

Mr. Trumbull submitted the following resolution for consideration:

"*Resolved*, That H. V. M. Miller has been duly elected a Senator by the legislature of Georgia, for the term ending March 4, 1871."

Mr. Stewart submitted the following resolution for consideration:

"*Resolved*, That Richard H. Whiteley is entitled to take his seat in the Senate upon taking the oath prescribed by law."

The Senate resumed the consideration of the resolution reported by the Committee on the Judiciary, declaring Joshua Hill to be duly elected a Senator of the United States, and entitled to take his seat upon taking the oaths prescribed by the Constitution and laws; and the question being upon the amendment proposed by Mr. Stewart, to strike out the name "Joshua Hill" and insert the name "Henry P. Farrow,"

After debate, it was determined in the negative—yeas 19, nays 37.

On motion by Mr. Stewart, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Abbott, Ames, Boreman, Brownlow, Chandler, Gilbert, Hamilton of Texas, Nye, Osborn, Pomeroy, Pratt, Ramsey, Robertson, Spencer, Stearns, Stewart, Sumner, Thayer, and Wilson.

Those who voted in the negative are Messrs. Anthony, Bayard, Blair, Buckingham, Carpenter, Casserly, Conkling, Corbett, Cragin, Edmunds, Fenton, Flanagan, Fowler, Hamilton of Maryland, Hamlin, Harlan, Harris, Howard, Johnston, Kellogg, McCreery, Morrill of Vermont, Patterson, Ross, Saulsbury, Sawyer, Scott, Sherman, Sprague, Stockton, Thurman, Tipton, Trumbull, Vickers, Warner, Willey, and Williams.

So the amendment of Mr. Stewart was not agreed to; and

On the question to agree to the resolution reported by the Committee on the Judiciary it was determined in the affirmative.

So it was

Resolved, That Joshua Hill has been duly elected Senator of the United States by the legislature of the State of Georgia, and is entitled to take his seat on taking the oaths required by the Constitution and laws.

Whereupon

Mr. Hill apppeared, and the oaths prescribed by law having been administered to him by the Vice-President, hetook his seat in the Senate.

[The debate is found on pages 871–874 of the Congressional Globe, part 2, 3d sess. 41st Cong.]

FRIDAY, *February* 24, 1871.

The Vice-President stated that the message of the President of the United States, just received, announced that he had approved and signed the "Joint resolution * prescribing the oath to be taken by H. V. M. Miller, Senator-elect from the State of Georgia," and requested Mr. Miller, Senator-elect from the State of Georgia, whose credentials were presented on the 11th day of January, 1869, to come forward and take the oath of office.

Whereupon

Mr. Miller appeared, and the oaths prescribed by law were administered to him by the Vice-President, and he took his seat in the Senate.

COMPENSATION OF SENATORS AND CONTESTANTS.

SATURDAY, *February* 25, 1871.

Mr. Trumbull submitted the following resolution; which was read, and passed to a second reading:

"*Resolved*, That the Secretary of the Senate be directed to pay to the Senators from the State of Georgia the compensation allowed by law, from the 29th day of July, 1868; and to H. P. Farrow and Richard H. Whiteley, contestants from the State of Georgia, compensation from the 16th day of February, 1870, the date of their election by the reorganized legislature of Georgia, to 30th day of January, 1871, when the Senate decided they were not entitled to seats."

MONDAY, *February* 27, 1871.

On motion by Mr. Trumbull, the Senate proceeded to consider the resolution submitted by him on the 25th instant, directing the Secretary of the Senate to pay the Senators from the State of Georgia; and the resolution was agreed to.

* The proceedings of the Senate relating to this joint resolution are omitted

[Forty-first Congress—Second session.]

H. R. REVELS,

Senator from Mississippi from February 25, 1870, till March 3, 1871.

February 23, 1870, the credentials of Mr. Revels were presented. A resolution was submitted that they be referred to the Committee on the Judiciary with instructions to inquire whether he had been nine years a citizen of the United States, and whether the person certifying to his election was the governor of the State. Mr. Revels's credentials were signed by Adelbert Ames, brevet major-general United States Army, provisional governor of Mississippi. The act of July 25, 1866, provided "that it shall be the duty of the governor of the State from which any Senator shall have been chosen as aforesaid to certify his election" &c. It was contended that this was not such a certificate as was required by that act. It was also contended that Mr. Revels, being partly of African blood, had not been nine years a citizen of the United States; that he was not a citizen at birth, following the decision of the Dred Scott case; that he became a citizen only on the ratification of the fourteenth amendment in 1868. After debate, the motion to refer the credentials was determined in the negative, and Mr. Revels took the oath of office February 25. Extracts from remarks given below will show the grounds upon which certain Senators proceeded.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 41st Cong., with extracts from remarks of Messrs. Vickers and Scott.

Special references to the debates of each day, which are found in the Congressional Globe, part 2, 2d sess. 41st Cong., are inserted below.

WEDNESDAY, *February* 23, 1870.

Mr. Wilson presented the credentials of H. R. Revels, elected a Senator by the legislature of the State of Mississippi for the unexpired portion of the term ending March 4, 1871; which were read.

Mr. Wilson presented a certified extract from the proceedings of the house of representatives of the State of Mississippi, also a certified extract from the proceedings of the senate and house of representatives of the State of Mississippi, relative to the election of H. R. Revels as a Senator in Congress; which were read.

Mr. Saulsbury objected to the reception of the credentials; and

After debate, the Vice-President submitted the question to the Senate: Shall the credentials be received? It was determined in the affirmative.

Whereupon

Mr. Stockton submitted the following resolution:

"*Resolved*, That the credentials of Hiram R. Revels, who is now claiming a seat in this body as a Senator-elect from the State of Mississippi, be referred to the Committee on the Judiciary, who are hereby requested to inquire and report whether he has been a citizen of the United States for the period of nine years, and was an inhabitant of the said State at the time of his alleged election in the sense intended by the third section of the first article of the Constitution of the United States, and whether Adelbert Ames, brevet major-general and provisional governor of Mississippi, as appears by the credentials, was the governor of the State of Mississippi at the time, and whether he was an inhabitant of the said State."

On the question to agree to the resolution of Mr. Stockton,

After debate,

On motion by Mr. Thayer (at 5 o'clock), the Senate adjourned.

[The debate is found on pages 1503–1514 of the Congressional Globe referred to in the head-note.]

THURSDAY, *February* 24, 1870.

The Senate resumed the consideration of the motion to refer the credentials of H. R. Revels, elected a Senator by the legislature of the State of Mississippi for the unexpired portion of the term ending March 4, 1871, with certain instructions; and

After debate, the Senate adjourned.

[The debate is found on pages 1542–1544 of the Congressional Globe referred to in the head-note. Mr. Saulsbury's speech is found on pages 125–130 of the Congressional Globe, part 7, Appendix, 2d sess. 41st Cong.]

FRIDAY, *February* 25, 1870.

The Senate resumed the consideration of the motion of Mr. Stockton to refer the credentials of H. R. Revels, elected a Senator by the legislature of the State of Mississippi for the unexpired portion of the term ending March 4, 1871, to the Committee on the Judiciary, with instructions to inquire and report whether he has been a citizen of the United States for the period of nine years, and was an inhabitant of the said State at the time of his alleged election in the sense intended by the third section of the first article of

the Constitution of the United States; and whether Adelbert Ames, brevet major-general and provisional governor of Mississippi, as appears by the credentials, was the governor of the State of Mississippi at the time, and whether he was an inhabitant of the said State; and

After debate, on the question to agree to the motion, it was determined in the negative—yeas 8, nays 48.

On motion by Mr. Pomeroy, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Casserly, Davis, Hamilton, McCreery, Saulsbury, Stockton, and Vickers.

Those who voted in the negative are Messrs. Abbott, Anthony, Boreman, Brownlow, Buckingham, Cameron, Carpenter, Chandler, Cole, Conkling, Corbett, Drake, Fenton, Ferry, Fowler, Gilbert, Hamlin, Harlan, Harris, Howe, Howell, Kellogg, Lewis, McDonald, Morrill of Maine, Morrill of Vermont, Nye, Osborn, Pomeroy, Pool, Pratt, Ramsey, Rice, Robertson, Ross, Sawyer, Schurz, Scott, Sherman, Spencer, Stewart, Sumner, Thayer, Tipton, Trumbull, Willey, Williams, and Wilson.

So the motion was not agreed to.

On motion by Mr. Wilson, that the oaths prescribed by law be now administered to Mr. Revels, it was determined in the affirmative—yeas 48, nays 8.

On motion by Mr. Pomeroy, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Abbott, Anthony, Boreman, Brownlow, Buckingham, Cameron, Carpenter, Chandler, Cole, Conkling, Corbett, Drake, Fenton, Ferry, Fowler, Gilbert, Hamlin, Harlan, Harris, Howe, Howell, Kellogg, Lewis, McDonald, Morrill of Maine, Morrill of Vermont, Nye, Osborn, Pomeroy, Pool, Pratt, Ramsey, Rice, Robertson, Ross, Sawyer, Schurz, Scott, Sherman, Spencer, Stewart, Sumner, Thayer, Tipton, Trumbull, Willey, Williams, and Wilson.

Those who voted in the negative are Messrs. Bayard, Casserly, Davis, Hamilton, McCreery, Saulsbury, Stockton, and Vickers.

So the motion was agreed to; and

The oaths prescribed by law were administered to Mr. Revels by the Vice-President, and he took his seat in the Senate.

[The debate is found on pages 1557–1568 of the Congressional Globe referred to in the head-note.]

[Extract from remarks of Mr. Vickers, of Maryland, in support of the resolution submitted by Mr. Stockton. Delivered in the Senate February 25, 1870, and found on pages 1557, 1558, and 1560 of the Congressional Globe referred to in the head-note.]

"The subject before the Senate is one which relates to the eligibility of an individual elected to this body. That question involves the three qualifications which the Constitution of the country requires of persons before they can take a seat in this Assembly: the first, that they shall have been citizens of the United States for nine years; secondly, that they shall be inhabitants of the State from which they are elected; and thirdly, that they shall be of the age of thirty years.

"Now, the question of reference to the Committee on the Judiciary includes all three inquiries, whether this party is thirty years of age, is a legal inhabitant of the State of Mississippi, and has been a citizen of the United States for nine consecutive years. I do not propose to dwell upon any of these propositions except the one of citizenship; and the question for the Senate to consider is whether he has been a citizen of the United States for nine years. That is the point which I wish to present to and impress upon the judgment of the Senate.

"I shall rely mainly on the judgment of the Supreme Court of the United States in the case of Scott *vs.* Sandford, which has been referred to, and upon the opinion delivered by Chief-Justice Taney on behalf of a large majority of that court.

"I know that decision has been denounced not only in the Senate but in the country, but it stands unrepealed, and is the adjudicated law of the land. Chief-Justice Taney was in social life one of the most exemplary of men. His private character was pure and unsullied. He was honest, just, and faithful. He performed all the duties of private, social, and public life with that fidelity and correctness which we should expect from a man so virtuous and exalted. There has never been a blemish upon his private or his public life. I believe, although I am not fully qualified to say, that he was not a slaveholder. I think he was not, and I am sure that I am justisfied in saying that after he was placed upon the bench he separated himself from the politics of the country and never exercised the right of suffrage. His ambition was to make an upright, able, and impartial judge, and he entered and left public office with as clean hands as any man that ever lived in this country. He entered it poor and he left it in the same condition, and bequeathed as a heritage to his family a high, pure, and exalted reputation.

"So much for the character of the judge. Now, what was that opinion? It was upon a case which involved the citizenship of a suitor in the courts of the United States. The Constitution gave jurisdiction to those courts between parties who are citizens of differ-

ent States. The very question presented to the consideration of the court was whether the parties plaintiff, Dred Scott and others, were citizens of the United States within the constitutional intendment. To show that the court desired nothing but impartial justice, the case was ably argued twice at different terms, in order that the most thorough examination, discussion, and deliberation might be had on a matter of such magnitude. And what, under the circumstances, was the duty of the court? It was to decide whether the parties plaintiff were citizens according to the Constitution. That was incumbent upon them, and there was no alternative. This necessarily brought up to the attention and consideration of the court the condition of the parties. They were of African descent, and the question naturally arose, and it was so argued, are they citizens of the United States and qualified to sue in its courts? A large majority of the court decided that they were not citizens of the United States.

"I did not suppose that any one would have found fault with the court for the performance of this duty. They were bound to decide according to their convictions; but the complaint was, as was stated by the Senator from Delaware yesterday, that they departed from this question and went into an argument upon the condition of this class of people and the right of masters to take them into the Territories of the United States. We all know that there was great excitement in the country at that period in reference to the constitutional right of a master to take his slaves north of the Missouri line of 36° 30′. Some of these parties had been taken by their owners north of the Missouri line into what was called free territory, and this fact necessarily brought to the consideration and examination of the court the question whether the owner of a slave had a right to take him into a Territory of the United States.

"That decision, I know, has been animadverted upon here as it has been elsewhere. But have not other decisions been condemned? Was not that upon the fugitive slave law severely criticised in the country, and probably in Congress, too, by the Freesoilers? The senior Senator from Massachusetts [Mr. Sumner] said in reference to it that he did not feel bound to sustain that law after the Supreme Court had decided in favor of its constitutionality; and yet that decision was made by a unanimous court. There was perfect unanimity upon the question of its constitutionality.

"But I have waited with anxiety to hear a refutation of any single position which the Supreme Court took in the decision of the Dred Scott case. I know it is easy to censure a decision and get up a political clamor against it, but I want to know if any single position of fact or of law which that court announced has ever been successfully controverted. I have not heard it attempted in the Senate of the United States. I have not heard a single argument against the correctness of the legal positions or to any statement of fact asserted by the court.

"And now, when a case has been so solemnly adjudicated by a court forming one of the co-ordinate branches of the Government, and whose duty it is to determine grave constitutional questions, I ask if any reason can be assigned against the decision of that case or any of the principles involved in it? Denunciation should be disregarded by an intelligent people while the principles of the opinion stand unassailed and irrefragable.

"What were some of the propositions of law decided by that tribunal?

"1. That when the Constitution was adopted persons of African descent were not regarded in any of the States as members of the community which constituted the States, and were not numbered among its people or citizens; consequently, the special rights and immunities guaranteed to citizens did not apply to them.

"2. That no State could by any subsequent law make a foreigner or any other description of persons citizens of the United States.

"3. That a State might by its laws put a foreigner, or any other description of persons, upon a footing with its own citizens; but that would not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

"The disqualification of the African race was as radical, fundamental, and perfect as language could make it. This is by a co-ordinate department of the Government, existing by the same Constitution as Congress; in its origin, design, and objects as thoroughly constitutional; in its powers and jurisdiction superior, because State and national legislation is measured and limited by the Constitution according to its judgment. Its decisions and decrees are as binding as the Constitution itself."

* * * * * * *

"I suppose there is not a Senator on this floor who voted either for the civil rights bill or for the submission of the constitutional amendment to the States but what believed it was absolutely necessary and indispensable to make these people citizens of the United States; without the passage of that bill in the opinion of some, and without the passage and adoption of the constitutional amendment in the opinion of others, they would not have been citizens of the United States. After the civil rights bill was passed and when it passed there were serious objections to it. It was doubtful in the minds of many whether grants by legislative enactment could make a citizen of the

Un. ed States; whether it did not require a constitutional amendment to make them such; and the better opinion was that it did require it, because by the Constitution they were not made citizens. You proceeded on the very ground that it was absolutely requisite that the amendment should be made which made the party now claiming his seat a citizen of the United States from the time of its approval only; from that time he became a citizen; and as nine years have not elapsed, how can we, upon our oaths and in view of the decisions of the Supreme Court, the practice of the Government, the decisions of all the State courts, the opinions of the Attorneys-General, say that in our opinion he was a citizen of the United States before the passage of the civil rights bill or of the fourteenth constitutional amendment?

"This is not a political but a judicial question, and ought to be decided by us as judges and not as politicians. In the Dred Scott case the Supreme Court said—

"'That, looking to the contemporaneous history and to the contemporaneous legislation of the several States at the time the Constitution was adopted, the use of the word "citizen," as employed in that Constitution, was to exclude the African and every race but the white.'

"The court looked into the construction of this provision. They took a deliberate view of the contemporaneous history of the States and the condition of the country at the time. This was proper and necessary to a full understanding of the subject. In a debate which took place in the Senate of the United States on the 7th of February, 1866, the senior Senator from Massachusetts [Mr. Sumner] assumed the ground that no State had a republican government that tolerated slavery; and it was in reference to that that the late Mr. Fessenden, who was so distinguished in this body, as he was in every public station which he occupied, said in reply:

"'I ask the question that he may answer it, because after all he will admit, as a lawyer, as we all must, that in construing a constitution, and construing a statute, and construing any provision, we look at contemporaneous history in the first place, and we look more particularly, when endeavoring to find out what the sense of an instrument is, at all its clauses in order to get the meaning of all, for one explains the other. It would seem to me that the Senator went a little too far with his argument as to the guarantee clause.'

"The opinion of Mr. Fessenden was that in construing the Constitution we must look at the contemporaneous history of the country. The Senator from Oregon [Mr. Williams] said yesterday that the decision in the Dred Scott case applied only to persons of African descent whose ancestors had been sold into slavery. Now, I ask how came that race among us? Is it not a historical fact that they were brought here and sold; that they were made articles of traffic; that they did not come here of their own accord; and that from those people have descended the whole of that class of population among us? They were denied naturalization. In the States where slavery existed the courts held that color, whether of the dark, mulatto, or mixed, was presumptive evidence of slavery, and the onus of proving emancipation or freedom rested upon the person. The courts of the United States always follow the decisions of State courts in matters local or affecting the relations or peculiar interests existing in them. If this subject shall be referred to a committee, there will be no difficulty in proving the race to which the claimant belongs, if appearances should not satisfy the most fastidious. The colonists coming from the bosom of Europe necessarily brought with them, to some extent, the feelings and sentiments of the nations toward this class of persons. The court, in reviewing the facts and the history of the condition of this people in the case alluded to, said that they did not migrate to America; and—

"'It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

"'They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.'"

[Extract from remarks of Mr. Scott, of Pennsylvania, in opposition to the resolution submitted by Mr. Stockton. Delivered in the Senate February 25, 1870, and found on page 1565 of the Congressional Globe referred to in the head-note.]

"The proposal is to refer his credentials to the Judiciary Committee for the purpose of making inquiry as to whether he has been a citizen of the United States for nine years. It is admitted that he is a citizen now, and therefore he is admissible as a Senator unless there be some disqualification. What is that disqualification? It is alleged

that he is a man of color, and that therefore he was not a citizen prior to the enactment of the civil rights bill. Now, sir, no one stands here to question that his citizenship was an open question before the adoption of the civil rights bill. The history of the litigation that had occurred in various States, and that finally got into the Supreme Court of the United States in the Dred Scott case, is enough to show that a question was made as to whether a colored man was or was not a citizen of the United States. The decisions in Kentucky, the decisions in Connecticut, the decisions in my own State, the discussion which took place upon the admission of Missouri into the Union, the Dred Scott case, the universal discussion of this question at one period in our history—these are enough to show that the public mind was not settled upon the question. But if it was not settled then, could it be more effectively settled than it has been, first by the passage of the civil rights bill, and then, if that was not sufficent as a mere act of Congress to determine the status of citizenship in the face of a decision of the Supreme Court, surely it will not be contended that the fourteenth constitutional amendment, declaring that all persons born within the United States are citizens, is not sufficient to settle it.

"The civil rights bill, if its text be turned to, and the fourteenth amendment, if its text be turned to, will be found to be both declaratory. They do not enact that 'from henceforth all persons born within the United States shall be citizens,' but the present tense is used in both: 'all persons' 'are citizens of the United States.' If that be sufficient to settle the question, if that be enough as a declaratory law to declare that all persons born within the limits of the United States are citizens of the United States, where does this man stand who now presents himself as Senator-elect from Mississippi?

"It is urged by gentlemen on the other side that he became a citizen only by virtue of one or the other of these enactments; but if they turn to the history of that clause of the Constitution of the United States on which they rely they will find that it was inserted both in reference to Senators and to Representatives in the other House of Congress, and also in reference to the President, because of the apprehension that was felt of foreign influences in our Government. In the discussion which occurred in the convention—I have it here, but will not take the time of the Senate to read it—on fixing the qualifications of Senators it was especially dwelt upon that the Senate being the body which was to pass upon treaties with foreign governments, it was particularly necessary that the period of citizenship should be extended and made longer for a Senator than for a member of the House of Representatives. The discussion of Mr. Madison in the Federalist of this clause shows that the purpose, the reason, the intention of this clause in the Constitution of the United States was that persons who had been born abroad should not be permitted to become Senators until after they had been citizens a certain length of time. That is the reason, that is the spirit of the law; and it is a maxim which I need not quote, that the reason ceasing the law ceases with it.

"Here, then, is a man born in the United States, not an alien, not a foreigner, who comes here elected by a State legislature. No question is raised as to his qualification as to age; no question is raised as to his qualification in any other respect than as to whether he has been a citizen of the United States for nine years. Now, even if the doctrine contended for by the gentlemen on the other side were true, that he was not a citizen until the time of the passage of the civil rights bill or until the adoption of the fourteenth constitutional amendment, still he is not within the meaning of that clause of the Constitution which requires a man to be a citizen for nine years. The meaning, the spirit of that was, that no man should occupy this place who had been naturalized as a foreigner until nine years had elapsed after his naturalization."

[Forty-first Congress--Second session.]

ADELBERT AMES,

Senator from Mississippi from April 1, 1870, *till he resigned in* 1874.

January 18, 1870, Mr. Ames was elected to fill the vacancy in the term beginning March 4, 1869. February 25, 1870, the credentials were presented and referred to the Committee on the Judiciary. March 18, the committee reported the following facts: Mr. Ames was born in Maine, in 1835, where he resided with his parents until 1856, when he entered West Point. Continuing in the military service, he was ordered to Mississippi in 1868. June 15, of that year he became provisional governor by appointment of General McDowell, then district commander, and in March, 1869, he became himself district commander by assignment of the President. These two positions Mr. Ames was holding at the time of the election. Mr. Ames testified that shortly before the election, being then in Mississippi, he determined to be a candidate and decided to remain and reside in Mississippi, and publicly declared that intention. After his election he resigned his commission. This, he states, was after the passage (February 17, 1870), but before the approval (February 23, 1870) of the bill declaring Mississippi entitled to representation in Congress. Mr. Ames's parents had continued to live in Maine until 1862, and some of his papers and effects remained at his father's house. In 1862 his parents removed to Minnesota, carrying with them the effects of their son in their possession. In subsequent years Mr. Ames occasionally visited Maine, but owned no land there and occupied no habitation there of his own. The committee reported that Mr. Ames was not, when elected, an inhabitant of that State for which he was chosen, within the meaning of the third clause of the third section of the first article of the Constitution. They reported the resolution "that Adelbert Ames is not eligible to the seat in the Senate of the United States to which he had been appointed." After long debate the Senate resolved, April 1, 1870, that he was eligible to the seat, and he took the oath of office.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 41st Cong., and the report of the committee from Senate Reports, 2d sess. 41st Cong., No. 75.

Special references to the debates of each day, which are found in the Congressional Globe, part 3, 2d sess. 41st Cong., are inserted below.

FRIDAY, *February* 25, 1870.

Mr. Robertson presented the credentials of Adelbert Ames, elected a Senator in Congress by the legislature of the State of Mississippi for the unexpired portion of the term commencing on the 4th day of March, 1869; which were referred to the Committee on the Judiciary.

FRIDAY, *March* 18, 1870.

Mr. Conkling, from the Committee on the Judiciary, to whom were referred the credentials of Adelbert Ames, elected a Senator by the legislature of the State of Mississippi for the unexpired term ending the 4th day of March, 1875, submitted a report (No. 75) thereon, accompanied by the following resolution. [Resolution found at end of report.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs Trumbull (chairman), Stewart, Edmunds, Conkling, Rice, Carpenter, and Thurman.]

IN THE SENATE OF THE UNITED STATES.

MARCH 18, 1870.—Ordered to be printed.

Mr. Conkling, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom were referred the credentials of Adelbert Ames, claiming to be Senator-elect from the State of Mississippi, report the following facts and conclusions:

Mr. Ames was born in Maine in 1835, and resided with his parents in that State until 1856, when he entered the Military Academy at West Point. From 1856 he remained in the military service of the United States until he resigned his commission, which he states was after the passage, but before the approval by the President, of the bill finally declaring Mississippi entitled to representation in Congress.

Until 1862 his parents continued to reside in Maine, and such articles and papers of his as would naturally be kept at his home remained at his father's house. In 1862 his parents removed to Minnesota, carrying with them the effects of their son in their possession, and in subsequent years he occasionally revisited Maine, but owned no land and occupied no habitation there of his own.

In 1868 he was ordered to Mississippi; on the 15th of June in that year he became provisional governor by appointment of General McDowell, then district commander, and in March, 1869, he became himself district commander by assignment of the President of the United States. These relations continued modified, if modified at all, only as will presently appear.

The election seems to have been regular, and waiving any criticism of the form of the certificate, no question has been made touching the right of Mr. Ames to take his seat, except in regard to the legal character of his residence in Mississippi.

The provision of the Constitution of the United States under which the question arises is this:

"No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

It will be seen that to be eligible as a Senator of the United States, a person, in addition to other qualifications, must be an inhabitant of the State for which he is chosen, and he must be such an inhabitant "*when elected.*"

The election in this instance occurred on the 18th day of January, 1870.

At this time Mr. Ames was a military officer, stationed in Mississippi by order of superior military authority, and acting as provisional governor by appointment from General McDowell, as already stated. His presence in these two characters comprises everything bearing upon the question of his residence in Mississippi down to the time when he became a candidate for the Senate. The precise date cannot be fixed, but not long before the election General Ames determined to allow his name to be submitted to the legislature as one of those from which the choice of Senators might be made.

Having reached this determination, and in connection with it, General Ames declared, as far as he did declare it, his intention in regard to his future residence. His language as delivered to the committee touching his declarations and acts is as follows:

"Upon the success of the Republican ticket in Mississippi I was repeatedly approached to become a candidate for the United States Senate. For a long time I declined—I wrote letters declining. A number of persons in Mississippi visited this city to find arguments by which I might be influenced to become a candidate. I hesitated because it would necessitate the abandonment of my whole military life. Finally, for personal and public reasons, I decided to become a candidate and leave the Army. My intentions were publicly declared and sincere. (The intentions thus declared were not only to become a candidate for the Senate, but to remain and reside in Mississippi.) I even made arrangements, almost final and permanent, with a person to manage property I intended to buy. This was before I left Mississippi. My resignation was accepted by the President before he signed the bill to admit the State."

The conclusion of the committee upon these facts is that General Ames was not, when elected, an inhabitant of the State for which he was chosen, and that he is not entitled to take his seat.

The committee therefore recommend the adoption of the following resolution:

Resolved, That Adelbert Ames is not eligible to the seat in the Senate of the United States to which he has been appointed.

MONDAY, *March* 21, 1870.

[A motion was made by Mr. Morton that the Senate proceed to the consideration of the resolution reported by the committee. After debate, the motion was withdrawn. The debate is found on pages 2087, 2088 of the Congressional Globe referred to in the head-note. This motion does not appear in the Senate Journal.]

TUESDAY, *March* 22, 1870.

The Senate proceeded to consider the resolution reported by Mr. Conkling from the Committee on the Judiciary on the credentials of Adelbert Ames, claiming to be a Senator-elect from the State of Mississippi, viz:

"*Resolved*, That Adelbert Ames is not eligible to the seat in the Senate of the United States to which he has been appointed."

After debate,

On motion by Mr. Hamlin, the Senate adjourned.

[The debate is found on pages 2122, 2123, 2125–2135 of the Congressional Globe referred to in the head-note.]

The Senate resumed, &c., and WEDNESDAY, *March* 23, 1870.

After debate,

On motion by Mr. Thurman (at five minutes before 5 o'clock p. m.) that the Senate adjourn, it was determined in the affirmative—yeas 28, nays 25.

[The debate is found on pages 2156–2169 of the Congressional Globe referred to in the head-note.]

MONDAY, *March* 28, 1870.

The Senate resumed, &c.
[No debate took place.]

TUESDAY, *March* 29, 1870.

The Senate resumed, &c.
[No debate took place.]

WEDNESDAY, *March* 30, 1870.

The Senate resumed, &c.
[No debate took place.]

THURSDAY, *March* 31, 1870.

The Senate resumed, &c.
Pending debate thereon,
Mr. Morrill, of Maine, presented a resolution adopted by the legislature of the State of Mississippi to facilitate the admission of Adelbert Ames to a seat in the Senate of the United States; which was read.
Ordered, That it lie on the table.
After further debate,
On motion by Mr. Hamlin (at 5 o'clock p. m.), the Senate adjourned.
[The debate is found on pages 2303–2316 of the Congressional Globe referred to in the head-note.

FRIDAY, *April* 1, 1870.

The Senate resumed the consideration of the following resolution, reported by the Committee on the Judiciary, on the credentials of Adelbert Ames, claiming to be a Senator-elect from the State of Mississippi, viz:
"*Resolved*, That Adelbert Ames is not eligible to the seat in the Senate of the United States to which he has been appointed."
After debate,
On motion by Mr. Sumner to amend the resolution by striking out the word "not,"
After further debate,
On the question to agree to the amendment proposed by Mr. Sumner, it was determined in the affirmative—yeas 40, nays 12.
On motion by Mr. Pomeroy, the yeas and nays being desired by one-fifth of the Senators present,
Those who voted in the affirmative are Messrs. Abbott, Brownlow, Cameron, Cattell, Chandler, Cole, Corbett, Cragin, Drake, Fenton, Flanagan, Gilbert, Hamilton of Texas, Hamlin, Harris, Howard, Howe, Howell, McDonald, Morrill of Maine, Morrill of Vermont, Nye, Osborn, Patterson, Pomeroy, Pool, Ramsey, Revels, Rice, Ross, Scott, Sherman, Spencer, Stewart, Sumner, Thayer, Tipton, Warner, Williams, and Wilson.
Those who voted in the negative are Messrs. Bayard, Carpenter, Casserly, Conkling, Davis, Edmunds, McCreery, Norton, Pratt, Schurz, Trumbull, and Vickers.
So the amendment was agreed to; and,
On the question to agree to the resolution as amended, it was determined in the affirmative.
So it was
Resolved, That Adelbert Ames is eligible to the seat in the Senate of the United States to which he has been appointed.
And thereupon the oaths prescribed by law were administered to Mr. Ames by the Vice-President, and he took his seat in the Senate.
Mr. Drake submitted the following resolution; which was considered, by unanimous consent, and agreed to:
"*Resolved*, That the Secretary of the Senate be directed to pay the Senators from the State of Mississippi the compensation allowed by law, from the 23d day of February, 1870, and the Senators from the State of Texas from the 30th day of March, 1870, the dates of the acts declaring said States, respectively, entitled to representation in the Congress of the United States."
After the consideration of executive business, the Senate adjourned.
[The debate is found on pages 2335–2349 of the Congressional Globe referred to in the head-note.]

[Forty-first Congress—Second session.]

OSSIAN B. HART vs. ABIJAH GILBERT, *of Florida.*

April 1, 1870, the petition of Mr. Hart, claiming to be entitled to a seat in the Senate for the term beginning March 4, 1869, and held by Abijah Gilbert, was presented and referred to the Committee on the Judiciary. The facts in regard to the elections were as follows: Florida had been without representation in Congress from 1861 to 1868. After the passage of the reconstruction acts, but before the passage of the act declaring Florida entitled to representation in Congress, the legislature of Florida, on the second Tuesday after its organization, proceeded, in accordance with the act of Congress of July 25, 1866, "regulating the times and manner of holding elections for Senators in Congress," to the election of two Senators to fill vacancies in the terms ending March 3, 1869, and March 3, 1873. At the end of three days these two elections had been made. On the fourth day the legislature proceeded to the election of a Senator for the term beginning March 4, 1869, and Mr. Gilbert was elected. In January, 1870, the same legislature held a new election and elected the petitioner for the term to which it had previously elected Mr. Gilbert. The petitioner claimed that the election of Mr. Gilbert was void because he had been elected before the passage of the act declaring Florida entitled to representation, and because he had not been elected in accordance with the act of July 25, 1866, inasmuch as the legislature had failed to take action on the "second Tuesday after its organization" in regard to the third Senator who was to be elected, but only in regard to the two Senators who were to fill the existing vacancies, and had taken no action in regard to the election of the third Senator until the third day after the "second Tuesday." April 13, 1870, the committee reported in regard to the first objection that the subsequent recognition of the State government made valid, by relation, its acts from the time of its organization; and in regard to the second objection, that the object of the act of Congress was to fix a time when proceedings for the election of Senators should be commenced and continued till the elections were effected, and that this legislature had acted in conformity therewith. They recommended the adoption of a resolution that Abijah Gilbert was duly elected and entitled to hold the seat, which was agreed to without a division April 28, 1870. Mr. Hart was allowed mileage and compensation.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 41st Cong., and the report of the committee from Senate Reports, 2d sess. 41st Cong., No. 101.

Special references to the debates, which are found in parts 3 and 4 of the Congressional Globe, 2d sess. 41st Cong., are inserted below.

FRIDAY, *April* 1, 1870.

Mr. Osborn presented the petition* of Ossian B. Hart, of Florida, claiming to be entitled to a seat in the Senate as a Senator duly elected by the legislature of the State of Florida, and asking that his claim to said seat may be investigated by the Senate; which was referred to the Committee on the Judiciary and ordered to be printed.

[Remarks accompanying the presentation of the petition are found on pages 2330, 2331 of part 3 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *April* 13, 1870.

Mr. Trumbull, from the Committee on the Judiciary, to whom was referred the petition of Ossian B. Hart, claiming to be entitled to the seat in the Senate now held by the Hon. Abijah Gilbert, as a Senator in Congress from the State of Florida, submitted a report (No. 101), accompanied by the following resolution. [Resolution found at end of report.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Stewart, Edmunds, Conkling, Rice, Carpenter, and Thurman.]

IN THE SENATE OF THE UNITED STATES.

APRIL 13, 1870.—Ordered to be printed.

Mr. Trumbull, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom was referred the petition of Ossian B. Hart, of Florida, claiming a seat in the Senate from the State of Florida for the term which commenced March 4, 1869, report as follows:

In consequence of the rebellion the State of Florida was without representation in the

* Found in Senate Miscellaneous, 2d sess. 41st Cong., No. 102.

Senate of the United States from 1861 till 1868. In pursuance of a constitution framed and adopted under what are known as the reconstruction acts, a legislature convened in Florida, Monday, June 8, 1868, the members of the assembly and half of the senate having been elected for two years, and the other half of the senate for four years.

This legislature, on the 16th day of June, 1868, being the second Tuesday after its meeting and organization, proceeded in accordance with the act of Congress of July 25, 1866, "regulating the times and manner of holding elections for Senators in Congress," to take action for the election of two United States Senators to fill the then existing vacancies for the terms expiring on the 3d of March, 1869, and the 3d of March, 1873. On Wednesday, the day following that on which each house had separately but without result voted for Senators to fill the two existing vacancies, the members of the two houses convened in joint assembly, elected a Senator to fill the vacancy expiring March 3, 1869, and adjourned till the next day, when they again assembled and elected a Senator for the term expiring March 3, 1873, and adjourned without date.

The next day (Friday) the members of the two houses, each house having previously concurred in a resolution to that effect, assembled again in joint convention for the election of a Senator to succeed the one whose term would expire on the 3d of March, 1869, when Abijah Gilbert, the present sitting member, was elected.

The petitioner was chosen by the same legislature in January, 1870, to represent the State in the Senate for the term commencing March 4, 1869, and now claims the seat occupied by Mr. Gilbert.

The elections of 1868 all took place before the passage of the act of June 25, 1868, which declared Florida entitled to representation in Congress.

Two objections are taken to the election of the sitting member:

1. That he was chosen by the legislature of a State not at the time recognized as entitled to representation in Congress.

2. That he was not elected in conformity with the act of July 25, 1866.

The first objection is answered by the fact that the subsequent recognition of the State as entitled to representation under the Constitution, in pursuance of which the legislature was elected and organized, related back to and made valid its acts from the time of its organization. Senators and Representatives from several of the reconstructed States have been chosen before the States were declared entitled to representation, and no one has ever questioned their right to seats when Congress subsequently recognized the government under which they were chosen as entitled to representation.

The only ground for the other objection arises from the fact that the legislature failed to take action on the "second Tuesday after its organization" in regard to the third Senator who was to be elected, but it took action on the subject of electing Senators, and actually voted, though unsuccessfully, on that day for persons to fill the two existing vacancies.

The object of the act of Congress was to insure the election of Senators by the proper legislature, and to fix a time when proceedings for that purpose should be commenced and continued till the elections were effected.

The legislature by which the sitting member was elected was the one chosen next preceding the term which would commence on the 4th of March, 1869, and was, therefore, the proper legislature to elect. "The second Tuesday after the meeting and organization of the legislature" was the time prescribed by the act of Congress for initiating the election of Senators, and that was the time when the legislature proceeded to that business. There being three Senators to elect, it took action on that day only in reference to two of them. Did its failure to take action on that day, and the two subsequent days (which were occupied in electing the first two Senators), in reference to the third Senator, render his election, in all other respects regular, invalid? The committee think not.

The language of the law is: "In case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote till a Senator shall be elected." No formal adjournment from day to day by vote of the joint assembly was necessary, but it was the duty of the members of each house to meet in joint assembly at noon of each day and vote at least once till all the Senators whom the legislature had the right to elect were chosen. This is exactly what the legislature did.

In no view which the committee can take would the petitioner be entitled to a seat in the Senate, for if the election of the sitting Senator was irregular, that of the petitioner, by the same legislature at a subsequent session, was equally so.

The committee recommend for adoption the following resolution:

Resolved, That Abijah Gilbert was duly elected a Senator from the State of Florida for the term commencing March 4, 1869, and is entitled to hold his seat as such.

FRIDAY, *April* 15, 1870.

Mr. Trumbull presented the memorial* of Ossian B. Hart, praying that he may be allowed to be heard in argument before the Senate in support of his claim to a seat in the Senate as a Senator duly elected by the legislature of the State of Florida.

Ordered, That it lie on the table.

[The debate is found on pages 2705, 2706 of part 3 of the Congressional Globe referred to in the head-note.]

THURSDAY, *April* 28, 1870.

On motion by Mr. Trumbull, the Senate proceeded to consider the resolution reported from the Committee on the Judiciary, declaring that Abijah Gilbert was duly elected a Senator from the State of Florida for the term commencing March 4, 1869, and is entitled to hold his seat as such; and the resolution was agreed to.

[The debate is found on pages 3053, 3054 of part 4 of the Congressional Globe referred to in the head-note.]

MONDAY, *May* 2, 1870.

Mr. Howe submitted the following resolution; which was read the first and second times, by unanimous consent, and referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Secretary of the Senate be directed to pay out of the contingent fund of the Senate to O. B. Hart, claimant of a seat in the Senate from the State of Florida, the usual mileage of a Senator and the monthly pay from the date of presenting his credentials until the passage of the resolution declaring him not entitled to a seat."

TUESDAY, *May* 10, 1870.

Mr. Ferry, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution of May 2, 1870, to pay O. B. Hart the usual mileage of a Senator for one session and pay from the date of presenting his credentials until the passage of the resolution declaring him not entitled to a seat, reported it without amendment.

WEDNESDAY, *May* 11, 1870.

The Senate proceeded to consider, as in Committee of the Whole, the resolution to pay O. B. Hart the usual mileage of a Senator for one session and the monthly pay of a Senator from the date of presenting his credentials until the adoption of the resolution by the Senate declaring him not entitled to a seat in the Senate of the United States as a Senator from the State of Florida; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read the third time.

The said resolution was read the third time.

Resolved, That it pass.

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* Found on page 2705 of part 3 of the Congressional Globe referred to in the head-note.

[Forty-second Congress—First session.]

JOSEPH J. REYNOLDS vs. MORGAN C. HAMILTON, *of Texas.*

July 13, 1870, the credentials of Mr. Hamilton, elected for the term beginning March 4, 1871, were presented. March 3, 1871, the credentials of Mr. Reynolds, elected for the same term, were presented. March 4, both credentials were referred to the Committee on Privileges and Elections. The facts in regard to the elections were as follows: Texas had been without representation in Congress from 1861 to 1870. After the passage of the several acts for the reconstruction of Texas, but before the passage of the act declaring her entitled to representation in Congress, the legislature of Texas, in February, 1870, proceeded, in accordance with the act of Congress of July 25, 1866, "regulating the times and manner of holding elections for Senators in Congress," to the election of Senators to fill vacancies in the terms ending March 3, 1871, and March 3, 1875. At the same time the legislature elected Mr. Hamilton for the term beginning March 4, 1871. The Senators elected to fill the vacancies were admitted to their seats. By the constitution of Texas there was another session of the same legislature after the elections referred to, and before March 4, 1871. The legislature at this second session passed a resolution declaring the election of Mr. Hamilton illegal, and on the second Tuesday after its organization elected Mr. Reynolds. Mr. Reynolds claimed the seat on the ground that the election of Mr. Hamilton was void, because he had been elected before the passage of the act declaring Texas entitled to representation, and because there was another session of the legislature after the election of Mr. Hamilton, and before the commencement of the term for which he was elected. March 18, the committee reported the facts as above, and the conclusions that the case was precisely like that of Hart and Gilbert (see page 320); that the election of Mr. Hamilton had been in accordance with the act referred to, which declares "that the legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator," &c.; and that the subsequent recognition of the State government of Texas had made valid, by relation, its acts from the time of its organization, so that the fact that the State was not admitted to representation when Mr. Hamilton was elected was immaterial. They recommended that Mr. Hamilton be admitted to his seat. He was admitted without debate.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 41st Cong. and 1st sess. 42d Cong.; and the report of the committee from Senate Reports, 1st sess. 42d Cong., No. 2.

There were no debates.

[Forty-first Congress.]

WEDNESDAY, *July* 13, 1870.

Mr. Nye presented the credentials of Morgan C. Hamilton, elected a Senator in Congress by the legislature of the State of Texas for the term of six years commencing on the 4th day of March, 1871.

The credentials were read.

Ordered, That they lie on the table.

FRIDAY, *March* 3, 1871.

Mr Morton presented the credentials of Joseph J. Reynolds, elected a Senator in Congress by the legislature of the State of Texas for the term of six years commencing on the 4th day of March, 1871.

The credentials were read.

[First session of the Forty-second Congress.]

SATURDAY, *March* 4, 1871.

Mr. Flanagan here submitted a motion that the oaths prescribed by law be administered by the Vice-President to Morgan C. Hamilton, whose credentials as Senator-elect from the State of Texas were presented on the 13th of July, 1870.

Mr. Morton presented a certified copy of a joint resolution of the legislature of the State of Texas, approved January 26, 1871, providing for the election of a United States Senator from that State on the 24th day of January, 1871, for the term of six years commencing on the 4th day of March, 1871, and declaring the election of Morgan C. Hamilton, on the 22d of February, 1870, as Senator for said term, illegal; which was read.

On motion by Mr. Morton,

Ordered, That the resolution of the legislature of the State of Texas and the credentials of Mr. Morgan C. Hamilton and Mr. Joseph J. Reynolds lie on the table.

MONDAY, *March* 13, 1871.

On motion by Mr. Anthony,

Ordered, That the credentials of Joseph J. Reynolds, and the credentials of Morgan C. Hamilton, with the resolution of the legislature of Texas, declaring the election of said Hamilton on the 22d of February, 1870, as Senator from that State for six years from March 4, 1871, illegal, be referred to the Committee on Privileges and Elections.

WEDNESDAY, *March* 15, 1871.

The Vice-President laid before the Senate the credentials of J. J. Reynolds, elected a Senator in Congress by the legislature of the State of Texas for the term of six years, commencing on the 4th day of March, 1871.

The credentials were read.

[The letter accompanying the credentials states that inadvertently the governor had not signed the credentials presented March 3.]

SATURDAY, *March* 18, 1871.

Mr. Stewart, from the Committee on Privileges and Elections, to whom was referred the credentials of Morgan C. Hamilton, the credentials of Joseph J. Reynolds, and the resolution of the legislature of the State of Texas declaring the election of Morgan C. Hamilton illegal, submitted a report (No. 2) thereon, accompanied by the following resolution:

"*Resolved*, That Morgan C. Hamilton was duly elected a Senator from the State of Texas for the term commencing March 4, 1871, and is entitled to take his seat as such upon taking the required oaths."

The Senate, by unanimous consent, proceeded to consider the said resolution; and the resolution was agreed to.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Stewart, Morton, Rice, Hamlin, Hill, and Thurman.]

IN THE SENATE OF THE UNITED STATES.

MARCH 18, 1871.—Ordered to be printed.

Mr. Stewart, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the credentials of the Hon. Morgan C. Hamilton, Senator-elect from the State of Texas, submit the following report:

That in pursuance of the several acts of Congress for the reconstruction of the State of Texas, the legislature convened on the 8th and completed its organization on the 10th of February, 1870. On the 22d of February, 1870, second Tuesday after its organization, the legislature elected the Hon. Morgan C. Hamilton a Senator of the United States for the term commencing on the 4th of March, 1871.

The same legislature on the same day elected the Hon. J. W. Flanagan a Senator of the United States for the term ending March 3, 1875, and the Hon. Morgan C. Hamilton for the term ending March 3, 1871. These last two elections were to fill vacancies then existing, and both of these Senators were admitted to their seats.

By the constitution of Texas there was another session of the same legislature held in Texas, after the election of Mr. Hamilton, and before the expiration of his term. This session commenced on the 10th of January, 1871, and on the second Tuesday after its organization proceeded to the election of a Senator for the term commencing on the 4th of March, 1871, the same term for which Mr. Hamilton had been elected at the preceding session.

General J. J. Reynolds is represented to have been elected, although the certificate referred to the committee is not signed by the governor.

The reasons assigned for the election of General Reynolds are that the legislature had no authority to elect Mr. Hamilton at the time of his election, first, because the State had not at that time been recognized as entitled to representation in Congress; and, secondly, because there was another session of the legislature after the election of Mr. Hamilton, and before the commencement of the term for which he was elected.

The case of Hon. Abijah Gilbert, Senator from Florida, is precisely in point upon both of these questions.

The act of Congress of July 25, 1866, declares "that the legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator

was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in the place of such Senator so going out of office, in the following manner."

The fact that the State was not admitted to representation until after the election of Mr. Hamilton is immaterial. The act admitting Texas to representation related back to the organization, and ratified the proceedings of the legislature.

The committee therefore recommend that Mr. Hamilton be permitted to take his seat on taking the oath prescribed by the Constitution and the laws.

MONDAY, *March* 20, 1871.

Mr. Morgan C. Hamilton, from the State of Texas, attended, and the oaths prescribed by law were administered to him by the Vice-President, and he took his seat in the Senate.

[Forty-second Congress—First and second sessions.]

GEORGE GOLDTHWAITE,

Senator from Alabama from January 15, 1872, till March 3, 1877.

February 6, 1871, the credentials of Mr. Goldthwaite, elected for the term beginning March 4, 1871, were presented. March 4, a protest of members of the legislature of Alabama against his admission to a seat in the Senate was presented; which, with the credentials, was ordered to lie on the table. March 13, the credentials and protest were referred to the Committee on Privileges and Elections. March 20, the committee reported that there would not be time at that session of Congress fully to consider the grounds upon which his right to a seat was contested, and reported a resolution that he be permitted to take his seat, and that the committee proceed thereafter to consider the grounds of the protest and report to the Senate thereon. This report and resolution included the case of Foster Blodgett, of Georgia, it being unanimous as to Mr. Goldthwaite, two dissenting as to Mr. Blodgett. A motion was made to amend the resolution by striking out the name of Foster Blodgett, but after debate it was ordered that the resolution lie on the table. January 9, 1872, in the next session of Congress, the case of Mr. Blodgett having been disposed of, the Senate resolved "that George Goldthwaite be permitted to take a seat in this body as a Senator from the State of Alabama upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which his right to a seat in the Senate is contested, and hereafter make report to the Senate thereon." January 15, Mr. Goldthwaite took his seat. No further report was made on the case, and the Senate took no further action in regard to it. The chief grounds of the protest (given below) were that some of the members of the legislature voting for Mr. Goldthwaite were not legally elected, having been either defeated at the polls or having procured their elections through fraud; that one member voting for Mr. Goldthwaite had no certificate of election to the legislature; that some members voting for him were under political disabilities.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 3d sess. 41st Cong., and 1st and 2d sess. 42d Cong.; the report of the committee from Senate Reports, 42d Cong., 1st sess., No. 3; and a copy of the protest above referred to from the Congressional Globe, part 1, 1st sess. 42d Cong., pages 1, 2.

Special references to the debates of each day are inserted below.

[Third session of the Forty-first Congress.]

MONDAY, *February* 6, 1871.

Mr. Spencer presented the credentials of George Goldthwaite, elected a Senator by the legislature of the State of Alabama for the term of six years commencing on the 4th of March, 1871.

The credentials were read.

[First session of the Forty-second Congress.]

MONDAY, *March* 4, 1871.

Mr. George Goldthwaite, whose credentials were presented on the 6th day of February last, appeared to take the oaths prescribed by law, when

Mr. Sherman presented a protest signed by forty-five members of the senate and house of representatives of the legislature of the State of Alabama against the admission of George Goldthwaite to a seat in the Senate as a Senator from said State; which was read.

After debate,

On motion by Mr. Sherman,

Ordered, That the protest, with the credentials of Mr. Goldthwaite, lie upon the table.

[The debate is found on pages 1–4 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

Protest of members of the Alabama legislature against the admission of Mr. Goldthwaite to a seat in the Senate.

MONTGOMERY, ALA., *January* 26, 1871.

To the Senate of the United States:

The subscribers, members of the senate and house of representatives of the State of Alabama, respectfully represent:

That they protest against the admission of Hon. George Goldthwaite to the Senate of

the United States as a Senator from Alabama, on the grounds that he was not elected by a majority of the legal votes of the joint meeting of the legislature. He was declared elected by the following vote: For George Goldthwaite, 65 votes; for Willard Warner, 50; for William J. Haralson, 14 votes. It will be seen that 65 votes constitute a majority of the votes cast, and that number of legal votes are necessary to an election.

We represent that Hon. George Goldthwaite did not receive that number of legal votes, as B. M. Henry, claiming to be a representative from Russell County, in said State, who voted for Hon. George Goldthwaite, was not elected by the people of said county, did not have a certificate of his election, as is required by our laws, but was defeated at the polls by several hundred, and was not legally entitled to vote for a United States Senator in said joint meeting of the legislature, which, if said illegal votes had been rejected, would have been sufficient to prevent the announcement of the election of Hon. George Goldthwaite to a seat in your honorable body.

Saul Bradford, of Talladega county, who had been rejected by the people at the ballot-box, was permitted to vote for said Hon. George Goldthwaite, when in our opinion his vote should have been rejected, as he had never been legally elected a member of the legislature.

In the counties of Greene, Sumter, Lee, and other counties, the representatives of which all voted for Hon. George Goldthwaite, we have every reason to believe that the elections of said representatives were procured by intimidating the voters, and in several instances fraud added thereto, and that the gentlemen claiming to be representatives of these counties were not legally elected by the people of said counties, are not their legal representatives, and were not entitled to vote for United States Senator at the joint meeting of the general assembly.

We are informed that some of the members of the legislature who voted for Hon. George Goldthwaite are laboring under political disabilities imposed by the fourteenth amendment of the Constitution of the United States, and it is an inquiry worthy the consideration of the Senate of the United States whether Hon. George Goldthwaite is not laboring under the same disabilities for his actions during the recent rebellion of the Southern States.

Believing, therefore, that Hon. George Goldthwaite is not legally elected Senator from Alabama, we respectfully pray that the Senate of the United States may so decide, and declare his seat vacant.

[The names of the signers are here omitted.]

MONDAY, *March* 13, 1871.

On motion by Mr. Anthony,

Ordered, That the credentials of George Goldthwaite, and the protest of members of the legislature of the State of Alabama against the election of said Goldthwaite as a Senator of the United States by the legislature of said State, be referred to the Committee on Privileges and Elections.

MONDAY, *March* 20, 1871.

Mr. Stewart, from the Committee on Privileges and Elections, to whom were referred the credentials of Foster Blodgett, with the memorial of members of the legislature of the State of Georgia, protesting against the admission of said Blodgett to a seat in the Senate of the United States as a Senator from that State, and the credentials of George Goldthwaite, with the protest of sundry members of the legislature of the State of Alabama against the election of said Goldthwaite, submitted a report (No. 3) thereon, accompanied by the following resolution. [Resolution found at end of report.]

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MARCH 20, 1871.—Ordered to be printed.

Mr. Stewart, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of George Goldthwaite, claiming a seat in this body as a Senator from the State of Alabama, and the credentials of Foster Blodgett, claiming a seat in this body as a Senator from the State of Georgia, report:

That said credentials are in due form, and *prima facie* entitle said Goldthwaite and Blodgett to their seats upon taking the oath prescribed by the Constitution and laws, neither of them being under any disability.

The grounds on which their right to seats are contested have not been fully considered by the committee for want of time, nor will there be sufficient time at this session to

consider them. In the opinion of your committee it would be unjust to those States and gentlemen to keep the latter out of their seats until such investigation can be had.

The committee therefore report the following resolution:

Resolved, That George Goldthwaite and Foster Blodgett be permitted to take seats in this body upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which their rights to seats, respectively, are contested, and hereafter make reports to the Senate thereon.

WM. M. STEWART.
O. P. MORTON.
H. HAMLIN.
B. F. RICE.

We concur in the foregoing as to Goldthwaite, but not as to Blodgett.

JOSHUA HILL.
A. G. THURMAN.

WEDNESDAY, *March* 22, 1871.

On motion by Mr. Stewart, the Senate proceeded to consider the resolution reported by the Committee on Privileges and Elections to admit George Goldthwaite and Foster Blodgett to seats in the Senate of the United States as Senators, respectively, from the States of Alabama and Georgia; when

Mr. Thurman called for a division of the question, so that it shall be taken first upon the admission of George Goldthwaite to his seat in the Senate as a Senator from the State of Alabama.

Pending debate,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

[The debate is found on pages 218, 219 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

SATURDAY, *March* 25, 1871.

On motion by Mr. Stewart, the Senate resumed, &c.

[The debate is found on pages 271–274 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

THURSDAY, *April* 6, 1871.

On motion by Mr. Stewart, the Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators respectively from the States of Alabama and Georgia; and

A division of the question having heretofore been called for by Mr. Thurman, so that a separate vote be taken on the admission of each person named in the resolution,

The Vice-President decided that the question on the resolution was not susceptible of a division, as desired by Mr. Thurman, but that the end desired by him could be attained by amendment.

On motion by Mr. Hill to amend the resolution by striking out the words "and Foster Blodgett,"

After debate,

Ordered, That the further consideration of the resolution be postponed to to-morrow.

[The debate is found on pages 494–498 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

* * * * * * *

On motion by Mr. Stewart, the Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators respectively from the States of Alabama and Georgia.

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 506, 507 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

FRIDAY, *April* 7, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators respectively from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill,

On motion by Mr. Anthony, and by unanimous consent, the further consideration was informally passed over.

* * * * * * *

The Senate then again resumed the consideration of the resolution reported by the

Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators respectively from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

[No debate took place.]

MONDAY, *April* 10, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators respectively from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

After debate,

On motion by Mr. Edmunds that the resolution lie on the table, it was determined in the negative—yeas 25, nays 26.

On motion by Mr. Stewart, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Ames, Anthony, Boreman, Buckingham, Carpenter, Chandler, Cole, Conkling, Corbett, Edmunds, Ferry of Michigan, Frelinghuysen, Harlan, Hill, Hitchcock, Howe, Morrill of Vermont, Patterson, Pratt, Sawyer, Scott, Sherman, Tipton, Trumbull, and Windom.

Those who voted in the negative are Messrs. Bayard, Brownlow, Cameron, Casserly, Clayton, Cooper, Cragin, Davis, Gilbert, Hamlin, Johnston, Kelly, Morton, Nye, Osborn, Ramsey, Saulsbury, Schurz, Spencer, Stevenson, Stewart, Stockton, Sumner, Thurman, West, and Wright.

So the motion to lay the resolution on the table was not agreed to; and

Pending further debate,

Mr. Thurman raised a question of order, namely: That in discussing the question before the Senate debate upon the question whether Foster Blodgett or Joshua Hill had or had not committed perjury was not in order.

The Vice-President sustained the point of order raised by Mr. Thurman, and ruled the debate on that question out of order; and

After further debate,

On motion by Mr. Trumbull (at 5 o'clock p. m.), the Senate adjourned.

[The debate which took place, pages 540–558 of the Congressioual Globe, part 1, 1st sess. 42d Cong., was wholly on the case of Mr. Blodgett.]

TUESDAY, *April* 11, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

On motion by Mr. Edmunds that the resolution lie on the table, it was determined in the affirmative—yeas 19, nays 17.

On motion by Mr. Robertson, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Ames, Anthony, Boreman, Carpenter, Chandler, Cole, Conkling, Davis of West Virginia, Edmunds, Harlan, Hill, Kelly, Morrill of Maine, Pratt, Scott, Sherman, Tipton, Wilson, and Wright.

Those who voted in the negative are Messrs. Bayard, Blair, Casserly, Cooper, Davis of Kentucky, Gilbert, Hamilton of Maryland, Hamlin, Johnston, Morton, Rice, Robertson, Saulsbury, Schurz, Stevenson, Stockton, and Wickers.

So the resolution was ordered to lie on the table.

[No debate took place.]

[Second session of the Forty-second Congress.]

THURSDAY, *December* 21, 1871.

Mr. Thurman submitted the following resolution for consideration:

"*Resolved*, That George Goldthwaite be permitted to take a seat in this body as a Senator from the State of Alabama. upon taking the oath, and that the Committee on

Privileges and Elections proceed hereafter to consider the grounds on which his right to a seat is contested, and hereafter make report to the Senate thereon."

[The debate is found on pages 261, 262 of the Congressional Globe, part 1, 2d sess. 42d Cong.]

TUESDAY, *January* 9, 1872.

On motion by Mr. Thurman that the Senate proceed to the consideration of the resolution reported from the Committee on Privileges and Elections on the 20th of March last, to admit George Goldthwaite and Foster Blodgett to seats in the Senate as Senators, respectively, from the States of Alabama and Georgia, it was determined in the affirmative, and the Senate resumed the consideration of the said resolution.

On the question to agree to the resolution, which is in the following words:

"*Resolved*, That George Goldthwaite and Foster Blodgett be permitted to take seats in this body upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which their rights to seats, respectively, are contested, and hereafter make reports to the Senate thereon,"

On motion by Mr. Thurman to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting:

"That George Goldthwaite be permitted to take a seat in this body as a Senator from the State of Alabama upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which his right to a seat is contested, and hereafter make report to the Senate thereon,"

It was determined in the affirmative; and

On the question to agree to the resolution as amended, it was determined in the affirmative.

So the resolution as amended was agreed to.

[The debate is found on pages 319, 320 of the Congressional Globe, part 1, 2d sess. 42d Cong.]

MONDAY, *January* 15, 1872.

Mr. George Goldthwaite, from the State of Alabama, attended, and the oaths prescribed by law were administered to him by the Vice-President, and he took his seat in the Senate.

[Forty-second Congress—First and second sessions.]

THOMAS M. NORWOOD vs. FOSTER BLODGETT, *of Georgia.*

January 20, 1871, the credentials of Mr. Blodgett, elected for the term beginning March 4, 1871, were presented. March 2, a memorial of members of the last general assembly of Georgia, remonstrating against his admission to a seat in the Senate, was presented. March 13, the credentials and memorial were referred to the Committee on Privileges and Elections. March 20, the committee reported that there would not be time at that session of Congress fully to consider the grounds upon which his right to a seat was contested, and reported a resolution that he be permitted to take his seat and that the committee proceed thereafter to consider the grounds of the remonstrance and report to the Senate thereon. This report and resolution included the case of George Goldthwaite, of Alabama. After debate it was ordered that the resolution lie on the table. December 4, 1871, in the next session of Congress, the credentials of Mr. Norwood, elected for the same term, were presented. December 11, they were referred to the Committee on Privileges and Elections. December 18, the committee reported in favor of Mr. Norwood. It appears that the legislature electing Mr. Blodgett was elected in April, 1868. By the laws of Georgia then in force it was provided that another legislature should be elected in November, 1870, and should meet and organize in January, 1871. The legislature electing Mr. Blodgett, subsequently to his election, provided by law that the legislature which was to be elected in November, 1870, and organized in January, 1871, should not be elected until December, 1870, and should not meet and organize until November, 1871. This second legislature was the one electing Mr. Norwood. The question to be decided was, which was the legislature "chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress?" (Act of July 25, 1866.) It was claimed by Mr. Blodgett that *chosen* and *elected* mean different things; that the legislators are elected by the people, but that the legislature is not chosen until the members elected assemble and organize as a legislature; that the legislature electing Mr. Norwood did not assemble until after March 4, 1871, and so could not be the one "chosen next preceding the expiration," &c. The committee reported that the meaning of the act referred to was that "the legislature whose members should be elected next preceding the expiration of the Senatorial term should elect the successor"; that the words *chosen* and *elected* were synonymous. They reported a resolution that Mr. Norwood was entitled to the seat, which was agreed to December 19, and Mr. Norwood took the oath of office.

Mr. Blodgett was allowed compensation and mileage.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 3d sess. 41st Cong., and 1st and 2d sess. 42d Cong., and the reports of the committee from Senate Reports, 42d Cong., 1st sess., No. 3, and 42d Cong., 2d sess., vol. 1, No. 10.

Special references to the debates of each day are inserted below.

[Third session of the Forty-first Congress.]

FRIDAY, *January* 20, 1871.

Mr. Morton presented the credentials of Mr. Foster Blodgett, elected a Senator from the State of Georgia for the term of six years commencing on the 4th day of March, 1871.

The credentials were read.

Ordered, That they lie on the table.

THURSDAY, *March* 2, 1871.

Mr. Hill presented a memorial of members of the last general assembly of the State of Georgia, remonstrating against the admission of Foster Blodgett to a seat in the Senate of the United States.

Ordered, That it lie on the table.

[First session of the Forty-second Congress.]

SATURDAY, *March* 4, 1871.

On motion by Mr. Morton,

Ordered, That the credentials of Mr. Foster Blodgett, as Senator-elect from the State of Georgia, and the protest of members of the general assembly of the State of Georgia against his election, on the files of the last Congress, be taken from the files and laid on the table.

[The debate is found on pages 4, 5 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

MONDAY, *March* 13, 1871.

On motion by Mr. Anthony,

Ordered, That the credentials of Foster Blodgett and the memorial of members of the general assembly of the State of Georgia against the admission of said Blodgett to a seat

in the Senate of the United States as a Senator from that State be referred to the Committee on Privileges and Elections.

MONDAY, *March* 20, 1871.

Mr. Stewart, from the Committee on Privileges and Elections, to whom were referred the credentials of Foster Blodgett, with the memorial of members of the legislature of the State of Georgia, protesting against the admission of said Blodgett to a seat in the Senate of the United States as a Senator from that State, and the credentials of George Goldthwaite, with the protest of sundry members of the legislature of the State of Alabama against the election of said Goldthwaite, submitted a report (No. 3) thereon, accompanied by the following resolution:

"*Resolved*, That George Goldthwaite and Foster Blodgett be permitted to take seats in this body upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which their rights to seats, respectively, are contested, and hereafter make reports to the Senate thereon."

Mr. Hill presented a brief* of the memorial of members of the legislature of the State of Georgia, protesting against the admission of Foster Blodgett to a seat in the Senate of the United States as a Senator from that State.

Ordered, That it lie on the table and be printed.

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MARCH 20, 1871.—Ordered to be printed.

Mr. Stewart, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of George Goldthwaite, claiming a seat in this body as a Senator from the State of Alabama, and the credentials of Foster Blodgett, claiming a seat in this body as a Senator from the State of Georgia, report:

That said credentials are in due form, and *prima facie* entitle said Goldthwaite and Blodgett to their seats upon taking the oath prescribed by the Constitution and laws, neither of them being under any disability.

The grounds on which their rights to seats are contested have not been fully considered by the committee for want of time, nor will there be sufficient time at this session to consider them. In the opinion of your committee it would be unjust to those States and gentlemen to keep the latter out of their seats until such investigation can be had.

The committee therefore report the following resolution:

Resolved, That George Goldthwaite and Foster Blodgett be permitted to take seats in this body upon taking the proper oath; and that the Committee on Privileges and Elections proceed hereafter to consider the grounds on which their rights to seats, respectively, are contested, and hereafter make reports to the Senate thereon.

WM. M. STEWART.
O. P. MORTON.
H. HAMLIN.
B. F. RICE.

We concur in the foregoing as to Goldthwaite, but not as to Blodgett.

JOSHUA HILL.
A. G. THURMAN.

TUESDAY, *March* 21, 1871.

Mr. Hill presented the memorial† of John E. Bryant, of Georgia, remonstrating against the admission of Foster Blodgett to a seat in the Senate as a Senator from the State of Georgia.

Ordered, That it lie on the table and be printed.

WEDNESDAY, *March* 22, 1871.

On motion by Mr. Stewart, the Senate proceeded to consider the resolution reported by the Committee on Privileges and Elections to admit George Goldthwaite and Foster Blodgett to seats in the Senate of the United States as Senators, respectively, from the States of Alabama and Georgia; when

* Found in Senate Miscellaneous, 1st sess. 42d Cong., No. 24.
† Found in Senate Miscellaneous, 1st sess. 42d Cong., No. 30.

Mr. Thurman called for a division of the question, so that it shall be taken first upon the admission of George Goldthwaite to his seat in the Senate as a Senator from the State of Alabama.

Pending debate,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

[The debate is found on pages 218, 219 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

SATURDAY, *March* 25, 1871.

On motion by Mr. Stewart, the Senate resumed, &c.

[The debate is found on pages 271–274 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

THURSDAY, *April* 6, 1871.

On motion by Mr. Stewart, the Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

A division of the question having heretofore been called for by Mr. Thurman, so that a separate vote be taken on the admission of each person named in the resolution,

The Vice-President decided that the question on the resolution was not susceptible of a division, as desired by Mr. Thurman, but that the end desired by him could be attained by amendment.

On motion by Mr. Hill to amend the resolution by striking out the words "and Foster Blodgett,"

After debate,

Ordered, That the further consideration of the resolution be postponed to to-morrow.

[The debate is found on pages 494–498 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

* * * * * * *

On motion by Mr. Stewart, the Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia.

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 506, 507 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

FRIDAY, *April* 7, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill,

On motion by Mr. Anthony, and by unanimous consent, the further consideration was informally passed over.

* * * * * * *

The Senate then again resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

[No debate took place.]

MONDAY, *April* 10, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

After debate,

On motion by Mr. Edmunds that the resolution lie on the table, it was determined in the negative—yeas 25, nays 26.

On motion by Mr. Stewart, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Ames, Anthony, Boreman, Buckingham, Carpenter, Chandler, Cole, Conkling, Corbett, Edmunds, Ferry of Michigan, Frelinghuysen, Harlan, Hill, Hitchcock, Howe, Morrill of Vermont, Patterson, Pratt, Sawyer, Scott, Sherman, Tipton, Trumbull, and Windom.

Those who voted in the negative are Messrs. Bayard, Brownlow, Cameron, Casserly, Clayton, Cooper, Cragin, Davis, Gilbert, Hamlin, Johnston, Kelly, Morton, Nye, Osborn, Ramsey, Saulsbury, Schurz, Spencer, Stevenson, Stewart, Stockton, Sumner, Thurman, West, and Wright.

So the motion to lay the resolution on the table was not agreed to; and

Pending further debate,

Mr. Thurman raised a question of order, viz: That in discussing the question before the Senate debate upon the question whether Foster Blodgett or Joshua Hill had or had not committed perjury was not in order.

The Vice-President sustained the point of order raised by Mr. Thurman, and ruled the debate on that question out of order; and

After further debate,

On motion by Mr. Trumbull (at 5 o'clock p. m.), the Senate adjourned.

[The debate, which was wholly on the credentials of Mr. Blodgett, is found on pages 540–558 of the Congressional Globe, part 1, 1st sess. 42d Cong.]

TUESDAY, *April* 11, 1871.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections, to permit George Goldthwaite and Foster Blodgett to take seats in the Senate of the United States, upon taking the proper oaths, as Senators, respectively, from the States of Alabama and Georgia; and

The question being on the amendment proposed by Mr. Hill to the resolution to strike out the words "and Foster Blodgett,"

On motion by Mr. Edmunds that the resolution lie on the table, it was determined in the affirmative—yeas 19, nays 17.

On motion by Mr. Robertson, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Ames, Anthony, Boreman, Carpenter, Chandler, Cole, Conkling, Davis of West Virginia, Edmunds, Harlan, Hill, Kelly, Morrill of Maine, Pratt, Scott, Sherman, Tipton, Wilson, and Wright.

Those who voted in the negative are Messrs. Bayard, Blair, Casserly, Cooper, Davis of Kentucky, Gilbert, Hamilton of Maryland, Hamlin, Johnston, Morton, Rice, Robertson, Saulsbury, Schurz, Stevenson, Stockton, and Vickers.

So the resolution was ordered to lie on the table.

[No debate took place.]

[Second session of the Forty-second Congress.]

MONDAY, *December* 4, 1871.

Mr. Thurman presented the credentials of Thomas M. Norwood, elected a Senator by the general assembly of the State of Georgia for the term of six years commencing March 4, 1871; which were read.

Ordered, That they lie on the table.

MONDAY, *December* 11, 1871.

On motion by Mr. Thurman,

Ordered, That the credentials of Thomas M. Norwood, claiming a seat in the Senate as a Senator from the State of Georgia, be referred to the Committee on Privileges and Elections.

MONDAY, *December* 18, 1871.

Mr. Carpenter, from the Committee on Privileges and Elections, to whom were referred the credentials of Thomas M. Norwood, claiming a seat in the Senate as a Senator from the State of Georgia, submitted a report (No. 10) thereon, accompanied by the following resolution. (Resolution found at end of report.)

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Morton (chairman), Rice, Carpenter, Logan, Hill, Thurman, and Anthony.]

IN THE SENATE OF THE UNITED STATES.

DECEMBER 18, 1871.—Ordered to be printed.

Mr. Carpenter, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of Foster Blodgett and Thomas M. Norwood, each claiming a seat as Senator from the State of Georgia for the term which commenced March 4, 1871, respectfully submit the following report:

The Senate being a branch of the Government of the United States, the right to elect a Senator is conferred and its exercise regulated by the Constitution of the United States, and no law or regulation of a State touching such election has any validity beyond the authority conferred upon the State by the Constitution of the United States.

The Constitution, Article I, section 3, provides that Senators shall be chosen by the legislatures of the respective States. Section 4 of the same article provides:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the *places* of choosing Senators."

The first clause of this section commits to the legislatures of the States primarily the whole subject of electing Senators and Representatives, and authorizes them to make such regulations upon the subject as they may deem proper. The phrase "the times, places, and manner of holding such elections for Senators and Representatives" embraces the whole subject of election of Senator except that the election must be made by the legislature of the State, as provided in the third section. The legislature may therefore provide that a Senator shall be elected by the legislature to be chosen next before the expiration of a term or next after its commencement. The second clause, quoted from the fourth section, confers upon Congress the same power and absolute control over the subject, to be exercised in the discretion of Congress, except that Congress cannot fix a place for holding the election different from that fixed by the State legislature.

In the exercise of this undoubted constitutional power Congress passed an act regulating the election of Senators, approved July 25, 1866 (14 Stat. at Large, page 243), which provides:

"The legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in place of such Senator so going out of office."

Foster Blodgett claims to have been elected on the 15th day of February, A. D. 1870, by the legislature then existing and in session. He received the requisite number of votes, and his credentials are in due form. The question, therefore, is whether it was competent for that legislature to elect a Senator to serve during the term before mentioned. If this question can be answered in the affirmative, Mr. Blodgett is entitled to the seat; if not, his pretended election was an absolute nullity. The answer to this question depends upon the true construction of the act of Congress before quoted. It is claimed by Mr. Blodgett that *chosen* and *elected* mean different things; that legislators are elected by the people, but that legislators are not the legislature, and that the legislature is not chosen until the members elected assemble as provided by law and organize as a legislature by determining what persons elected or claiming to be elected are entitled to seats. That is, the people elect the legislators, and the legislators after their election choose the legislature, and hence the legislature which was in fact organized next preceding the expiration of the term of office is the one authorized to elect a successor without regard to the time when the members of such legislature were elected by the people.

This refinement of reasoning does not meet the approbation of your committee. The question is, what was the intention of Congress in passing this act? The legislature designated by the act is the one "which shall be chosen next preceding the expiration of the time," &c. There is no such thing as choosing a legislature except by choosing its members. The Constitution declares that Senators shall be elected by the legislature of each State. Hence the act of Congress employs the same phrase. But your committee cannot doubt that it was the intention of Congress to provide that the legislature whose members should be elected next preceding the expiration of the Senatorial term should

*

elect the successor. The distinction sought to be established between the words *elected* and *chosen* derives no support from popular or legal lexicography. Elected is defined *chosen* and chosen is defined *elected*, and the words are used as synonymous in the Constitution of the United States, the constitution of every State, in all our statutes, and in all popular literature. It is a universal rule of construction, applicable to constitutions and statutes, that words are to be understood in their popular, commonly received meaning, and to force upon this statute so unnatural a construction would defeat the intention of Congress, manifest in the act itself, and violate the fundamental principle of free government which doubtless inspired the passage of the act.

The legislature which was in session on the 15th day of February, 1870, when Mr. Blodgett claims to have been elected, was chosen in April, 1868. By the constitution and laws of Georgia then in force it was provided that another legislature should be elected on Tuesday after the first Monday in November, 1870, and that the legislature so to be elected should meet and organize on the second Wednesday in January, 1871. Thus it will be seen that at the time Mr. Blodgett claims to have been elected there was to be another legislature elected and organized prior to the expiration of the term for which Mr. Blodgett claims to have been elected to serve. Therefore, as the case then stood, the action of that legislature in the premises was without authority and directly in contravention of the act of Congress upon that subject. It is not claimed that Mr. Blodgett was elected at any other time or by any other legislature. The validity of his election must depend upon the state of case then existing. If the legislature had no authority to elect him at that time, their pretending to do so conferred upon him no right to claim this seat. If he has any rights they vested by that election, and were perfect as soon as the election was completed. His election was either valid or void; if valid, no subsequent action of the legislature could impair his rights; if void, no subsequent action of the legislature, short of another election, could entitle him to this seat.

Subsequently to Mr. Blodgett's pretended election the legislature provided by law, as it was authorized to do by the constitution of the State, that the legislature which was to be elected in November, 1870, and organized in January, 1871, as required by law at the time of Blodgett's pretended election, should not be elected until December, 1870, and should not convene and organize until November, 1871. But if your committee are right in their construction of the act of Congress, the legislature which convened in November, 1871, was the legislature chosen next preceding the expiration of the Senatorial term, and, consequently, that legislature was the one which was authorized to elect the successor; and this legislature did, in fact, elect Mr. Norwood. The fact that the State for months after the expiration of the former term, March 4, 1871, was without full representation in the Senate is not the fault of the act of Congress. The legislature authorized under the act of Congress to make this election would have been elected in November, 1870, and convened in January, 1871, and might have elected a Senator prior to the expiration of the former term but for the action of the State in postponing the election and organization of the legislature authorized to elect the successor. The State cannot complain of its own act, nor ask the Senate to disregard the act of Congress, because the State has intentionally omitted to comply with the act of Congress and avail itself of its provisions.

Therefore, Mr. Norwood having been duly elected at the first session of the legislature which was chosen prior to the expiration of the former term, your committee respectfully recommend the adoption of the following resolution:

Resolved, That Thomas M. Norwood is entitled to a seat in the Senate as a Senator from the State of Georgia for the term commencing March 4, 1871, and that he be admitted to the same.

TUESDAY, *December* 19, 1871.

The Senate proceeded to consider the resolution reported from the Committee on the Judiciary, to admit Thomas M. Norwood to a seat in the Senate as a Senator from the State of Georgia; and,

On the question to agree thereto, it was determined in the affirmative.

So it was

Resolved, That Thomas M. Norwood is entitled to a seat in the Senate, as a Senator from the State of Georgia, for the term commencing March 4, 1871, and that he be admitted to the same.

Whereupon

Mr. Norwood appeared, and the oaths prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

COMPENSATION OF MR. BLODGETT.

Mr. Morton submitted the following resolution for consideration:

"*Resolved*, That the Secretary of the Senate be directed to pay, out of the pay and mileage account, to Foster Blodgett, claiming a seat as Senator-elect from the State of

Georgia, the pay and mileage of a Senator, commencing March 4, 1871, to the passage of this resolution."

TUESDAY, *January* 9, 1872.

On motion by Mr. Morton that the Senate proceed to the consideration of the resolution submitted by him on the 19th December last, to pay Foster Blodgett the pay and mileage of a Senator for the period therein named, it was determined in the affirmative; and

Mr. Morton having modified the said resolution,

After debate,

On the question to agree to the resolution, in the following words:

"*Resolved*, That the Secretary of the Senate be directed to pay, out of the pay and mileage account, to Foster Blodgett, claiming a seat as Senator-elect from the State of Georgia, the pay and mileage of a Senator from March 4, 1871, to the 19th of December, 1871, when the question of his right to his seat was determined by the Senate,"

It was determined in the affirmative.

So the resolution as modified was agreed to.

[Forty-second Congress—Second session.]

MATT W. RANSOM vs. JOSEPH C. ABBOTT, *of North Carolina.*

Mr. Abbott's term expired March 3, 1871. March 7, a memorial of Mr. Abbott was presented, claiming that he had been legally elected for the succeeding term. March 13, the memorial was referred to the Committee on Privileges and Elections. February 28, 1872, the committee reported as follows: At the election held in November, 1870, Zebulon B. Vance received "a majority of the whole number of votes cast in each house," and Mr. Abbott received the next highest number of votes. On the day following the election Mr. Vance was declared duly elected. Mr. Vance at the date of the election was under the political disabilities imposed by the fourteenth amendment of the Constitution. Mr. Abbott rested his claim on what he assumed to be the legal result of the conceded ineligibility of Mr. Vance. He assumed that it was a conclusion of law that if the candidate receiving the highest number of votes was ineligible, and that ineligibility was known to the electors, the votes so cast for him were void, and should be considered mere nullities, and, consequently, that the candidate receiving the next highest number of votes was elected. The committee were of opinion that, while that might be the English rule, it was directly at variance with our theory of government; and that the English rule was not applicable in this case for the reason also that the amendment imposing the disabilities also provided for the removal of them by Congress, and that consequently the election of Mr. Vance was not void but voidable only; that the removals of these disabilities after election in several previous cases by acts of Congress were decisions that such votes were not mere nullities. The committee were furthermore of opinion that the facts in this case would not bring it within the English rule, supposing it to be admitted that that rule was applicable here. The committee recommended the adoption of a resolution that Mr. Abbott, not having received a majority of the votes cast, was not entitled to a seat. There was a minority report in support of Mr. Abbott's claim. April 23, 1872, the Senate agreed to the resolution reported by the committee.

The credentials of Mr. Vance were not presented, and no claim was made to the seat by him.

February 5, 1872, pending the action of the committee on Mr. Abbott's memorial, the credentials of Mr. Ransom were presented and referred to the committee. They certified that he had been elected January 30, 1872, to fill a vacancy existing by reason of the resignation of Zebulon B. Vance. April 24, the day after the Senate resolved that Mr. Abbott was not entitled to the seat, the committee reported that Mr. Ransom's credentials appeared to be in due form, and recommended that he be admitted to his seat. He was admitted the same day.

The Senate resolved that Mr. Abbott be allowed compensation, and that Mr. Ransom's pay commence on the first day of the term.*

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 42d Cong., 1st and 2d sess., and the report of the committee from Senate Reports, 2d sess. 42d Cong., No. 58.

Special references to the debates of each day, which are found in the Congressional Globe, 2d sess. 42d Cong., part 3, and in the Appendix, are inserted below.

[First session of the Forty-second Congress.]

TUESDAY, *March* 7, 1871.

Mr. Pool presented the memorial† of Joseph C. Abbott, claiming to have been legally elected a Senator of the United States by the legislature of the State of North Carolina for the term of six years commencing on the 4th day of March, 1871.

Ordered, That it lie on the table and be printed.

MONDAY, *March* 13, 1871.

On motion by Mr. Pool,

Ordered, That the memorial of Joseph C. Abbott, claiming to be duly elected a Senator of the United States by the legal votes of the members of the legislature of the State of North Carolina, for the term of six years commencing on the 4th day of March, 1871, be referred to the Committee on Privileges and Elections.

[Second session of the Forty-second Congress.]

WEDNESDAY, *February* 28, 1872.

Mr. Logan, from the Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming a seat in the Senate as a Senator from the State of North Carolina, submitted a report (No. 58), accompanied by the following resolution:

"*Resolved*, That Joseph C. Abbott, not having received a majority of the votes cast by

* The Senate passed a similar resolution June 8, 1872, in regard to the pay of George Vickers, of Maryland, who was elected March 7, 1868, for the term beginning March 4, 1867. Philip F. Thomas had been elected for this term and was not admitted. For report on Mr. Vickers's pay, see report No. 231, 42d Cong., 2d sess.

† The memorial is found in Senate Miscellaneous, 1st sess. 42d Cong., No. 1.

the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator."

Mr. Carpenter asked and obtained leave to present the views of the minority of the committee on the memorial of Mr. Abbott; which were ordered to be printed, to accompany the foregoing report.

REPORT OF COMMITTEE, AND VIEWS OF MINORITY.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 28, 1872.—Ordered to be printed.

Mr. Logan, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, claiming to be entitled to a seat in this body as a Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report:

Article I, section 5, of the Constitution of the United States provides that—

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented, and in accordance with legal principles, as established by former parliamentary and judicial precedents and decisions.

The only evidence which is before the committee in relation to the claim of the memorialist Abbott to a seat in the Senate of the United States is as follows:

That, on the second Tuesday of November, 1870, the day prescribed by law, the two houses of the legislature of North Carolina proceeded to the election of a Senator from that State for the term of six years commencing on the 4th day of March, 1871, with the following results:

	Votes.
In the house of representatives:	
Zebulon B. Vance received	63
Joseph C. Abbott received	32
Scattering	10
Members present	105
In the senate:	
Zebulon B. Vance received	32
Joseph C. Abbott received	11
Scattering	5
Members present	48

That the number of members present at the time and so voting constituted a quorum of each house of the legislature; the constitution of North Carolina providing that "neither house shall proceed upon public business unless a majority of all the members are actually present," the numbers so present amounting to a majority of all the members.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes cast in both houses, and that he was duly elected as such Senator for said term of six years commencing on the 4th day of March, 1871.

It is also further in evidence that said Vance was not on said second Tuesday of November, 1870, and at no time since has been, qualified to serve as such Senator, owing to disability imposed by the fourteenth article of amendment of the Constitution.

It is averred that the members of the legislature of North Carolina so voting for Vance, at the time their votes were cast, had notice of the ineligibility of Vance, but no evidence on this point has been presented to the committee, the memorialist relying upon the assumption that this was a matter of public notoriety.

It appears, therefore, that Abbott rests his claim to the seat solely upon what he assumes to be the legal result of the conceded ineligibility of Vance, who, although receiving a majority of the votes, is not entitled to take the oath of office or hold the seat. He assumes that it is a conclusion of law that if the candidate who has received the highest number of votes is ineligible, and that ineligibility was known to those who voted for him before casting their votes, that the votes so cast for him are void, and should be

considered as nullities, and as though they never had been cast; and, consequently, the candidate receiving the next highest number of votes is elected.

In support of this view of the case the memorialist has called the attention of the committee to a large number of English authorities bearing on this question. While the committee make no question as to the general tenor of the decisions to which attention has been called, yet it is evident that these are based upon a very different rule from that adopted in our country. To show that this rule is different, the committee would refer to the following authorities, which are cited in the very able report of Mr. Dawes from the Committee on Elections, in the case of Smith *vs.* J. Y. Brown (Report of Committees, No. 11, 2d sess. 40th Cong.).

Haywood on County Elections, 535:

"If, before the election comes on, or a majority has polled, sufficient notice has been publicly given of his ineligibility, the unsuccessful candidate next to him on the poll must ultimately be the sitting member."

Male on Elections, 336:

"If an election is made of a person or persons ineligible, such election is void, where the ineligibility is clear and pointed out to the electors at the poll."

In the case of King *vs.* Hawkins (10 East., 210), Lord Ellenborough states that such is the law in England, "after notice of ineligibility."

In the case of Claridge *vs.* Evelyn (5 B. and A., 8), Abbott, C. J., remarks:

"I am of the opinion, therefore, that he (the infant) was ineligible, and due notice of his incapacity having been given to the electors at the time of the election, their votes are thrown away."

Clerke on Election Committees, 156:

"Whenever a candidate is disqualified from sitting in Parliament, and notice thereof is publicly given to the electors, all votes given to such disqualified candidate will be considered as thrown away."

This notice, in order to bring the case within the rule, was required to be strictly formal, and was generally given at the polls. And the reason for this is apparent, as by their theory a voter who, after due notice of the ineligibility of a candidate, persisted in voting for him, was deemed guilty of a crime. Therefore, as all crimes are committed with an intention to commit the offense, it was necessary that the knowledge of the fact by the voter should be clear.

Roe on Elections, 256:

"It will be seen that the latter proposition is that which constitutes the law in cases where misapplication of the franchise by the electors was willful, and therefore made in their own wrong."

But is such a principle applicable in a government based upon the theory that the power emanates from the people? In the British Government the case is exactly the reverse, as there the theory is that the power originates with the monarch, and the privileges allowed the people to select representatives are, under that theory, considered as conceded and not as inherent rights. But this Government rests upon an entirely different basis. Here the power originates with the people, and that which the Government is authorized to exercise is conceded by the people. The right to designate who shall exercise this power has never been delegated. The method by which this choice shall be made known consistent with this theory can never be otherwise than by giving the majority or plurality the right to decide. Any attempt to restrict the right of the voter is an attempt to invade that right; therefore the theory that casting a vote knowingly for an ineligible candidate is in the nature of a crime which may be punished by ignoring the act of the majority and recognizing the act of the minority is in direct conflict with that most sacred right which the people of this Government have always guarded with jealous care. Such a rule is consistent with the theory of the British Government, as it affords one means of preventing the power from passing into the hands of the people; but it is directly at variance with the theory of our Government, as it affords one means by which that right which the people have of selecting their representatives may be abridged.

While, therefore, the general tenor of the English authorities to which he refers us is admitted to be as claimed by the memorialist, yet we do not conceive such a rule to be applicable to and consistent with the political institutions of the United States, where the right of the majority to govern and the Government is based upon the consent of the governed is one of the first political lessons to be learned.

There is also another very strong reason why the English authorities relied upon by the memorialist are not applicable in the present case, even if the spirit and fundamental idea of our institutions were insufficient to show this.

The third section of the fourteenth amendment of the Constitution, which imposes the disabilities in question, also contemplates and provides for the removal thereof by Congress. There is no such feature in the English law. The English cases are therefore

based upon a very different state of facts from those that exist in this country, and are not precedents for this case.

It is difficult to conceive how the Constitution could grant authority to Congress to remove the disabilities under which an individual who has been elected is laboring, and allow him to take his seat as a member, and yet at the same time embrace the idea that such an election is wholly void and the votes cast for him nullities. Yet Congress by its action in numerous instances has given the first construction to this clause of the Constitution, and if the memorialist in this case shall be admitted to his seat the Senate will have to give the second construction.

The English law in question does not obtain in the United States, as is clearly shown from the following considerations:

First. The judicial decisions are against it, there being but one decision which sustains it, namely, the Indiana case of 14 Ind., page 927; while on the other hand are the decisions in Maine, New Jersey, Pennsylvania, Wisconsin, and California, to which your committee would refer, and from which the following quotations are made:

1795. The State *vs.* Anderson (1 Cox, N. J. Rep., 318):

"Anderson was elected sheriff of Hunterdon. He had not been three years a freeholder, and was therefore absolutely disqualified, the statute of 1788 having declared that no person shall hereafter be eligible to the office of sheriff in any county in this State unless he shall be and hath been an inhabitant thereof and possessing a freehold estate in his own right in fee-simple in the same county for three years previous to his election."—(324.)

Held by the court—

"That Anderson was disqualified, but that his election was not void. The election of an unqualified person as sheriff is not *ipso facto* void; it is only voidable.—(Syllabus, 318). Still, however, we think the election not *ipso facto* void."—(Opinion, 327.)

1849. State *vs.* Giles, *ex rel.* Dunning, &c. (1 Chand., Wis. Rep., 112):

"Two questions arose in this case:

"First. Whether the person holding the office of sheriff at the time of the adoption of the constitution was eligible to that office at the next ensuing election.

"Second. If the then sheriff was ineligible, whether the person who at that election received the next highest number of votes could be considered as entitled to the office.—(13.)

"'The mere ineligibility of a person to hold a particular office, and who receives the greatest number of votes, such votes are not a mere nullity, but should be counted by the canvassers. A contestant for the same office, and receiving a lesser number of votes, though eligible, cannot be regarded as elected, and does not thereby become invested with the right to the office.'—(Syllabus, 112.)

"It is proper to say that we are all of the opinion that the mere ineligibility of a candidate does not, as the law now is, render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers, and that in the event of such ineligible person having the highest number of votes, the person having the next highest number is not thereby elected. If any public embarrassment is apprehended from this, such as that an office may remain indefinitely vacant by reason of a majority of the electors obstinately persisting in voting for an ineligible person, it is within the undoubted power of the legislature to prevent it by enacting that all such votes shall be deemed void and not be counted."—(Opinion, 117.)

And this remedy is so reasonable and practical that we may well ask, if it is intended that the English rule shall prevail in this country, why has it not been resorted to? Our answer is that such an idea is contrary to the spirit of our institutions and opposed to the principle that all power granted is by the consent of the governed. When we decide that a minority of votes may elect we strike a blow at the very heart of this republican principle.

1855. 38 Maine Rep., 597:

A majority of the votes at the election in Sagadahoc County were cast for Abel C. Dinslow for county commissioner. There was no such person in being. The governor submitted to the judges the question whether it was competent "to throw out the votes for Abel C. Dinslow and issue a new commission to such person who is eligible to said office as shall appear to have the highest number of votes?"

The judges answered in the negative.

They were further asked whether the office was vacant.

The judges answered it was.

1861. State *ex rel.* Off. *vs.* Smith (14 Wis., 497):

"The remaining questions are: First. Whether the defendant, being an alien and not a qualified elector at the time of his election, was eligible to the office. Second. If he was ineligible, whether the relator, who received the next highest number of votes cast is entitled to the office.

"The last question has been already settled in this State by the case of the State *vs.* Giles (1 Chand., 112.) It was there held by the unanimous judgment of the court that in the absence of a statute declaring it so, the mere ineligibility of a candidate does not render void the votes cast for him; that such votes should not be rejected, but should be counted by the canvassers; and that in the event of such ineligible person having the highest number of votes, the person having the next highest number would not be thereby elected."—(Opinion, 498.)

1867. Commonwealth *vs.* Cluley (56 Penna., 270):

"The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal. Even in England it has been held that votes for a disqualified person are not lost or thrown away so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and if they do so a *quo warranto* information will be granted against the person so declared to be elected, on his accepting the office. (See Cole on Quo Warranto, 141–2; Regina *vs.* Hiorns, 7 Ad. & E., 960; 3 Nev. & Perry, 184; Rex *vs.* Bridge, 1 M. & S., 76.) Under institutions such as ours are there is even greater reason for holding that a minority candidate is not entitled to the office if he who received the largest number is disqualified. We are not informed that there has been any decision strictly judicial upon the subject, but in our legislative bodies the question has been determined. It was determined against a minority candidate in the legislature of Kentucky, in a case in which Mr. Clay made an elaborate report and was sustained. In 1793 Albert Gallatin, elected a Senator from this State, was declared by the Senate of the United States disqualified because he had not been a citizen of the United States nine years, and his election was declared void for that reason, but his seat was not given to his competitor. Nobody supposed the minority candidate was elected. There have been several other cases of contested elections in which the successful candidates were decided to have been disqualified, and denied their offices. John Bailey's case is one of them. He was elected to Congress from Massachusetts, and refused his seat in 1824. But neither in his case, nor in any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one who had received a less number of votes to the office. There is a class of cases in England apparently, but not really, asserting otherwise."—(Opinion of the court by Strong, J.)

This able opinion by Judge Strong, now on the Supreme Bench of the United States, is well worth careful consideration. Your committee would call special attention to that sentence where it is stated that "the disqualified person is a person still, and every vote thrown for him is formal." The act of Congress prescribing the time and manner of electing Senators specifies what the vote shall be for in order to make it available in the count; for it says "each house shall openly, by a *viva voce* vote of each member present, name one person for Senator." The vote must be for a person, not a blank in fact, not for a myth, but for a person. But if the vote is cast for a person for Senator in Congress from that State, this statute has been formally complied with, and no construction can change the fact. Vance is a person; 63 *viva voce* votes in the House and 32 *viva voce* votes in the Senate were given for him for Senator in Congress from North Carolina on the day and at the place required. Then the provisions of the act of July 25, 1866, have been strictly and formally complied with. What power, then, has the Senate of the United States, or any court, to declare these votes were never cast for a person? For this, it seems to your committee, must be said before the memorialist could be entitled to the seat he claims. But even this conclusion must result in a decision adverse to his claim; for if these votes are declared nullities, then no quorum voted. (Also Saunders *vs.* Hayes, 13 Col., pages 145, 156; 10 Col., Whitman *vs.* Maloney.)

Secondly. The legislative decisions are against the idea that the English law obtains in this country. So far as any action has been taken in the Senate which bears upon the question, it has been decidedly against the English law.

In the case of Mr. Gallatin, from Pennsylvania, in 1793, although deciding him to be ineligible and his election void, yet, by resolution, the governor of that Commonwealth was simply notified of this action.—(Cont. El. Cong., page 859.)

The case of Mr. Shields, of Illinois.—(Cont. El. Cong., from 1834 to 1865, page 606.)

The case of Yulee *vs.* Mallory, of Florida, where blank votes were taken into the count.—(Cont. El. Cong., from 1834 to 1865, page 608.)

The cases of Mr. Thomas, of Maryland, and Miller, of Georgia, where the oath of office was modified, is a declaration on the part of the Senate of the American rule.

In the House of Representatives the same rule has so far prevailed.

The case of Mr. Bailey, of Massachusetts, 1824, where the candidate receiving the highest vote was declared ineligible, yet the votes given to him, as Judge Strong remarks in the case of Cluley, "were not treated as nullities."—(Cont. El. from 1789 to 1834, page 254.)

The case of Smith *vs.* J. Y. Brown, 1868, where the present question is ably discussed in the report by Mr. Dawes from the Committee on Elections, and it is decided that a minority cannot elect.—(Cont. El. from 1865 to 1871, page 395.)

In the case of McKee *vs.* J. D. Young, 1868, although the claim of the contestant was decided on other grounds, yet the opinion is reaffirmed that a minority cannot elect.—(Cont. El. from 1865 to 1871, page 422.)

The case of Christy *vs.* Wimpy is of a similar character.—(Cont. El., 1865 to 1871, page 464.)

Also the case of Jones *vs.* Mann, 1869.—(Cont. El., 1865 to 1871, page 471.)

The case of Wallace *vs.* Simpson, 1870, has been referred to as sustaining the English rule. But an examination of that case shows that it was decided on wholly different grounds. That the proposition "that when one of two candidates is ineligible the votes given for him are of no effect, and the other candidate is elected," was maintained by but one member of the subcommittee, Mr. Cessna, while it is expressly stated that the other two members, Mr. Hale and Mr. Randall, dissented from the proposition.—(Cont. El., 1865 to 1871, page 731.)

In the case of Zeigler *vs.* Rice, of Kentucky, 1870, it is decided that even where there is notice of ineligibility of the successful candidate this does not entitle the minority candidate to take his seat. The majority report of the committee in this case states:

"The committee are well satisfied that the acts of the contestee were well understood by the voters of said district at the time contestee was voted for, but do not agree with contestant that as contestee was ineligible, the candidate who was eligible is entitled to the seat."—(Cont. El., 1865 to 1871, page 884.)

The removal of disabilities by the action of Congress, of the same nature as these under which Vance labored, is a decision in the strongest possible terms that such votes are not nullities; that the election of such candidate is not void but voidable only. For if they were nullities, and the election of such candidate void, then Congress, by such action as it has taken, has elected members to one of its own houses without reference to the action of the people. As an example, we may refer to the case of R. R. Butler, of Tennessee (Contested Election Cases, 1855–'71, page 464); also case of Young, of Georgia.

But suppose that it is admitted that the English rule is applicable here, do the facts in this case bring it within that rule? Were the votes for Vance cast in willful obstinacy for a candidate the voters knew, or had good reason to believe, would not be entitled to take his seat? The memorialist avers that the fact that Vance was known to be ineligible is not controverted. That his ineligibility was a matter of public notoriety in North Carolina is doubtless true, and that it was known to most if not all of the members of the legislature is quite probable; yet no evidence has been presented to the committee proving this fact, or that notice of his disqualification was given at the time the vote was taken.

Let us even go one step further, and suppose that the evidence on this point was clear and explicit; are we not justified in believing that those who voted for Vance did so in good faith, believing that his disabilities would be removed after the election by the action of Congress, basing this presumption on the precedents which had recently been set in similar cases? Nor is this by any means an improbable hypothesis, but accords much better with the facts presented to the committee than the hypothesis that the votes given for Vance were cast in "willful obstinacy" for a candidate they knew would not be admitted to his seat. If they were given under the impression that these disabilities would be removed, then, although unavailing, they cannot be rejected from the count. And the committee would again refer to the report of the committee in the case of Yulee *vs.* Mallory, of Florida, 1852, where the following language is used which is applicable to this view of this case:

"If blank votes are beyond a doubt a nullity; if the resolution is to be regarded of no effect, and we are brought to the question, under these circumstances, whether Mr. Yulee is duly elected, it seems to us difficult to maintain the affirmative of that proposition upon the facts before us. If the members were misled on both these material points by assuming that their previous doings afforded safe and certain rules of action, then they were misguided by what they had a right to consider as authority, and must have acted under a misconception of right, which stood, as they supposed, unquestioned. If this be so, they stand substantially in the condition of an elector who votes for a person disqualified, believing him to be qualified. The vote in such case, though unavailing, is not rejected from the count."—(Senate Election Cases, page 223.)

Under the English rule, it is the fact that the voters knowingly and purposely throw away their votes that lays the foundation for saying they assent to the election of the minority man. But no such purpose can be predicated of the legislature of North Carolina. They did not know that their votes for Vance would be thrown away. They did not purposely throw them away, because Congress had in numerous cases previously

removed disabilities of a similar character from those elected and allowed them to hold their offices. Nearly all of the officers elected in this State in 1868 had their disabilities removed by the act of June, 1868, and were allowed by virtue thereof to enter upon and discharge the functions of their respective offices.

The same act removed the disabilities of a large number of persons elected in Alabama in February, 1868, and at the close of the section contains this sweeping clause:

"And also all officers-elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected."—(15 Stat. at Large, 366, 2.)

These were certainly sufficient to raise in the minds of the members of the legislature of North Carolina who voted for Vance the belief that his disabilities would be removed and that he would be allowed to take his seat. In fact, they had good right to believe that this was the rule, and the opposite the exception, especially where the persons so elected were known to favor the restoration of order and obedience to law.

Again, it may be fairly argued that the fourteenth amendment to the Constitution did not disqualify Vance to be elected, but only to hold the office of Senator in case his disability should not be removed. Upon this interpretation his election was voidable only, and not void, and, as a consequence, Abbott was not elected. But even if this interpretation is erroneous, it is one the legislature of North Carolina might (and as nothing to the contrary is shown, we are to presume did) honestly entertain (especially in view of the action of Congress above referred to), and if they elected Vance under a mistake in law, his election was not void, but only voidable.

Although the committee have referred to the decisions of the courts and legislative bodies of this country bearing upon this case, the tenor of which is believed to be decidedly adverse to the claim of the memorialist, yet this appears unnecessary, as a careful examination of the act of Congress of July 25, 1866 (which has already been alluded to on one point), when applied to the facts in this case, would seem to be an effectual bar to the claim of the memorialist.

The first section of this act is as follows:

"That the legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress, in the place of such Senator so going out of office, in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journals of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At 12 o'clock meridian of the day following that on which proceedings are required to take place as aforesaid the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected Senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and take at least one vote until a Senator shall be elected."

The passage of this act was evidently intended to be an exercise of that authority conferred upon Congress by Article I, section 4, of the Constitution, so far as the same relates to the election of Senator. This section provides that—

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed by each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The words "such regulations" in the latter clause refer to "the times and manner of holding elections" in the first clause ("places" being expressly excluded); therefore, by virtue of this provision, Congress has power—so far as the election of Senators is concerned—to prescribe the times and manner of holding elections. The act of July 25, 1866, is evidently intended to do this, and therefore has taken it out of the power of the legislatures of the States to determine either the times or manner of holding these elections so long as this act remains unrepealed.

In regard to the time fixed there is no difference of opinion. What then is prescribed

in regard to the manner of holding the election in the first provision of the section? "Each house shall openly" do what? "Name one person for Senator in Congress from said State." How? "By a *viva voce* vote of each member present." If we give to each word of this clause its full force and effect, consistent with the other portions of the provision, what are we to understand by "each member present?" Does it signify those voting only, or has it some other meaning? If we refer to the second provision of the section we find the words "present" and "voting" both used in the same clause, showing clearly that the two are intended to have different significations. But it is insisted that if we give this construction to the provision of the act in relation to the election by the two houses, it is equivalent to saying that to obtain an election every member present must vote, thus placing it in the power of a single member so present to defeat an election on that day. If, on the other hand, it only applies to those voting, what force and effect do we give to these words?

It is manifest that the second provision of this section was intended to take it out of the power of a small majority in one house, by preventing an election, to defeat the election of a candidate in favor of whom there is a majority of the aggregate of the two houses, and as the usual method of proceeding is changed by this provision, it was necessary to prescribe what should constitute a quorum. A majority of all the members elected to both houses are required to be present to constitute this quorum, and the person elected is required to have a majority of all the votes of said joint assembly.

What shall constitute a quorum in each house on the day the vote is taken separately is left to the constitution and laws of the State. The constitution of North Carolina requires a majority of each house to be present; it follows that the provisions of the two parts of the section are substantially the same. For upon what grounds can we suppose that Congress would require a majority of a quorum on the second day to elect, and not on the first?

Your committee is therefore satisfied that Congress, in the passage of this act, contemplated and intended that in the election of Senators, whether under the first or second provisions of this section, to be valid, it should appear that a quorum was present and voting.

It is, moreover, evident from the very wording of this act that Congress did not even contemplate the possibility of an election by a minority under any circumstances, but by this act imply the opposite; for in the provision relating to the election by the two houses, separately, it is required that "the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house, shall be entered on the journal of each house." This language is plain and easily understood. If any person receives a majority of the votes cast his name is to be entered on the journal; nothing is said of those in the minority; no evidence is to be preserved of the fact that they were known in the election; nothing is required to be said about the number of votes that even the successful candidate receives; the simple fact that Mr. A. received a majority of all the votes cast is all that is required. The next day the two houses shall convene in joint asssembly and compare journals, and if the same name and same fact in regard to him is on each, he is to be declared duly elected. But if neither candidate receives a majority the first day, the fact is to be entered on the journal; nothing more is required; no person has received a majority, and there is no use to preserve upon the record anything but that fact; yet it is possible that one out of three candidates may be known to be ineligible by those voting for him. If the second out of three candidates was disqualified, and those voting for him knew it, the case would be much more plausible than the present one. Yet this act contemplates no such contingency. Your committee is aware that this inference has no binding force; it is only alluded to to show that the idea of a minority candidate being entitled to his seat under any circumstances is at war with the very spirit of our laws and institutions, and that the principle involved in this case is at variance with the spirit of the law upon which the memorialist founds his claim to a seat.

It has been suggested that there is a distinction in respect to the operation of the rule insisted on by the memorialist, between a popular election, under our liberal system of suffrage, for a member to the House of Representatives by ballot and an election of a Senator by *viva voce* vote of the members of a legislature.

Your committee are inclined to think this is correct, but that the distinction bears against the claim of the memorialist instead of in favor of it.

The number of persons entitled to vote at a popular election is not fixed and definite, and hence it is impossible to have a quorum or anything answering thereto. There is no power to compel attendance. This is, and necessarily must be, wholly voluntary; therefore it is necessary that those attending should have the right to elect, where the election is free, and are prevented from attending by force, intimidation, or fraud. If a candidate receiving the majority is disqualified, and the votes cast for him are declared nullities (as claimed by the memorialist), the remaining votes are as effectual to elect as if every voter of the district had been present; and if those who voted for the can-

didate receiving the majority had not been present at all, the election nevertheless would have been valid. But the rule is wholly different in legislative bodies. The number is fixed and definite, a quorum can be and is required to act, and the presence of a less number is not effectual. Had but the thirty-two who voted for Abbott been present in the house at the time the vote was cast, we do not suppose any one would contend that he had even a shadow to base his claim upon; yet this number would be sufficient to elect in a district of a thousand voters if no others voted. We therefore coincide in the view that there is a difference, and that, even if the English rule was applicable in the case of an election of a member to the House of Representatives, it would by no means follow that it was applicable to the election of a Senator where the number voting, of the votes counted, is less than a quorum.

Your committee, therefore, after a full hearing of the case and examination of the authorities, come to the conclusion that the Hon. Joseph C. Abbott, of North Carolina, is not entitled to a seat in the United States Senate, and recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott, not having received a majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator.

O. P. MORTON.
JOHN A. LOGAN.
A. G. THURMAN.
JOSHUA HILL.

The following statement of Mr. Ransom, of North Carolina, is herewith presented with the report of your committee:

"Immediately after the election in North Carolina in 1870, which resulted in the triumph of the Democratic-Conservative party, the question of the election of a United States Senator became one of great, exciting interest throughout the State, and very soon assumed a sectional (State) character. Governor Vance, Governor Graham, and Judge Merrimon were the persons most prominently brought forward by the western gentlemen and papers. The "west" (of the State of North Carolina) insisted most earnestly that their section, of right, ought to have the Senator. Article after article was written in the western papers, claiming the Senator for the west, and there was great feeling on the question when, in November, 1870, the legislature met.

"Immediately on its meeting Mr. Jarvis, an eastern member, was elected speaker of the house, and this event gave western gentlemen still further ground to claim the Senator. Mr. Jarvis, in caucus, beat Mr. Welch and Colonel McAfee, both western gentlemen.

"The Democratic caucus met.

"Vance's, Merrimon's, Graham's, Warren's, and Ransom's names were before the caucus.

"The balloting at first was entirely indecisive.

"While the Democratic strength in the legislature was from 105 to 110, only 94 members attended caucus.

"On the eighth ballot Merrimon was ahead, receiving 35 votes; Vance and Ransom about 25 each, and Graham some 9 or 10.

"Merrimon's vote then declined and Graham's vote went up; when Ransom's strength was developed and his vote began to go up.

"The balloting continued, and finally, Ransom being ahead, Vance's vote went up on the twenty-sixth ballot, Ransom then having 42, Vance 39, about 10 for Graham, and 3 scattering, when Graham's friends, western men, went to Vance, and the last ballot was—for Vance, 48; Ransom, 46. Vance was nominated, the vote standing 48 for Vance and 46 for Ransom.

"After the twelfth ballot Ransom had been ahead of Vance until the twenty-sixth ballot, and on the twenty-seventh the Graham men went to Vance and elected him.

"There were about 35 Democrats from east of Raleigh, and about 70 or 75 west; but only 94 at caucus.

"Vance's great personal popularity accounts for his running ahead of Graham and Merrimon, both western men; and his popularity and position in the west, he living in the stronghold of the western Democracy, beat Ransom.

"Had Vance's disability been removed he would have beaten all his opponents without a struggle; while it is simple candor to say that Ransom would beat any other man except Vance. The last election proves this.

"Vance's nomination was then owing to his being a western man and his great personal popularity, both causes contributing to his nomination; his popularity beating Graham and Merrimon, and his position and popularity together beating Ransom.

"Merrimon had no disabilities.

"Graham was laboring under disabilities.

"DISABILITIES.

"Before the caucus met, and at the caucus, it was generally stated that Vance's disabilities would be removed and that he would be admitted. It was generally argued and believed that many influential Republicans of the North had assured Vance that his disabilities would be removed, and Vance himself expressed no doubt of it. His friends, by authority, stated in caucus that Vance would resign unless admitted.

"REMOVAL OF DISABILITIES.

"On the 20th of April, 1868, an election took place in North Carolina for all the State officers—governor, lieutenant-governor, secretary of state, treasurer, judges of the supreme court, judges of the superior courts, the probate judges, members of the legislature, and all county officers, sheriffs, &c.

"On the 25th June, 1868, two months after this election, Congress removed the political disabilities of most of these officers, nearly all of whom were under disability when elected.

"Governor W. W. Holden and Mr. Thomas Ashe and Mr. D. R. Goodloe were the candidates for governor—Holden, Republican; Ashe, Democrat, and Goodloe, Republican. Goodloe was eligible, and he received only 300 out of 170,000 votes. The fact that he (Goodloe) only was eligible, and the others not, was fully discussed in the papers and canvass.

"On the 25th of June, as aforesaid, Todd R. Caldwell, lieutenant-governor, was also relieved.

"And so were Richmond Pearson, chief-justice; Robert P. Dick, associate justice; Thomas Settle, associate justice; Edwin G. Read, associate justice supreme court. And so with many of the judges of the superior courts: Daniel L. Russell, Anderson Mitchell, C. R. Thomas (now member of Congress), Judge Logan, &c.

"The superintendent of public works, C. L. Harris; W. L. Adams, auditor of public accounts; Joseph W. Holden, speaker of the house of representatives, and nearly every white member of the legislature of 1868, which actually elected Mr. Abbott to the Senate when he was admitted, and, as before said, nearly if not all of the county officers in the State—all, all had their disabilities removed after the election.

"And in the same act of June 25, 1868, it is declared in section 2, page 581 (Congressional Globe, part 5, 2d sess. 40th Cong.):

"'* * * And also all officers-elect at the election commenced the 4th day of February, 1868, in said State of Alabama, and who have not publicly declined to accept the offices to which they were elected.'

"This is the concluding sentence after the enumeration of a long list of persons in Alabama.

"GOVERNOR VANCE AND SENATOR POOL.

"About the 4th of March, 1871, great anxiety was felt by the legislature as to Vance's prospects, and Mr. Martin, member of the legislature from Carteret, introduced a resolution looking to Vance's resignation and another election. There was great interest on this question, and a caucus of the Democrats called with a view to settle the matter, when, on the 17th of March, 1871, Mr. Cowles, a senator in the North Carolina legislature, read from his place in the senate this letter from Hon. John Pool, now Senator in Congress, and this assurance quieted the legislature, and no action was taken.

"This letter is herewith presented.

"A. C. Cowles, esq., the senator from Yadkin County, recently wrote to Hon. John Pool at Washington in regard to the prospect of Governor Vance obtaining his seat, and received the following answer:

"'SENATE CHAMBER,
"'*Washington City, March* 17, 1871.

"'MY DEAR SIR: You ask me as an old friend to tell you candidly if Governor Vance is likely to be relieved. The Senate committee has just reported a bill for his relief, and it will pass next December, if not before. In the present state of things here it may not be acted upon this session, as Congress refuses to take up any business except some few special matters. But even at this disadvantage Vance stands a good chance of being relieved before we adjourn. Many Senators heretofore opposed will vote for him now. If Congress remains in session two weeks he will be relieved at this session. The House would pass the bill by an immense majority. I hardly have a doubt as to his final relief early in the next session.

"'I have not time to write more fully.

"'Very truly, &c.,

"'JOHN POOL.'"

VIEWS OF THE MINORITY OF THE COMMITTEE ON PRIVILEGES AND ELECTIONS.

FEBRUARY 28, 1872.—Ordered to be printed.

Mr. Carpenter asked and obtained leave of the Senate to present the following as the views of the minority:

A minority of the Committee on Privileges and Elections, to whom was referred the memorial of Joseph C. Abbott, who claims to be entitled to a seat in this body as Senator from North Carolina, for the term commencing on the 4th day of March, A. D. 1871, respectfully submit the following report:

The gravity of the question now for the first time directly presented to the Senate, and the fact that the decision which shall be made in this case will be a precedent, render it desirable that the question should be fully considered; and believing that the conclusion arrived at by the committee is erroneous in law, we present to the Senate the reasons which have compelled us to dissent.

The Constitution of the United States, Article I, section 5, provides:

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

The duty cast upon the Senate by this provision of the Constitution is judicial in character. We may not inquire or consider what party interests demand; whether it would appear impartial to decide against a political friend, or whether a decision in his favor would be condemned in political circles. The question to be determined is one of strict right, depending upon legal principles, as settled by former decisions, parliamentary and judicial; and we have no more right than a judge upon the bench to turn away from the law to consider the political or partisan interests involved in the case or to be affected by the decision.

The case is this: On the 4th of March, 1871, the term of service of Joseph C. Abbott as Senator from North Carolina expired. On the second Tuesday of its session, in November, 1870, the day prescribed by law, the two houses of the legislature of North Carolina proceeded to the election of a Senator from that State for the succeeding term of six years, commencing on the 4th day of March, 1871, with the following result:

In the house of representatives:

	Votes.
Zebulon B. Vance received	63
Joseph C. Abbott received	32
Scattering	10
Members present	105

In the senate:

Zebulon B. Vance received	32
Joseph C. Abbott received	11
Scattering	5
Members present	48

these numbers constituting a quorum of each house of the legislature respectively.

On the following day the two houses, in the usual form, declared that Vance had received a majority of the votes in both houses, and was duly elected for the said term.

Had Vance been qualified to serve, there would be no question as to his right. But he was disqualified by the fourteenth amendment to the Constitution of the United States, for the reason that he had been a member of the Congress prior to the rebellion, and, as such member, had taken an oath to support the Constitution of the United States, and during the rebellion he had acted as colonel in the rebel army, and taken an oath of allegiance to the so-called Confederate States of America; and he had acted as governor of the rebel State of North Carolina from August, 1862, to April, 1865; and this disqualification was notorious—known to all the members of the legislature at the time of his election, and to all the people of that State. The fact that Vance was known to the members of the legislature who voted for him for Senator to be disqualified is not controverted. On the contrary, General Ransom, who claims to have been subsequently elected, upon the resignation of Vance, was heard before your committee, and frankly admitted that the fact that Vance was disqualified was well known to all the members of both houses of the legislature at the time of his pretended election.

It is admitted on all hands that the election which was held, as before stated, conferred no right upon Vance to a seat in this body; but Abbott, who was qualified, and who received the next highest number of votes cast, and a majority of all the votes cast for qualified candidates in both houses, insists that he was elected at said election, and is now entitled to the seat; and this is the question to be determined.

The Constitution, Article I, section 4, provides:

"The times, places, and manner of holding elections for Senators and Representatives

shall be prescribed in each State by the legislature thereof, but Congress may at any time, by law, make and alter such regulations, except as to the places of choosing Senators."

The election of Senators is thus, by the Constitution, committed to the regulation of the respective States, except so far as Congress, under this provision, may legislate upon the subject. The only act of Congress applicable is that of July 25, 1866, as follows:

"That the legislature of each State which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in place of such Senator so going out of office, in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At 12 o'clock meridian of the day following that on which proceedings are required to take place, as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected Senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes cast in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and take at least one vote until a Senator shall be elected."—(U. S. Laws, vol. 14, page 253.)

This act was intended to assure the election of a Senator by the action of the two houses separately, or in case of a failure to elect in that mode, then by joint assembly of the two houses commencing on the following day and continuing day after day until a result should be reached. This act deserves a careful consideration, because it is insisted that the conclusions herein arrived at are in conflict with its provisions. In regard to election by the houses separately it is provided:

"Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof."

It will be perceived that this act does not attempt to determine what shall be a quorum of each house, but leaves that question to be determined by the constitution and laws of the State. By the constitution of North Carolina it is provided:

"Neither house shall proceed upon public business unless a majority of all the members are actually present."

It is not necessary that all the members should participate in the transaction of public business by either house, but merely that a majority of all the members should actually be present in each house. But in providing for an election by the joint assembly of the two houses the act of Congress does provide that in such election—

"The person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The difference in these two provisions is not one of phraseology merely, but of substance. In the election by the two houses separately in North Carolina, if a majority of the members elected to each house are actually present, the person who shall receive the highest number of votes cast, though that may be less than half of a constitutional quorum, is to be declared elected; but in the election by the joint assembly it is not enough that a candidate should receive a majority of all the votes cast, but he must receive a majority of "all the votes of the said joint assembly—a majority of all the members elected to both houses being present and voting." These provisions are so materially different that the variation cannot be regarded as accidental, and the reason for the distinction is, no doubt, that the act intended to leave the matters of a quorum and the proceedings of the houses acting separately to be regulated by the constitution and laws of the State, but the act intended to provide what should be necessary to constitute a quorum and make an election in the joint assembly—a body created by the act, and whose proceedings might not be regulated by the constitution of the State.

It is only necessary in this case to consider the effect of the proceedings in the two houses on the first day, because it is upon those proceedings Mr. Abbott founds his claim.

If he was legally elected on that day the subsequent proceedings by the joint assembly could not affect his right, nor can such claim be affected by any subsequent proceedings of the legislature. His claim depends upon the legal effect of what took place in the two houses on the first day of the election.

It is insisted that the provisions of the act in relation to election by the two houses and by the joint assembly are substantially the same, because it is provided by the act that—

"Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator, &c., and the name of the person so voted for who shall have a majority of the whole number of votes cast in each house shall be entered on the journal," &c.

And hence it results that to be elected on the first day the person must have a majority of all the members present. But this construction, which is equivalent to saying that, to make an election, every member must vote, would put it in the power of a single member of the legislature to defeat an election on that day. This could not have been intended, and that clause must be regarded as relating merely to the manner of voting; and if a number of votes are cast for a qualified candidate, and the other members refuse to vote at all, then the person "who shall have a majority of the whole number of votes cast" must be deemed elected.

The provision concerning the joint assembly is materially different. There it is provided:

"The joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected."

The clause "a person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting," undoubtedly requires that to make an election a candidate must receive a number of votes greater than half of the majority of both houses. The difference between the two provisions is this: if a majority or quorum of each house are actually present when each house proceeds to the election on the first day, the person receiving the highest number of votes cast is elected, though receiving less than half of a majority. But in the joint assembly it is necessary to an election that a candidate should receive the votes of more than half of a majority of both houses.

It is a well-established rule for construing statutes that every clause, phrase, and word must be deemed to have been added to the statute for the purpose of accomplishing some end that would not be accomplished without it.

Dwarris on Statutes (Potter's edition, 1871), 198, says:

"It is a safe method of interpreting statutes to give effect to the particular words of the enacting clauses. For when the legislature in the same sentence uses different words the courts of law will presume that they were used in order to express different ideas. So, if there be a material alteration in the language used in the different clauses, it is to be inferred that the legislature knew how to use terms applicable to the subject-matter. 'The several inditing and penning of the different branches,' said the judges in Edrick's case, 'doth argue that the maker did intend a difference of the purviews and remedies.'"

To the same effect, see Rex *vs.* Bolton (5 Barn. and Cres., 74).

Applying this familiar precept to the statute before us, it must be held that the provision in regard to an election by the joint assembly requiring a person to receive "a majority of all the votes of the said joint assembly," which is not found in the act in relation to an election by the two houses acting separately, was added for the purpose of requiring in one case what was not necessary in the other. It may be said that the same thing ought to be required in the one case as in the other, and that the act of Congress ought not to be so construed as to permit an election by the minority in one case and to forbid it in the other. But the answer to this is obvious. Before the passage of this act the States elected Senators by various methods; some by a joint assembly of both houses and some by the action of the two houses separately. In those States which elected by the latter method the houses might sometimes disagree, and thus defeat an election. It was the manifest intention of the act of Congress to afford to a legislature the opportunity of electing a Senator by the separate action of the houses, and in doing so to leave the whole detail of the election to be regulated by the parliamentary usage of the State. But in providing for an election by the joint assembly, a method not in use in some of the States, it was necessary to provide what should be a quorum, and what should be necessary to an election.

As the act of Congress does not affect the question under consideration, resort must be had to the precedents and authorities, English and American.

It is admitted that when the electors vote for a disqualified candidate, in ignorance of his disqualification, the election is void, and must be remitted to the elective body.

But it is insisted that where, as in this case, the electors (the members of the two houses) had full knowledge of the disqualification, votes cast for such person are considered as thrown away, and the qualified candidate receiving the next highest number of votes, and a majority of all votes cast for qualified candidates, is elected. If this proposition is well grounded, Mr. Abbott is entitled to a seat; and this is the precise question upon which we are to consult the authorities.

Mr. Abbott furnished to your committee a printed brief containing references to and quotations from the decisions upon this question from the earliest times, which quotations are embodied in this report.

Rogers on Elections (ed. 1847, ch. 7) says:

"The principle upon which courts of law have acted in such cases is broad and uniform, and is thus laid down, and the authorities all cited by Lord Ellenborough in pronouncing the judgment of the Court of King's Bench in the case of Rex *vs.* Hawkins (A. D. 1808), 10 East, 211, which judgment was affirmed upon appeal to the House of Lords (2 Dow, 124).

"The general proposition that votes given for a candidate after notice of his being ineligible are to be considered the same as if the person had not voted at all is supported by the cases of The Queen *vs.* Boscawen, E. T., 13 Anne, 1713; The King *vs.* Withers, E. T., 8 Geo. II, 1835; Taylor *vs.* Mayor of Bath, M., 15 Geo. II, 1742, all of which are cited in Cowper, 537, in King *vs.* Monday (A. D. 1777). In the first, Boscawen and Roberts, the two candidates, had an equal number of votes, but because Boscawen was incapable, the votes given for him were considered as thrown away, and the other duly elected. In the second case, Withers had five votes out of eleven, and the other six refusing to vote at all, the court held Withers duly elected, and the six who refused to vote were virtually consenting to the election of Withers. In the third case, Taylor, Biggs, and Kingston were candidates. Biggs was objected to as a disqualified person, notwithstanding which Biggs had 14 votes, Taylor 13, and Kingston only 1. Then Lord Chief-Justice Lee, at *nisi prius*, directed the jury that if they were satisfied that the electors had notice of Biggs's want of qualification they should find for the plaintiff (Taylor), because Biggs, not being qualified, was to be considered as a person not *in esse*, and the voting for him a mere nullity. The jury found for the plaintiff, and the court, on a motion for a new trial, agreed with the law as laid down by Lord Chief-Justice Lee, and refused a new trial. The same principle has been acted on in the case of Claridge *vs.* Evelyn (1821), 5 B. and A., 81, where an infant, having been elected to the office of clerk of a court of requests, notice was given at the time of his election of his ineligibility on the ground of nonage. An action was brought for a false return by the unsuccessful candidate, and a verdict given for the plaintiff, subject to the opinion of the Court of King's Bench. At the close of his judgment, after argument, Abbott, C. J., said: 'I am of opinion, therefore, that he (the infant) was ineligible; and due notice of his incapacity having been given to the electors at the time of his election, their votes were thrown away, and consequently there must be judgment for the plaintiff.' (*Vide* also R. *vs.* Coe., Haywood on County Elections. 538; R. *vs.* Parry & Phillips (1787), 14 East, 549; R. *vs.* Bridge (1811), 1 M. & S., 76.)

"Fife, 1 Luders, 435 (A. D. 1785–'90): General Skene was elected. Mr. H. gave notice at the poll that General Skene was incapacitated by reason of holding the offices of baggage-master to the forces and inspector of the roads, and petitioned upon those objections. The committee seated Mr. Henderson, on the ground that the novel creation of one of the offices was notorious and within Anne, c. 7, s. 625 (*a*).

"Cockermouth (1717), 18 Journ., 673: The votes were, for Sir Wilfred Lawson 90, for Lord Percy Seymore 84. The former had been proved at the election to be under twenty-one years of age. The House seated Lord Percy Seymour.

"Flintshire, 1 Peck, 526 (1802–1806): The facts and decisions the same as in the case of Cockermouth.

"Second Southwark (Clifford, 130, 1796): The former committee having resolved, 'that at the last election for the borough of Southwark G. W. Thellusson, esq., did act in violation of the statute of the 7 W. III, c. 4, whereby he is incapacitated to serve in Parliament upon such election,' and notice having been given of this resolution, the petitioner was seated with a minority of votes.

"Second Canterbury (Clifford, 353): The first committee merely declared that neither of the sitting members was duly elected, and that the election was void. The second committee found specially that the first election was declared void for bribery and corrupt practices only; and having heard evidence that notice was given at the election of the ineligibility of the sitting members on account of bribery and corruption at the former election, and that copies of the opinions of three counsel, all stating that the sitting members were ineligible, were read, seated the petitioners with the minority of votes. (Kirkcudbright, 1 Luders, 72 *ante*, 72 *et seq.*; Radnorshire, 1 Peck, 496; Leominster, 1 C. & D., 12; and 2 Dungarvon case K. & Ambl., 6).

"Leominster (1827), C. & D., 1: Objection made that the candidate had declined to

take the qualification oath when requested so to do. His return declared void and the petitioner seated."

Haywood on County Elections, 535, says:

"It must be remembered, however, that in case a candidate laboring under disabilities should be returned, the election will be avoided on petition; and that if, before the election comes on, or a majority has polled, sufficient notice has been publicly given of his disability, the unsuccessful candidate next to him on the poll must ultimately be the sitting member. * * * When the disability of the candidate is notorious, it should seem that it was not necessary to give notice to the electors."

Roe on Elections (ed. 1818), page 256, says:

"If there be no other candidate than the person incapacitated, the election will necessarily be void; but if, besides such incapacitated person, there be also one or more candidates, it is a very important question whether, in consequence of the incapacity of the former, the electors are to be called upon to reconsider their choice, or whether they are to be represented by the second in number upon the poll, he in reality being regarded the first by reason of the nullity of the franchise given to the other candidates. It will be seen that the latter proposition is that which constitutes the law in cases where misapplication of the franchise by the electors was willful, and therefore made in their own wrong."

Male on Elections, 336, says:

"If the election is made of a person or persons ineligible, such election is void either *in toto* or of one only, according as the ineligibility applies to all or one only, where that ineligibility is clear and pointed out to the electors at the poll. It has been held that the votes given to such ineligible candidate, after notice, are thrown away, and a competitor, though chosen by a smaller number of electors, has in such case been held duly elected.

"But such ineligibility ought to be clear, and grounded upon some known and settled rule of law. The same doctrine holds at law in the election to offices in which, after notice of the ineligibility of any particular candidate, the votes given to him are held to be thrown away."

Clerk on Elections, page 156, says:

"Whenever a candidate is disqualified from sitting in Parliament, and notice thereof is publicly given to the electors, all the votes given for such disqualified candidate will be considered as thrown away, and the other candidate, with a minority of votes, will be in position to claim the seat on proof of the existence of the disqualification, and that sufficient notice has been given of it to the electors."

2 Kyd on Corporations, 12, says:

"Two requisites are necessary to make a good election: 1. A capacity in the electors. 2. A capacity in the elected. And unless both concur the election is a nullity. With respect to the capacity of the electors, their right is this: They cannot say there shall be no election, but they are to elect; therefore, though they may vote and prefer one to fill an office, they cannot say such a one shall not be preferred; or by merely saying we dissent to every one proposed, prevent any election at all. Their rights consist in an affirmative, not a negative declaration. Consequently, there is no effectual means of voting against one man but by voting for another; and even then, if such other person be unqualified, and the elector has notice of his incapacity, his vote will be thrown away."

Grant on Corporations, 109, says:

"When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know and are chargeable with notice of such ineligibility."

And on page 208 he says:

"A disqualification, patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away."

Arnold on Corporations, 141, says:

"The general rule may be stated thus: If a candidate for an office is ineligible at the time of the election by reason of any disqualification, and public notice of such disqualification is given at the election, all votes given for that candidate after such notice are thrown away; and if there are other eligible candidates, the one who has the largest number of votes will be duly elected."—(*Vide* R. *vs.* Hawkins, &c.)

In King *vs.* Parry (in 1811), 14 East., 559, it was ruled:

"When a candidate is disqualified for sitting in Parliament, and notice thereof is given to the electors, all votes given for such candidate will be considered thrown away, and the other candidate, with a minority of votes, will be in a position to claim the seat on proof of the existence of the disqualifications."

In Rex *vs.* Blissell, upon a motion for a new trial, Lord Mansfield, interrupting counsel for the Crown, who was arguing that the disqualification was not notorious, said:

"Do you doubt that, if he is really disqualified, whether such disqualification is noto-

rious or not, the votes given for him are thrown away? In another jurisdiction, if the disqualification is notorious, it does more—it elects the other party; and of the law in this case you can have no doubt."—(*Vide* Heywood on Elections, 533–537.)

In confirmation of this rule, we have a decision that to vote knowingly for a disqualified candidate is equivalent to not voting at all. In the case of Taylor *vs.* Mayor of Bath, quoted above—

"All the judges held that the verdict was right. They held that, as the fourteen electors who voted for Biggs had notice that he was not qualified, their votes were thrown away; that when electors vote for a person not qualified it is the same thing as if they had given no votes at all, in which case it was not disputed that silence was a constructive consent."

In Queen *vs.* Coaks (1855), 28 Eng. L. and E., 307, Lord C. J. Campbell said:

"Now, it is the law—both the common law and parliamentary law—and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for the man in the moon."

In Oldknow *vs.* Wainwright (2 Burr., 1017), it was held that if a majority dissent from an election, but vote for nobody else, the election by the minority is good. This case related to an election of town clerk by mayor, aldermen, and common council. Whole number of electors 25, of whom, after due notice, 21 assembled. Nine electors voted for Seagraves, while 11, protesting against any election at that time, refused to vote. As to the election of Seagraves, Lord Mansfield held:

"Whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do."

In King *vs.* Monday (2 Cowp., 538), Lord Mansfield said:

"Upon the election of a member of Parliament, or a verderor, where the electors must proceed to an election, because they cannot stop for that day or defer it to another time, there must be a candidate or candidates; and in that case there is no way of defeating the election of one candidate proposed but by voting for another."

In Southwark (Elections, 259), it is said—

"That it is willful obstinacy and misconduct in a voter to give his vote for a person laboring under a known incapacity."—(See also Willcock, Cor., 215, 1827.)

See also Regina *vs.* Hiomes, 3 Nevill and Perry, 48, 1839; S. C., 7 Adolph. and E., 960; and Regina *vs.* Pancras, 1857, 7 Ellis and B., 954.

In Gosling *vs.* Veley, decided in 1848, 7 Q. B. R., 437, Lord Dunnan, C. J., delivering the judgment of the court, after citing cases, said:

"Where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and, therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it can be resisted; that is, the helping to the election of some other person. He is present as an elector; his presence counting as such to make up the requisite number of electors where a certain number is necessary; but he attends only as an elector, to perform the duty which is cast on him by the franchise he enjoys as elector; he can speak only in a particular language; he can do only certain acts; any other language means nothing; any other act is null; his duty is to assist in making an election. If he dissents from the choice of A, who is qualified, he must say so by voting for some other also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made, and at the lawful time; the electoral meeting is held for that purpose only; and but for this rule the interest of the public and the purpose of the meeting might both be defeated by the perverseness or corruption of electors who may seek some unfair advantage by postponement. If, then, the elector will not oppose the election of A in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing he voluntarily leaves unopposed, *i. e.*, assents to the voices of the other electors. * * * It follows from these observations that the true ground of the decision is that stated by Lord Mansfield in the case first cited: 'Whenever electors are present and do not vote at all they virtually acquiesce in the election made by those who do.' * * * In case of Taylor *vs.* Mayor of Bath, the counsel, in argument, took the distinction between not voting at all and voting for the disqualified candidate. They admitted that silence might well be held to give consent, but that voting for the other candidate was an express negative; it was the only way, they said, of voting against one to vote for the other. But the court overruled the distinction. To vote for a person not qualified, they said, was the same thing as not to vote at all, which, it was admitted, would have been a constructive assent. It will not escape observation that, in all these

cases, the law required the concurrence of a majority of the electors present to make the election good. In none of them could it be stated as a tenable proposition that the minority could bind the majority, or make a good election against their votes. In all of them, too, the numerical majority were *de facto* opposed to the election made. Yet this fact was never considered as rendering the election in law other than by an actual majority."

Cushing's *Lex Parliamentaria* states the rule as follows:

"Section 111. Of elections of, and votes given for, disqualified persons.

"175. If an election is made of a person who is ineligible, that is, incapable of being elected, the election of such person is absolutely void, even though he is voted for at the same time with others who are eligible and who are accordingly elected (see Male on Elections, 336); and this is equally true whether the disability is known to the electors or not; whether a majority of all the votes or a plurality only is necessary to the election; and whether the votes are given orally or by ballot.

"176. The principle above applies equally where the constitution or law points out, among other eligible persons, the particular candidates to be voted for; in which case votes given for other persons are void. Thus the constitutions of Maine and Massachusetts, providing that, in case of a failure to elect senators at the general election, the deficiency shall be supplied on the day of the meeting of the legislature by such senators as shall be elected and the members of the other branch from among the persons voted for and not elected as senators. All votes given on such occasions for any other than the candidate designated by law, though otherwise eligible, are thrown away.

"177. In England, where a plurality only is necessary to an election, and where the votes are given orally, it is also held that if electors have notice of the disqualification of a candidate, every vote given for him afterward will be thrown away and considered as not having been given at all. (King *vs.* Monday, Cowper's Reports, 537; Rex *vs.* Hawkins, 10 East's Rep., 211, and cases there cited; 2 Dow's Rep., 124; Claridge *vs.* Evelyn, 5 Barnewall and Ald. Rep., 81; Rex *vs.* Coe, Heywood on County Elections, 538; Douglas's Rep., 398, n.; Rex *vs.* Blissell, Heywood, 537; Rex *vs.* Parry, 14 East, 549; Rex *vs.* Bridge, 1 Maule and Selwyn's Rep., 76.) The effect of this rule is that not only will the election of a disqualified person be held void, but if such election takes place after notice of the disqualification is given to the electors, the candidate having the next highest number of votes will be elected. (Fife, 1 Luders, 455; Cockermouth, 18 Commons Jour., 672; Flintshire, 1 Peckwell, 526; Southwark, 2 Clifford, 130; Canterbury, 2 Clifford, 353; Kirkcudbright, 1 Luders, 72; Radnorshire, 1 Peckwell, 496; Leominster, Corbet, and Daniel, 1; Leominster, Rogers, App. IX; Cork County, Knapp and Ambler, 406; Belfast, Falconer, and Fitzherbert, 603; Rogers on Elections, 224. See also Male on Elections, 336; and Abington, 1 Douglas, 419.) This doctrine, however hard it may seem, is founded in the familiar principle that every man is bound to know the law with reference to any act which he undertakes to do; and consequently that when an elector is apprised of the fact of disqualification of a candidate, and notwithstanding gives his vote for him, the elector takes upon himself the risk of losing his vote, if his construction of the law turns out to be wrong. (Rogers on Elections, 226.)

"178. In this country it is equally true that the election of a disqualified person is absolutely void; and in those States where a plurality elects and where the votes are given orally, as in England, votes given for a candidate after notice of his disqualification are thrown away, and the candidate having the next highest number of votes is elected.

"179. In reference to elections by ballot, in which secrecy is the distinguishing feature, and in which, consequently, neither the returning officers nor the electors themselves are supposed to know for whom the votes are given until the result is declared, it seems not unreasonable to consider the votes for ineligible candidates to be thrown away in all cases, and the opposing candidate elected, where the electors know, or must be presumed to know, the disability; and in all cases where there is no such actual or presumed knowledge to hold the whole proceeding merely void.

"180. In reference to elections in which an absolute majority is requisite to a choice, and in which, consequently, the whole number of votes received is first to be ascertained, votes given for ineligible persons must of course be excluded from the enumeration, for the reason that as the whole balloting would be void and all the votes excluded if they were all for such candidates, it would be preposterous to enumerate such votes where they constitute a part only of the votes given in. If, in consequence of such exclusion, the result of the election would be different from what it would otherwise be, the whole proceeding must perhaps be held void or valid according as the electors have actual or personal knowledge of the ineligibility of the persons for whom the excluded votes are given."

To the same effect see Wilson's Digest of Parliamentary Law, pages 107–114.

Angell and Ames on Corporations, page 98, n. 3, say:

"If the assembly be duly convened, and the majority vote for an unqualified person,

after notice that he is not qualified, their votes are thrown away, and the person having the next majority, and not appearing to be disqualified, is duly elected."

This subject has been discussed at different times in the legislature of Massachusetts, and it has been uniformly decided that votes given for candidates constitutionally ineligible should be regarded the same as blank votes. In 1843 an effort was made to change this parliamentary rule, and a majority of the committee submitted a report, accompanied by a resolution, to the effect that it was "not in accordance with the constitution and laws for the two branches of the legislature to reject in making up the count the ballots cast for ineligible candidates." A minority of the committee submitted an adverse report, saying:

"The fact that the votes given for ineligible candidates, when the two houses have met in convention for the purpose of filling vacancies in certain offices, have been rejected from the count, is of long standing; and that no evil has resulted from such practice is of itself a sufficient reason why a different rule should not be established. It is time enough to provide a remedy when an evil is found to exist, and not in anticipation of an evil. This it is believed is a safe course in all cases. * * * The practice of rejecting blank pieces of paper, although they may have the form and shape of the actual votes which are cast, is believed to be uniform everywhere. The reason for the rejection of such paper is that it is not a voice given and numbered; that no one is designated who can be elected.

"It is, however, no less an expression of dissatisfaction to the candidate voted for by other persons, on one side or the other, than it would be if it bore the name of an imaginary being or a person ineligible. In both cases it is not a vote and should not so be treated. So far as precedents can be found, the practice of rejecting from the count votes cast for an ineligible candidate is not peculiar to the convention of the two houses in the Massachusetts legislature. It has obtained more or less in the House of Representatives of the United States and in the House of Commons in Great Britain. * * * Inasmuch as the custom has obtained, for aught that appears, from time immemorial to reject such votes, the undersigned take leave to submit that the proposed resolution of the majority of the committee is uncalled for, and that no further action be had on such order."

The house laid the resolution of the majority on the table, thus in effect adopting the report of the minority.—(Cushing's Reports of Contested Elections in Massachusetts, page 499.)

The subject was again discussed, and the decision reaffirmed, that votes cast for ineligible candidates should be thrown away. In 1849 Mr. Slade was returned as the duly elected representative of the town of Somerset, and his seat was contested for the reason, among others, that a ballot for Nathaniel Morton, of Taunton, for member of Congress, was thrown out by the judges of election.

The committee, in their report declaring Mr. Slade lawfully entitled, discussed this question as follows:

"The policy of the law requires that such a construction should be put upon all proceedings at elections as to make such proceedings valid rather than nugatory. An election is always attended with trouble, inconvenience, and expense, and should not be set aside for light or frivolous causes. If votes cast by mistake for persons not eligible are to be counted, then the intention and will of the voter is defeated; if, on the other hand, such votes are willfully put into the ballot-box, the person who thus votes indicates so clearly his disregard of the value of the elective franchise that it is only a deserved punishment for his delinquency to deprive his vote of all weight and influence at such election. By so doing a voter is not deprived of any legitimate exercise of his right, because he can always manifest his opposition to any one candidate by voting for some other.—(Rex *vs.* Monday, Cowper, Lord Mansfield said the only way of voting against one was to vote for another.)

"Finally, it seems to the committee that there is no reason why a person who votes for an ineligible candidate should not be put upon the same footing with one who does not vote at all, as in both cases the parties show a disposition to prevent an election, and both of them show an unwillingness to perform their duty by aiding to promote those elections which are absolutely essential to the existence of the government. For if every voter refrained wholly from voting, or voted for an ineligible candidate, the result would be the same—no choice; and although it is true that no penalty is attached by law to a neglect of this obligation of voting, yet the obligation is not the less plain for that; and the committee believe it to be a duty too important to be neglected and too sacred to be trifled with by voting for fictitious persons or ineligible candidates. * * * The voter who puts into the ballot-box a blank piece of paper as clearly indicates his opposition to all the candidates as he who puts in a vote for an ineligible candidate; and there seems to be no reason why the opinion of the one should not be entitled to consideration as well as that of the other."—(Report agreed to April 10, 1849. See Cushing, Reports Contested Election Cases, Mass., page 576.)

In Indiana the same doctrine has been established by two decisions of the supreme court in the cases Gulick *vs.* New (14 Ind., 927) and Carson *vs.* McPhetridge (15 Ind., 327). In the former case the court say:

"It being conceded that the votes cast for Wallace were powerless and fruitless in effecting the main end arrived at—that is, in electing him—we are still asked to decide that they were so far effective as to prevent the election of any other person; that they were, so far as affirmative results were involved, thrown away, but that negatively they were operative We are reminded that in our form of government the majority should rule, and that if the course indicated is not followed a majority of the voters may be disfranchised, their voice disregarded, and their rights trampled under foot and the choice of a minority listened to. True, by the constitution and laws of this State the voice of a majority controls our elections, but that voice must be constitutionally and legally expressed.

"Even a majority should not nullify a provision of the constitution, or be permitted at will to disregard the law. In this are the strength and beauty of our institutions. Suppose a majority should persist in voting for a man totally ineligible to take the office of sheriff; what would be the result? As he could not hold the office, either the one capable of holding, receiving the next highest vote, would, as contended by the appellant, be entitled to the office, or there would be a vacancy, as insisted by the appellee. Suppose the proceedings should result in creating a vacancy; then it would remain, greatly to the detriment of public and private interests, or it would, under the statute, have to be filled by the action and choice of perhaps two men, which might be, possibly, in direct conflict with the choice of that majority in every respect. Then, while it is true that the votes of a majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse, or negligently fail to express their choice, those, although a minority, who should legitimately choose one eligible to the position should be heeded. Suppose that eight years ago, at the first election under our new constitution, when nearly all the offices in the State were to be filled, a majority of the voters in the State, and in the several districts and counties, had voted for persons wholly ineligible to fill the several offices, would those offices have thereby remained vacant? Could that majority, by persevering in that course, have continued the anarchy which might have resulted from such action? Or, rather, is it not the true theory that those who act in accordance with the constitution and the law should control even a majority who may fail so to act? Whether the same reasoning should hold good where the ineligibility should arise out of some cause other than a constitutional prohibition is a question we are not now called upon to decide."

The majority of the court held that the voter must take notice of the disqualification of the candidate, and that votes cast for a candidate in fact disqualified must be thrown out, whether the voters knew of the disqualification or not. Judge Perkins dissented upon this point, but affirmed the general doctrine, as follows:

"1. Where, at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but, from a fact or cause which the voters did not and were not bound to know, the result is a failure, and gives no candidate a right to the office, and should be followed by another election.

"Probable examples, under this proposition, of cases where the voters might not have knowledge, viz, infancy of candidate, non-residency, want of naturalization, not of male sex, not of requisite degree of white blood, not in existence. This last was the fact in the case cited from 38 Maine R., app. There a portion of the people by mistake voted for a person not in being. The case of the State *vs.* Swearinger (12 Ga. R., 23) was a case of non-residency.

"2. Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know of the ineligibility of a candidate, the election does not result in a failure; but, in such case, the eligible candidate receiving the highest number of votes is legally elected and entitled to the office.

"Against this proposition we have not found a single authority. Those relied on as such by the court below were the cases in 38 Maine R. and 12 Ga., *supra*, and The State *vs.* Giles (1 Chand. Wis. R., 112.)

"Of the case in Maine, we have said enough above.

"Of the cases in Georgia and Wisconsin, it may be remarked that neither of them involved the point now under consideration, and what is said upon it is mere *dicta*, and neither of the cases cites a single authority.

"The point involved in the Georgia case was whether a certain corporate town in that State could elect to office in it a person not residing within the corporate limits, and it was held that it could. This closed the case.

"The point involved in the Wisconsin case was this: The constitution, article 6, section 4, provided that sheriffs should be ineligible for two years next succeeding the

termination of their offices. A sheriff, in office at the time the constitution was adopted, was elected his own successor under the constitution; and it was held that he was legally elected; and that the disability imposed by the constitution related only to elections and terms held under the constitution. The decision of this point disposed of the case; and what is said beyond it, as in the Georgia case, if not improperly, but still is very loosely and carelessly said, and is not binding as authority.

"But while there are no authorities adverse to the second proposition above laid down, there is a cloud of them vindicating its correctness. As the attention of the court below does not appear to have been called to them, we shall here indicate where they may be found and examined.

"Mr. Grant, a late accurate English writer on corporations, at page 208, says: 'As has been stated, a disqualification, patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away; the same would probably be held to be the case where the electors had the means of knowledge of the candidates' qualification, or the contrary, and might have ascertained the facts if they had pleased.' Numerous cases are cited to sustain these positions.

"Judge Cushing, in his American work on the Law of Legislative Assemblies, at pages 66, 67, lays down the same doctrine as deducible from the decided cases.

"Where the same ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know—are chargeable with notice—of such ineligibility; the votes given for such candidate are of no effect, and his highest eligible competitor is elected."—(Grant on Corp., *supra*, page 107; Biddle *vs.* Willard, 10 Ind. R., 62, on page 68.)

It is assumed that in general a certain number of persons less than a majority of a legislature, or any other legal elective body, is competent for the transaction of business. Speaking upon this point, Cushing's *Lex Parliamentaria*, section 247, says:

"This number may be precisely fixed in the first instance, or some proportional part established, leaving the particular number to be afterward ascertained, with reference to each assembly; and this may be done either by usage or by positive regulation; and if not so determined, it is supposed that a majority of the members composing the assembly constitute a quorum."

And we have before seen that, by the constitution of North Carolina, either house of the legislature may proceed to the transaction of public business, if a majority of the members-elect are present. And if a quorum are present there may be an election by such members as choose to vote. This point was decided in England in the case of Oldknow *vs.* Wainwright (2 Burr., 1017), and in this country in Commowealth *vs.* Green (4 Wharton, 531), where the court charge the jury as follows:

"When there is a quorum of members present, the moderator can only notice those who actually vote, and not those who do not choose to exercise their privilege of voting. 'Whenever,' says Lord Mansfield, 'electors are present and do not vote at all, they virtually acquiesce in the election of those who do.' And with this principle agrees one of the rules of the general assembly itself, which must be familiar to every member: 'Members (thirtieth rule) ought not, without weighty reasons, to decline voting, as this practice might leave the decision of very interesting questions to a small proportion of the judicatory. Silent members, unless excused from voting, must be considered as acquiescing with the majority.'

"This is not only the doctrine of the common law, of the written law, as you have seen, but it is the doctrine of common sense; for without the benefit of this rule it would be almost impossible, certainly very inconvenient, to transact business in a large deliberative assembly. * * * This, gentlemen, has been stigmatized as a technical rule of law, a fiction, and intendment of law. It is sufficient for us that it is a rule of law. We must not be wiser than the law. * * * Nor can we know anything of any fancied equity as contradistinguished from the law. The law is the equity of the case, and it must be so considered under the most awful responsibility by the court and the jury. In my opinion, a court and a jury can never be better employed than when they are vindicating the safe and salutary principles of the common law."

To the same effect, in the act of Congress before quoted, which declares that the person who shall receive a "majority of all the votes cast" shall be declared elected. Does this rule hold good in case of votes for a disqualified candidate, as well as in the case of members not actually voting? The unanimous opinion of the court in the case of Taylor *vs.* Mayor of Bath, before quoted, was that—

"When electors vote for a person not qualified, it is the same thing as if they had given no votes at all; in which case it is not disputed that silence was a constructive consent."

In Regina *vs.* Coaks, before cited, Lord C. J. Campbell said:

"Now, it is the law, both the common law and parliamentary law, * * * that if an electcr will vote for a man who he knows is ineligible, it is as if he did not vote at all."

This question is also answered in the affirmative by an American work of standard authority, as follows:

"After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstains from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes; the only manner in which they can effectually prevent his election is by voting for some other qualified person."—(Angell & Ames on Corporations, ch. 4, sec. 6, and cases there cited; Brooks *vs.* Young, 12 Grattan, 303; State *vs.* Lehre, 7 Rich., 234; King *vs.* Monday, 2 Cowper, 537; Oldknow *vs.* Wainwright, 2 Burr., 1017; and Crawford *vs.* Powell, 2 Burr., 1016).

This is also in harmony with the act of Congress before quoted.

Inquiry has been suggested on the point whether, in the cases supposed, the person having the legal votes may be deemed elected, although the number of votes cast for him be less than the majority of a quorum.

To what has been above stated, and which may be applied to this question, the following additional reasons may be given to show that in law there is no sufficient ground for this objection:

First, in no one of the cases cited, either in argument of counsel or opinion of the judge, do we find that this point has been raised or suggested, as it seems probable it would have been had it been valid; or, second, we find at least two cases (King *vs.* Blissell and King *vs.* Monday) where, if this objection had been raised and sustained, it would have determined the case, but the point was not made. Third, in two cases the judges incidentally, but unequivocally, deny the truth of this objection.

In 14 East's Reports, page 599, note "*d*," on the case of Taylor *vs.* Mayor of Bath (M. 15, Geo. II.), it is said:

"Taylor moved a mandamus to be admitted into the office of a common councilman of the corporation of Bath.

"The defendant returned *non fuit electus.* * * * It appeared in evidence at the trial that, by the charter, the election of common councilmen is to be by the mayor, recorder, and aldermen, or the major part of them then present, and the mayor and twenty-seven aldermen being assembled for this purpose—Biggs had 14 votes, Taylor 13, and Kingston 1."

In 2 Cowper, 537, in reference to the above case, it is stated:

"Twenty-eight electors assembled; 14 voted for A (Biggs), 13 for B (Taylor), and 1 for C (Kingston). A was unqualified, and his incapacity known to the electors at the time."

Lee, chief-justice, in his directions to the jury said:

"That the votes given to A, with notice of his incapacity, were thrown away."

It afterwards came before the court (on motion for new trial), when Lee, C. J., compared it to voting for a dead man, and held that B, who had the 13 votes, was duly elected. And Justice Page (one of the court) said:

"That in such a case a minority of 2 only would have been sufficient to elect the other candidate."

And this where the "majority of a quorum" was 8.

The case of King *vs.* Blissell was a motion for a new trial on an information in the nature of a *quo warranto* against the defendant for acting as alderman at Portsmouth, and a verdict had been given for the Crown on two material issues. Pike and Blissell were adverse candidates. At the election the mayor only voted for Blissell, while three aldermen voted for Pike; but the mayor gave notice to the aldermen that Pike was incapacitated to be elected because he held the office of chamberlain, which was incompatible. Lord Mansfield, addressing the counsel for the Crown, who was arguing that the disqualification was not notorious, said:

"Do you doubt that, if he is really disqualified, whether such disqualification is notorious or not, that the votes given for him are thrown away? In another jurisdiction, if the disqualification is notorious, it does more—it elects the other party; but of the law in this case you can have no doubt."—(Heywood on Elections, page 533, and Wilson's Digest of Parliamentary Law, page 111.)

In this case 2 was a majority of a quorum, yet Lord Mansfield said if Pike was notoriously disqualified, Blissell, who received 1 vote, was elected, and "of the law in this case you can have no doubt."

An examination of the opinion of the judges in 25 Maine Rep., 567, throws light upon the above opinion. There the governor submitted the following questions:

1. Whether the governor and council in counting votes for county officers, under the

statutes of that State, had power to receive from the town canvassers evidence to contradict the return made by them?

2. Whether the governor and council could receive an amended return from the town canvassers?

The judges, after citing the statutory provisions, answered as follows:

"The powers conferred upon the governor and council are specific and precise; and it is believed that it would be irregular to go beyond them, or in any manner to deviate from them. If they could receive evidence that the certificates were erroneous in one particular they might with equal propriety do so in another, and so exercise the powers of judges of those elections generally, and without restriction."

In other words the duty cast upon the governor and council was purely ministerial. They were to canvass the election from the returns and had no power to inquire beyond them. This was the ground upon which the opinion in the 38 Maine Rep. rested, as is evident from the fact that in the opinion in the 38th the judges refer to the opinion in the 25th Maine Rep. as conclusive of the questions then presented. In the opinion in 38 Maine the judges say the only duty cast upon the governor and council is to "open and compare" the copies of the records of the votes given, and from such comparison to ascertain and determine who had been elected. In other words, the statute did not make the governor and council the judges of the election, but merely cast upon them a specific ministerial duty, which performed, their power was at an end. This act had been performed by the former governor and council, who had declared that Abel C. Dinslow was elected. Consequently the then governor and council had no power to revise such former determination and declare that another was elected. And the precise and express ground upon which the opinion was given was that Dinslow having been elected, and there being no such man in existence, the office was vacant. It is evident that these opinions have no application to a case like the one under consideration, where the Senate is "the judge" of the election and is not restricted, as the governor and council in the Maine cases were, to a performance of the mere ministerial duty of declaring who appeared by the certificate to be elected.

Saunders *vs.* Haynes (13 Cal., 145), was a proceeding to contest the election of the defendant Haynes as judge of the district court for the eighth district in California.

The facts were these: Turner and Haynes were competing candidates at the election, and Turner received the larger number of votes, but the certificate was delivered to Haynes upon the assumption that Turner was ineligible because of his holding a lucrative office under the United States. The court held that Turner was not ineligible, and that, of course, ended the case and entitled Turner to the office. In the opinion of the court, it is said, *obiter dictum*, that if Turner had in fact been ineligible Haynes would not have been elected; and the case of State *vs.* Giles (1 Chand. Wis., 112) is cited as sustaining that principle. With the opinion and decision in Saunders *vs.* Haynes we fully concur. But the question involved in Mr. Abbott's claim to a seat, viz, that the electors knew the candidate to be disqualified, was not averred, and was not involved, because the fact did not exist in that case. The court held that Turner was not ineligible. Of course, the electors did not know a fact that did not exist.

Commonwealth *vs.* Cluley (56 Penn. St., 270), was a rule on the relation of McLaughlin against Cluley to show cause why a *quo warranto* should not issue against Cluley, to test his right to the office of sheriff of Allegheny County. At the election, October 9, 1866, Cluley received 19,915 votes and McLaughlin 12,925 votes for the office of sheriff. The suggestion rested upon the allegation that Cluley was ineligible at the time of the election, but it did not appear that the electors had notice of the disqualification; nor did it appear that, if the votes for Cluley were thrown out, McLaughlin was elected. The case turned upon the precise point that, inasmuch as it was not alleged that throwing out Cluley's votes, McLaughlin had a majority, therefore it did not appear that McLaughlin had such an interest in the question as would enable him to contest the election. It is true that the court, speaking *obiter dictum* in regard to a popular election by ballot, expressed the opinion that McLaughlin was not elected. But the court fully approve of the English rule, that at an election *viva voce*, by a limited number of electors, the votes given for a candidate known to be ineligible are thrown away.

The court says:

"There is more reason for this in England, where the vote is *viva voce*, and the elective franchise belongs to but few, than here, where the vote is by ballot, and the franchise well-nigh universal. In those cases the notice was brought home to almost every voter, and the number of electors was never greater then three hundred, and generally not more than two dozen. Besides, a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote cannot, therefore, be effective, that it will be thrown away, may very properly be considered as intending to vote a blank, or throw away his vote.

"But the present relator suggests no such cause. He does not even aver that, if the votes given for Cluley were thrown out, he received a majority, though doubtless such was the truth. He has, therefore, exhibited no such interest as entitled him to be heard."

Without considering or quoting from the very able dissenting opinion of Chief-Justice Thompson in this case, we think it quite evident that the majority of the court have laid down principles upon which Abbott is entitled to his seat. Indeed, Abbott's case is precisely that in which, according to the opinion of the court, those who voted for Vance "may very properly be considered as intending to vote a blank, or throw away (their votes.") The election of Senator in North Carolina is made by two bodies, numbering, in the aggregate, less then two hundred, voting *viva voce;* and in this case those who voted for Vance voted *viva voce* for a person known by them to be disqualified.

These are the only American decisions supposed to conflict with the principle herein maintained which have been brought to the notice of your committee. In neither of these cases was the precise point now under consideration involved, and in no one of these cases is the principle of common and parliamentary law that a *viva voce* vote given for a person known by the elector to be disqualified is thrown away asserted, or even suggested to be unsound. On the contrary, in the Pennsylvania case, State *vs.* Cluley, as we have shown, the correctness and justness of this principle are expressly declared.

There are but two cases, so far as your committee are informed, in which the election of a Senator has been contested upon the ground of ineligibility at the time of the election—that of Gallatin from Pennsylvania and Shields from Illinois. And an examination of these cases will show that in neither of them was the point now made either involved or considered.

In Gallatin's case (1 Cont. Elec. in Congress, 854) the proof showed that when Gallatin was first mentioned as a candidate he expressed his opinion that his citizenship did not entitle him to be elected. Henry Kammerer testified that, at a meeting of some of the members of the legislature to agree upon a candidate for Senator, he heard Mr. Gallatin say:

"As for my name, it is out of the question; I have not been a citizen long enough to entitle me to serve in that station."

That at a second meeting it was stated, though not by Gallatin, that the doubt about his citizenship was then put to rights; and then it was almost unanimously agreed to put up Mr. Gallatin's name. Mr. Kammerer also stated the ground upon which Mr. Gallatin had at first supposed his citizenship did not entitle him to be a Senator. He says that the day after Gallatin's election he had a conversation with him, in which Gallatin said he had first declared himself ineligible "under a mistaken idea that it was necessary for him to have been nine years a citizen of the State of Pennsylvania; but that upon examining the Constitution he found that to have been nine years a citizen of the United States was sufficient, and that he had been above nine years a citizen of the United States, or words to that effect."

From this it is evident that at the time of his election Mr. Gallatin, and those by whose votes he was elected, believed that he had been for more than nine years a citizen of the United States. And although the Senate decided that he had not been a citizen of the United States for nine years prior to his election, and unseated him for that reason, yet it was nowhere suggested, either by proof or on the argument, that the electors knew him to be disqualified at the time they cast their votes for him.

Shields's case (Cont. Elec. in Congress, 1834 to 1865) is in all material respects like that of Gallatin. He had not, in fact, been nine years a citizen of the United States, and was unseated for that reason. But it was not pretended that the electors knew of his disqualification.

Therefore neither of these cases has any bearing upon the question now under consideration.

Your committee have also been referred to the case of Yulee *vs.* Mallory, same volume, page 608. In that case, on the first day of the election—January 13, 1851—the general assembly of the legislature of Florida met in convention of the two houses, and proceeded to vote *viva voce* for Senator. Twenty-nine votes were given for Yulee, and 29 votes were given for "blank." Thereupon the presiding officer declared no choice had been made. They then proceeded to a second and third vote, with substantially the same result. On the 15th of January they met again, and, on a call of the roll, thirty-one members responded "S. R. Mallory," and 27 votes were given to Yulee and others, whereupon the presiding officer declared Mallory to be duly elected. From this statement it might seem that Yulee's case raised the question now under consideration. But the brief, though very clear and able report of Mr. Bright, from the select committee in that case, shows the contrary. The two houses of the Florida legislature had, in 1845, passed a concurrent resolution, as follows:

"*Resolved*, That a majority of all the members-elect composing the two houses of

general assembly shall be necessary to determine all elections devolving upon that body."

Though the validity of this resolution was attacked by Mr. Yulee, the committee held that the resolution had been duly passed; that it had never been rescinded; that it was consistent with the Constitution of the United States empowering the legislature of a State to regulate the time, place, and manner of electing a Senator; and that it was conclusive against the right asserted by Yulee. And the resolution reported by the committee declaring that Mallory had been duly elected passed in the Senate without a dissenting vote.

In the report the committee, after determining that under the resolution of the legislature above quoted Yulee was not entitled to a seat, say:

"This being the view which the committee take of the case, there is no necessity for pursuing the subject further, since Mr. Yulee did not obtain votes sufficient to elect him."

The committee then notice the fact that the members of the legislature evidently voted upon the supposition that the resolution was valid, and say that—

"Even conceding the resolution to be invalid, yet the members in the election were misguided by what they had a right to consider as authority, and must have acted under a misconception of right which stood as they supposed unquestioned. If this be so, they stand substantially in the condition of an elector who votes for a person disqualified believing him to be qualified. The vote in such a case, though unavailing, is not rejected from the count.

"The only remedy which we can see for an election carried on through misapprehension from such well-founded causes is to set it wholly aside and open the way to a new choice; but in our view of the case there is no occasion to consider what ought to be done upon such a state of facts."

The distinction between votes cast with knowledge or in ignorance of the disqualification of the candidate voted for is inferable from the report in Yulee's case. And the doctrine maintained by that report, that an election carried on under honest misapprehension in regard to then existing facts ought to be set aside and a new election ordered, is conceded.

It was strongly contended before your committee that the case under consideration falls fairly within this equitable principle; because it was said that all the State officers and judges of North Carolina had been elected while under disability imposed by the fourteenth amendment, and Congress had subsequent to their election removed their disabilities and enabled them to hold their offices; and your committee were referred to the act of June 25, 1868 (15 Statutes at Large, 366), by which "all officers elected at the election commencing the 4th day of February, 1868, in the State of Alabama," and who had not publicly declined to accept the offices to which they were elected, were relieved of their disabilities. From these facts it was contended that the members of the legislature who voted for Vance might well believe, and it was said that in fact they did believe, that Congress would relieve Vance of his disability and that he would be admitted to his seat in the Senate.

This suggestion has some force, but a slight examination will show that it is rather plausible than sound. In the first place the case bears no resemblance to that supposed in the report in Yulee's case; because here there was no misapprehension as to any fact then existing. If the electors had supposed that Vance was not disqualified, though in fact he was, or had they believed that an act had already passed Congress relieving him from his disability, though such was not the case, then the electors would have acted under a misapprehension and honestly entertained the belief that Vance was eligible. But such is not the case. Every elector who voted for Vance knew that he was disqualified by the fourteenth amendment, and that his disability had not been removed. Every elector therefore knew when he gave his vote for Vance that, as the case then stood, such vote was thrown away. As well might a man claim exemption from the penalty imposed by a statute upon the ground that although he knew he was violating its provisions he expected the legislature would repeal it. It was the duty of that legislature to elect a Senator who, in virtue of that election, and without the aid of any other government, would be authorized to demand his seat as a Senator. To elect a disqualified candidate, and then refer it to Congress to remove his disqualifications or not, is to transfer the election from the legislature to Congress. In such case the legislature would in effect be nominating a Senator and submitting it to Congress to determine whether or not he should be a Senator. Put the case in the strongest possible light for Vance, still it must be admitted that the electors who voted for him knew that as the case then stood their votes were being thrown away; that without the action of Congress, which might or might not be interposed, the election was in violation of the Constitution; and up to the time when Abbott claimed his seat in this body, and up to the present hour, the votes given for Vance remain wholly inoperative, void, blanks in the

law, thrown away for every legal purpose. Mistakes which equity may relieve against are mistakes in regard to existing facts—not oversanguine and unfounded hopes looking to the future for realization and accomplishment.

In the second place, the legislation of Congress in regard to the organization of the reconstructed governments of the Southern States furnishes no precedent to bind the Senate in determining the election of its own members. Those State governments could not be organized without relieving the disabilities of those who had been elected. Congress was therefore compelled to do so or abandon those States to anarchy or remit them to military rule. To quote the language of a great statesman on another subject: "A doubtful precedent should not be followed beyond its necessity." No such necessity exists in regard to the Senate of the United States; and therefore the electors had no right to assume that Congress would do in this case where there was no necessity for it what it had been compelled to do in the other cases referred to. And in no case has a Senator elected under disabilities imposed by the fourteenth amendment been relieved of such disability and permitted to take his seat.

Several decisions of the House of Representatives have been referred to, which are supposed to be inconsistent with the principle here asserted. But it is believed that in none of those cases was it established that the electors knew of the disqualification of the candidate voted for; and in the very able report of Mr. Dawes, from the Committee on Elections (Rep. of Committees, 11, 2d sess. 40th Cong.), which is much relied upon, it is expressly stated that this point was not involved because it did not appear that the electors had such notice.

But there are many reasons for declining a critical examination of the decisions of the other House in regard to the election of its members. By the Constitution, each House is made the judge of the elections, returns, and qualifications of its members. It would therefore be improper for the Senate—certainly indelicate for a committee of the Senate—to criticise the actions or decisions of the House; and it would be subversive of the Constitution because it would practically make the House of Representatives not only the judge of the election, returns, and qualifications of its own members, but also of the members of this House, if the Senate were to follow as precedents the decisions of the House in conflict with its own opinions.

Again, there is much force and reason in the distinction made by the court, in Commonwealth *vs.* Cluley (56 Penn. St., 274), between a popular election, under our system of almost universal suffrage, for a member of the House of Representatives, by ballot, and an election of a Senator by a *viva voce* vote of the members of a legislature. And it might well be that the House of Representatives should establish one rule appropriate to the election of its members, and the Senate a different rule in regard to the election of its members. The difference between the two cases would justify different rules.

In a popular election, by ballot, for a member of the House of Representatives, where the voters are numerous and scattered over a considerable territory, it would be impossible to ascertain whether or not the electors, or enough of them to change the result, had knowledge of the disqualification of the candidate. Besides, voting by ballot includes the right of the elector to conceal the fact for which candidate he voted. This is his secret, which cannot be wrested from him even in a court of justice. And they who voted against the successful candidate, yet failed to defeat him at the polls, might attempt to accomplish the same end by pretending to have voted for him with knowledge of his incapacity. Even perjury in such case, should a voter voluntarily swear falsely in regard to it, could never be detected and punished. Such a principle applied to such elections would be unsatisfactory, often incapable of application, and always a temptation to frauds and perjuries, which might be committed with impunity. And it may be conceded that, in determining who has been elected at such popular election by ballot, no candidate not receiving a majority of all votes cast, counting blanks and ballots for disqualified candidates, ought to be declared elected; and that the decisions of the House of Representatives, as applied to the election of its own members, ought to proceed upon a different principle than the one here contended for.

But the circumstances which may well induce the House of Representatives to depart from the ancient rule and practice in determining the election of its members do not exist in relation to the election of Senators. Senators are elected by a small number of persons, the number fixed by law, who are compelled to vote *viva voce*. Their votes are matters of record, and the record discloses who voted for and who voted against the disqualified candidate. Whether these electors had notice or not of the ineligibility of a candidate is easily, and may be definitely and certainly, ascertained. There is no inconvenience, no opportunity for fraud, no temptation to perjury, in the application of the principle here contended for to such an election. Every reason that can be given for excluding the application of this principle to popular elections by ballot sustains its application to the election of a Senator by the *viva voce* vote of the members of the legislature; and it is worthy of remark that the rule of parliamentary and common law, which

is established by an unbroken current of decisions in England, had reference to elections, not by ballot, but *viva voce*. That method of election gave rise to the rule, and no reason has been given, none suggests itself, for departing from it now in regard to such elections. And it should also be observed that in every case in the American courts of law where the judges have, *obiter dictum*, declared that the minority candidate was not elected, not only was the element of knowledge of the disqualification wanting, but the election was by ballot, and not *viva voce*. Not a *dictum* of any American court, or American law-writer of established reputation, has been cited to your committee, and it is believed that none exist, which disapproves of the principle as applicable to elections *viva voce*.

In the report of the majority it is said that this principle belongs to a government where, as in England, the right to vote has been granted or conceded as a boon or franchise by the monarch to his subject; and hence to vote for a candidate known to be disqualified is a crime. But that in this country voting is the inherent right of every citizen; and Roe on Elections, page 256, is cited as sustaining this assertion in relation to elections in England. The author referred to, so far from sustaining such a distinction, does not allude to it. And it is believed, for many reasons, that no such distinction can be maintained.

(1) The great charter in England was not a concession in the sense of a grant of rights. It was an admission that certain rights belonged to Englishmen, and always had belonged to them. The rights there admitted to exist were the inherent rights of Englishmen. Blackstone says:

"The great charter 'contained very few new grants, but, as Sir Edward Coke observes, was, for the most part, declaratory of the principal grounds of the fundamental laws of England.'"

The great bill of rights delivered by the Lords and Commons to the Prince and Princess of Orange February 13, 1688, and afterward enacted in Parliament, after enumerating the privileges of the people, concludes in the following strain of ancient, manly eloquence:

"And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties."

And the act of Parliament recognizes—

"All and singular the rights and liberties asserted and claimed in the said declaration to be true, ancient, and indubitable rights of the people of this kingdom."

(2) The right of voting in this country is not an inherent right of the citizen. If it were, women as well as men could vote; because women as well as men are citizens, and always have been under our Constitution; and every inherent right of the citizen is possessed as fully, and may be exercised as freely, by the female as the male citizen. Our popular elections are participated in by those who have a constitutional right to vote. Their right to vote does not spring merely from citizenship; it is a right secured, limited, and regulated by the Constitution and laws. A citizen has no more inherent right to be a voter than to be a Senator. The citizen may vote if the Constitution and laws permit, not otherwise; so every citizen may be a Senator if duly elected and qualified, not otherwise.

(3) But if such distinction were conceded to exist, it would strengthen the conclusion here arrived at. To test this, let us concede that the Englishman, in voting, is exercising not an inherent right, but a franchise delegated to him by the Crown; therefore it is a crime for him to vote for a disqualified candidate, and for that reason his vote is considered as thrown away, and the next highest qualified candidate is to be considered as elected. And let us also concede that at a popular election in this country the voter exercises an inherent right of citizenship; and hence, if he votes for a candidate known to be disqualified, his vote is not thrown away. From these admissions what results? Simply this: That in our popular elections, by ballot, for a member of the House of Representatives, the principle here contended for does not apply. Very well. It does not apply upon this hypothesis, because the voter is exercising an inherent right, and not a delegated power, when he casts his ballot. Now, if this distinction be well taken, does not every one perceive that the principle here contended for must apply to an election of Senators by the members of a legislature, who, in that election, are exercising a delegated power, and not an inherent right? The members of the legislature, in electing a Senator, are exercising a power that is delegated in a double sense. The power to elect a Senator is delegated by this Government—that is, by the Constitution of the United States—to the legislature of the State; and the people elect members of that legislature, who are, among other things, to exercise this power of electing a Senator. It will not be pretended that a member of the legislature in voting for a Senator is exercising an inherent right of a citizen, and all must admit that he is exercising a delegated power; so that the very argument which exempts the election of members of the House of Representatives from the operation of the principle under consideration subjects the election of Senators to its full operation.

It has also been urged before your committee that bills passed by Congress to relieve

disabilities of members elected to the House of Representatives rest upon principles inconsistent with the conclusions of this report. To this two answers may be made: 1. The proceedings of Congress in relation to cases of election while reconstruction of the late rebel States was in progress can hardly be relied upon as settling principles by which either House of Congress ought to be bound in times of peace. The circumstances under which such legislation was had were exceptional, and the legislation itself ought not to stand as a precedent. 2. The bills which have passed were bills originating in the House of Representatives concerning members elected to that House, and although the Senate has concurred in the enactment of such laws it ought not to be regarded as settling principles by which the Senate must be bound in determining the election of its own members. Whenever the House of Representatives manifests its desire to seat a member, although it may require the enactment of a law by both Houses to accomplish the purpose, still the Senate in concurring in such enactment may be regarded as extending a courtesy to the House of Representatives rather than settling principles which will bind the Senate in relation to the election of its own members.

To recapitulate, in regard to the precise legal question involved in this case, viz, whether in an election *viva voce* the votes cast for a candidate known by the electors when they gave their votes to be disqualified are to be considered as thrown away and the qualified candidate next on the poll is to be declared elected, we have in favor of such a principle:

1. The uniform and unbroken current of decisions in the British Parliament from the earliest to the present time.

2. The unanimous voice of the English courts of law.

3. The express and well-considered decision of the supreme court of the State of Indiana in the case of Gulick *vs.* New (14 Ind. Rep., 927), and the case of Carson *vs.* McPhetridge (15 Ind. Rep., 327), applying the rule even to a popular election.

4. The authority of Cushing's *Lex Parliamentaria*, the best American work on the subject; Wilson's Digest of Parliamentary Law; Angell and Ames on Corporations, a work of standard authority; the precedent of the legislature of Massachusetts even in regard to a popular election of its members (*vide* Cushing's Reports of Contested Election Cases in Massachusetts, page 499; and another case, same report, 576).

And opposed to this principle in regard to an election *viva voce* we have absolutely nothing. Not a writer, English or American, not a decision of any court or *dictum* of any judge in either country has been cited condemning or denying this principle in regard to such an election; and, on the contrary, the court, in Com. *vs.* Cluley (56 Penn. St., 270), which is relied on as being opposed, expressly recognize and indorse this principle when applied to elections *viva voce* by a limited number of electors.

The cases which have been cited from the American reports and are relied upon as being opposed to this principle all related to popular elections by ballot, and not to elections *viva voce*. Yet even in those cases the element of knowledge that the candidate was disqualified did not exist, and therefore all that is said about it in those cases is *obiter dicta*.

A declaration from the bench is *obiter dictum*, and not binding as authority when it was unnecessary to a decision of the case in which it was made.

To illustrate, the Supreme Court of the United States in the Dred Scott case (19 Howard, 393), first determined that the circuit court of the United States had no jurisdiction in the case. That ended the matter. The decision of the court below had to be reversed for that reason. It was therefore *obiter dictum* for the court to proceed to decide questions which, decided either way, would not affect the judgment to be pronounced. Had the court in that case held that the Missouri compromise, so called, was constitutional, yet the decision, that is, the judgment, would have been the same.

The true rule upon this subject is given by Vaughan, C. J. (Vaughan, 382), as follows:

"An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion," &c.

To the same effect see Heath, J., in Hutchinson *vs.* Birch, 4 Taunton, 625; Pittstown *vs.* Plattsburg, 18 Johnson, 418.

Therefore all that was said by the judges in the American cases cited, which cases did not involve the element of knowledge of the incapacity of the candidate, is *obiter dicta*. But were it otherwise, and had those decisions been made in cases which showed that the disqualification of the candidate was known to the elector, still the fact that they relate only to popular elections by ballot would render them wholly inapplicable to the case now before the Senate.

Therefore it is submitted that upon reason and authority the votes cast for Mr. Vance, with full knowledge on the part of the members of both houses of the legislature that

he was disqualified by the Constitution to serve in this body, ought to be considered as thrown away; and that, inasmuch as a majority of all the members elected to each house were "actually present," the election was legal, and that the qualified candidate receiving the highest number of votes, and a majority of all votes cast for qualified candidates, was duly elected. It is conceded that majorities have a constitutional right to govern in this country; but it is not conceded that even the majority of the legislature of a State may morally or constitutionally defeat government by refusing to elect Senators to serve in the Senate of the United States. In this case the majority had a right to elect a qualified person to the Senate; but, having waived their right by voting for a person known to be disqualified, as much as though they had refused to vote at all, or had voted for a man known to be dead, the minority who complied with the Constitution by voting for a qualified candidate may well be held to have expressed the will of the legislature. If the majority, being called upon, will not vote, they cannot complain that the election was decided by those who did vote, though a minority of the elective body. And voting for a person known to be disqualified is not voting. Such votes are void—no votes; and the highest number of votes cast, a quorum being present, must effect an election.

Therefore, in view of the premises, the minority of your committee recommend the adoption of the following resolution:

Resolved, That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator.

MATT. H. CARPENTER,
B. F. RICE,
Minority of Committee.

THURSDAY, *April* 11, 1872.

On motion by Mr. Logan, the Senate proceeded to consider the following resolution, reported from the Committee on Privileges and Elections:

"*Resolved*, That Joseph C. Abbott, not having received a majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator."

On motion by Mr. Carpenter to amend the resolution by striking out all after the word "resolved," and inserting in lieu thereof the following:

"That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years, commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator,"

After debate,

On motion by Mr. Edmunds (at 5 o'clock and 15 minutes) the Senate adjourned.

[The debate, including a speech by Mr. Logan, is found on pages 219–229 of the Appendix to the Congressional Globe referred to in the head-note.]

FRIDAY, *April* 12, 1872.

The Senate resumed, &c.

[The debate is found on pages 2387–2390 of the Congressional Globe referred to in the head-note. Mr. Carpenter's speech is found on pages 245–257 of the Appendix referred to in the head-note.]

MONDAY, *April* 15, 1872.

The Senate resumed, &c.

[The debate is found on pages 2431–2434 of the Congressional Globe referred to in the head-note. Mr. Thurman's speech is found on pages 234–245 of the Appendix referred to in the head-note.]

MONDAY, *April* 22, 1872.

The Senate resumed, &c.

[The debate is found on page 2639 of the Congressional Globe referred to in the head-note. Mr. Pool's speech is found on pages 272–279 of the Appendix referred to in the head-note.]

TUESDAY, *April* 23, 1872.

The Vice-President announced that the morning hour had expired, and called up the unfinished business of the Senate at its last adjournment, viz, the resolution reported from the Committee on Privileges and Elections declaring Joseph C. Abbott not entitled to a seat in the Senate as a Senator from the State of North Carolina; and the Senate resumed the consideration of the said resolution.

* * * * * * *

On the question to agree to the amendment proposed by Mr. Carpenter to amend the resolution, viz: Strike out all after the word "resolved," and in lieu thereof insert:

"That Joseph C. Abbott has been duly elected Senator from the State of North Carolina for the term of six years commencing on the 4th day of March, 1871, and that he is entitled to a seat in the Senate as such Senator,"

After debate,

It was determined in the negative—yeas 10, nays 42.

On motion by Mr. Carpenter, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Ames, Chandler, Cragin, Gilbert, Howe, Nye, Osborn, Patterson, Pool, and Sawyer.

Those who voted in the negative are Messrs. Alcorn, Bayard, Blair, Buckingham, Caldwell, Cameron, Casserly, Clayton, Cooper, Davis of West Virginia, Edmunds, Fenton, Ferry of Connecticut, Ferry of Michigan, Frelinghuysen, Goldthwaite, Hamilton of Maryland, Hamlin, Hill, Hitchcock, Johnston, Kelly, Logan, Morrill of Maine, Morrill of Vermont, Morton, Pratt, Ramsey, Robertson, Schurz, Scott, Sprague, Stevenson, Stockton, Sumner, Thurman, Tipton, Trumbull, Vickers, West, Windom, and Wright.

So the motion was not agreed to; and

On the question to agree to the resolution reported by the Committee on Privileges and Elections, it was determined in the affirmative.

So it was

Resolved, That Joseph C. Abbott, not having receiveda majority of the votes cast by the North Carolina legislature on the second Tuesday in November, 1870, for the office of Senator of the United States, is not entitled to a seat in said United States Senate as such Senator.

[The debate is found on page 2676 of the Congressional Globe referred to in the head-note. Mr. Carpenter's speech is found on pages 328–334 of the Appendix referred to in the head-note.]

COMPENSATION OF MR. ABBOTT.

WEDNESDAY, *April* 24, 1872.

Mr. Morton, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times, by unanimous consent:

"*Resolved*, That Joseph C. Abbott, late contestant for a seat in this body from the State of North Carolina, be allowed his salary from 4th of March, 1871, up to the 23d of April, 1872, and one mileage each way."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

CREDENTIALS OF MR. RANSOM.

MONDAY, *February* 5, 1872.

The Vice-President laid before the Senate the credentials of Matt W. Ransom, elected a Senator by the legislature of the State of North Carolina for the unexpired portion of the term commencing March 4, 1871; which were read.

Ordered, That they be referred to the Committee on Privileges and Elections.

WEDNESDAY, *April* 24, 1872.

Mr. Morton, from the Committee on Privileges and Elections, to whom were referred the credentials of Matt W. Ransom, elected a Senator by the legislature of North Carolina for the term of six years commencing March 4, 1871, reported that upon examination the committee had found that the credentials were in due form, and recommended that Mr. Ransom be admitted to a seat in the Senate;

Whereupon

Mr. Ransom appeared, and the oaths prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

COMPENSATION OF MR. RANSOM.

FRIDAY, *April* 26, 1872.

Mr. Bayard submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That the pay of the Hon. Matt W. Ransom, as a Senator from the State of North Carolina, shall commence on the 4th day of March, 1871."

TUESDAY, *June* 4, 1872.

Mr. Thurman, from the Committee on Privileges and Elections, to whom was referred the resolution submitted by Mr. Bayard April 26, 1872, relative to the pay of Matt W. Ransom, a Senator from the State of North Carolina, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the following resolution offered by the Senator from Delaware, Mr. Bayard, to wit:

"*Resolved*, That the pay of Matt W. Ransom as a Senator from the State of North Carolina shall commence on the 4th day of March, A. D. 1871,"

Report that the practice in each House of Congress seems to have been founded upon an interpretation of the act of July 12, 1862 (12 Stat., 624; Manual, 312), consistent with the resolution. As this interpretation has been practiced upon since 1862, and may be considered as within the spirit of the act aforesaid, your committee report back the resolution with a recommendation that it be passed.

O. P. MORTON.
A. G. THURMAN.
H. B. ANTHONY.
JOSHUA HILL.
M. H. CARPENTER.
JOHN A. LOGAN.
B. F. RICE.

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time.

Resolved, That it pass.

[Forty-second Congress—Second and third sessions.]

S. C. POMEROY AND ALEXANDER CALDWELL, *of Kansas.*

April 8, 1872, a report of a joint committee appointed by the Kansas legislature to investigate charges of bribery and corruption connected with the Senatorial elections of 1867 and 1871 was presented and referred to the Committee on Privileges and Elections. Mr. Pomeroy had been elected in 1867, and Mr. Caldwell in 1871. May 11, the Senate resolved that the committee be authorized to investigate these elections. June 3, the committee reported in regard to Mr. Pomeroy's election that there was no evidence that Mr. Pomeroy had used money to influence any vote in his favor, *except hearsay*, and that was plainly contradicted by direct testimony; that the charges of bribery and corruption against Mr. Pomeroy, connected with his election, totally failed to be sustained by competent proof, but seem to have been urged for some purpose unknown to the committee beyond that of correcting existing evils. Two members of the committee did not concur in the last conclusion. The committee reported the testimony taken, and asked to be discharged from the further consideration of Mr. Pomeroy's case.

February 17, 1873, the committee reported in regard to Mr. Caldwell's election that they could "not doubt that money was paid to some members of the legislature for their votes, and money promised to others which was not paid, and offered to others who did not accept it;" that it was a subject of discussion in the committee whether the offenses of Mr. Caldwell should be punished by expulsion, or go to the validity of his election, but that a majority were of opinion that they went to the validity of his election and had the effect to make it void. The committee submitted the evidence taken and recommended the adoption of a resolution that Mr. Caldwell was not duly and legally elected. March 24, after long debate on the resolution, before a vote was taken, Mr. Caldwell resigned his seat.

February 10, 1873, on motion of Mr. Pomeroy, the Senate resolved that a select committee investigate charges of bribery and corruption in the Senatorial election held in January, 1873, relating to the alleged purchase by Mr. Pomeroy of the vote of A. M. York, a State senator. (Mr. Pomeroy had been a candidate for re-election in January, 1873.) February 18, a memorial of B. F. Simpson was presented, praying that the committee be authorized to investigate certain other general charges of bribery against Mr. Pomeroy. The Senate resolved that the committee be directed to inquire into these general charges. March 3, the committee reported the evidence, and the conclusions that "none of the charges preferred by Mr. Simpson were sustained"; and that, in regard to the charges of Mr. York, he "had not sustained his charge by sufficient proof, contradicted as it was by the evidence of Mr. Page and Mr. Pomeroy." One member of the committee did not agree with the report. No further action on the subject was taken.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 42d Cong., 2d and 3d sess., and the reports of the committees, references to which are given in foot-notes.

Special references to the debates of each day are inserted below.

[Second session of the Forty-second Congress.]

TUESDAY, *March* 5, 1872.

Mr. Pomeroy submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That all papers and communications relating to the election of Senators in the State of Kansas in the years 1867 and 1871 be referred to the Committee on Privileges and Elections, and that they be directed to report to the Senate, after examination, what action, if any, should be taken by the Senate in relation thereto."

Mr. Pomeroy presented a printed paper, purporting to be the report of a committee of investigation of the legislature of Kansas on the Senatorial elections in that State in the years 1867 and 1871, and moved that the same be referred to the Committee on Privileges and Elections.

The reference of the paper being objected to,

Ordered, That the paper lie on the table.

On motion by Mr. Hamlin that the Senate reconsider its vote agreeing to the resolution of Mr. Pomeroy in reference to the election of Senators in the State of Kansas in 1867 and 1871, it was determined in the affirmative; and,

On motion by Mr. Hamlin,

Ordered, That the resolution lie on the table.

[The debate is found on pages 1410, 1411 of the Congressional Globe, 2d sess. 42d Cong., part 2.]

MONDAY, *April* 8, 1872.

The Vice-President laid before the Senate a report of a joint committee appointed by the legislature of Kansas to investigate charges of bribery and corruption connected with the Senatorial election in that State in 1867 and 1871; which was referred to the Committee on Privileges and Elections.

Mr. Pomeroy presented a report of a joint committee appointed by the Kansas legislature to investigate charges of bribery and corruption connected with the Senatorial elections of 1867 and 1871 in that State; which was referred to the Committee on Privileges and Elections.

SATURDAY, *May* 11, 1872.

Mr. Morton, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections be authorized to investigate the election of Senator C. S. Pomeroy by the legislature of Kansas in 1867, and the election of Senator Alexander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman or acting chairman of said committee or any subcommittee thereof have power to administer oaths, and that the committee be authorized to sit in Washington or elsewhere during the session of Congress and in vacation."

[The debate is found on pages 3316, 3317 of the Congressional Globe, 2d sess. 42d Cong., part 4.]

MONDAY, *May* 13, 1872.

Mr. Morton presented a petition of citizens of Kansas, praying an investigation of the election of Hon. Alexander Caldwell as Senator from that State.

Ordered, That it lie on the table.

* * * * * * *

Mr. Morton, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections be authorized to employ a stenographer in the investigation which it has been directed to make into the Kansas Senatorial elections."

Mr. Morton, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times, by unanimous consent:

"*Resolved*, That the sum of $10,000 be appropriated from the contingent fund of the Senate, or so much thereof as may be necessary, to defray the expenses of the investigation into the Kansas Senatorial elections, ordered by the Senate to be paid upon vouchers approved by the chairman of the Committee on Privileges and Elections."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

MONDAY, *June* 3, 1872.

Mr. Logan, from the Committee on Privileges and Elections, who were instructed by a resolution of the Senate of May 11, 1872, to investigate the election of the Senators from Kansas, submitted a report (No. 224) thereon.

REPORT OF COMMITTEE ON ELECTION OF MR. POMEROY IN 1867.*

IN THE SENATE OF THE UNITED STATES.

JUNE 3, 1872.—Ordered to be printed.

Mr. Logan, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred a certified copy of the report of the joint committee of investigation appointed by the Kansas legislature of 1872 to investigate all charges of bribery and corruption connected with the Senatorial elections of 1867 and 1871, met on the 20th of April, 1872, and directed the clerk of said committee to prepare an abstract of the evidence furnished by the said report of the legislature of Kansas. On the 23d of April your committee met and adjourned over until the 24th, when, on account of sickness in the family of Senator Thurman, the case was postponed until he should return from a visit home.

On May the 11th your committee met and adopted the following resolution:

"*Resolved*, That the chairman of the committee do ask the Senate for leave to send for persons and papers in reference to the elections of both 1867 and 1871, and that the committee have leave to sit in the vacation, and to take testimony by either the whole committee or a subcommittee, at Washington or elsewhere; that, in asking for authority as aforesaid, the chairman be requested to state that the committee express no opinion upon the subject."

* Taken from Senate Reports, 2d sess. 42d Cong., vol. 1, No. 224. The testimony accompanying the report is here omitted.

On the same day the Senate, in response to the request of the committee, adopted the following resolution:

IN THE SENATE OF THE UNITED STATES, *May* 11, 1872.

Resolved, That the Committee on Privileges and Elections be authorized to investigate the election of Senator S. C. Pomeroy, by the legislature of Kansas, in 1867, and the election of Senator Alexander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman, or acting chairman, of said committee, or any subcommittee thereof, have power to administer oaths; and that the committee be authorized to sit in Washington, or elsewhere, during the session of Congress and in vacation.

Attest:

GEO. C. GORHAM,
Secretary.
By W. J. McDONALD,
Chief Clerk.

On the 13th of May your committee met, and, in accordance with the authority conferred upon them by the resolution of the Senate, directed all witnesses in reference to the charges against S. C. Pomeroy, Senator from the State of Kansas, to be summoned to appear forthwith and testify in reference to said charges, and also the clerk of the committee was directed to make inquiry who is the present custodian of the books and papers of the late Perry Fuller, of Washington, D. C., and, if such information can be had, that the party having possession of his account-books, check-books, and bank-books, for the time between December 1, 1866, and February 1, 1867, be summoned to appear with them.

On motion, the committee adjourned subject to the call of the chairman.

On the 21st day of May your committee were called together for the purpose of proceeding with the examination, a portion of the witnesses having arrived.

Senator Caldwell, of Kansas, appeared and urged an early examination and disposition of the question in reference to his election in 1871. Your committee, however, considering the time too short during the sitting of Congress to thoroughly investigate both Senatorial elections, concluded to proceed only with the investigation of the election of Mr. Pomeroy in 1867, leaving the case of Mr. Caldwell to be examined during the vacation of Congress, or at such time as may be agreed upon by your committee.

The examination of the witnesses in the case of Mr. Pomeroy was then proceeded with, and continued from day to day until the case was closed.

Your committee respectfully submit all the testimony, and report as follows:

1. That it appears from the evidence that two United States Senators were elected by the Kansas legislature in 1867, Mr. S. C. Pomeroy for a full term of six years, and Mr. Ross for an unexpired term of four years from the 4th day of March, 1867; that the candidacy of Mr. Pomeroy was generally understood by the people of Kansas during the election of members of the legislature who were to elect Senators for the State of Kansas, and that the election of Mr. Pomeroy as one of those Senators was generally conceded; that all candidates against Mr. Pomeroy for the long term withdrew from the contest, save Mr. A. L. Lee. Mr. Pomeroy, in joint convention of the two houses of the legislature, received 84 votes; Mr. Lee received 25 votes; the disparity of votes being so great as to preclude of itself the idea that the election of Mr. Pomeroy, against the will of the constituents of those who voted for him, was procured by corrupt means.

2. There is no evidence that Mr. Pomeroy, or any one for him, used any money or other valuable thing to influence any vote in his favor, or in any manner to bring about his election, except hearsay, and this is plainly contradicted by the direct testimony of the parties either to whom or by whom it is alleged such considerations were given.

3. The evidence that Mr. Pomeroy's canvass for Senator cost him considerable money is clearly shown to be the expenses paid by him for himself and friends during the Senatorial canvass, for hotel accommodations, disconnected entirely with the vote of any member, either for or against him.

4. The evidence shows that some of the friends of Mr. Pomeroy have been appointed to office under the Government of the United States, but fails to show that they were appointed in consideration of any vote or any influence used by them in procuring the election of Mr. Pomeroy; and your committee beg leave to say that they can find no fault with Mr. Pomeroy or any one else (when they recommend for appointment to office) that they recommend their friends instead of their enemies.

5. It appears from the evidence that Mr. Pomeroy engaged, for a compensation to be made, the services of the Lawrence State Journal to advance the interests of the Republican candidates and of the Republican party in the State of Kansas in the year 1866; but it also appears that said Journal broke its engagement, and supported the Conservative or Democratic ticket.

Your committee, therefore, after maturely considering the testimony adduced before them, are clearly of the opinion that the charges of bribery and corruption against S. C. Pomeroy, connected with his Senatorial election by the Kansas legislature in 1867, totally fail to be sustained by any competent proof, but seem to have been urged for some purpose, unknown to your committee, beyond that of correcting existing evils. Your committee, therefore, beg to be discharged from the further consideration of the same.

O. P. MORTON,
B. F. RICE,
JOHN A. LOGAN,
H. B. ANTHONY,
MATT. H. CARPENTER,
Committee.

We concur with the other members of the committee in the finding that there is not evidence before us sufficient to show that Mr. Pomeroy's election was procured by the use of corrupt means; and having no definite, reliable information leading to the conclusion that further investigation would develop such evidence, we concur in the recommendation that the committee be discharged from the further consideration of the subject. Here we think that our duty ends. We do not think it proper to impugn the motives of those who urged this investigation. The subject was brought to the notice of the Senate by the general assembly of Kansas, and, as it seems to us, a proper respect for that body precludes an imputation of improper motives.

We cannot, therefore, concur in the last paragraph of the report, and there are other passages that do not meet our approval. For these reasons we have preferred to state our views in our own language.

A. G. THURMAN.
JOSHUA HILL.

[Third session of the Forty-second Congress.]

MONDAY, *February* 17, 1873.

Mr. Morton, from the Committee on Privileges and Elections, who were instructed by a resolution of the Senate to investigate the election of Alexander Caldwell, a Senator from the State of Kansas in 1871, submitted a report (No. 451) accompanied by the following resolution:

"*Resolved*, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas."

REPORT OF COMMITTEE ON ELECTION OF MR. CALDWELL IN 1871.*

[The committee consisted of Messrs. Morton (chairman), Carpenter, Logan, Alcorn, Hill, Anthony, and Trumbull.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 17, 1873.—Ordered to be printed.

Mr. Morton, from the Committee on Privileges and Elections, submitted the following report:

On the 11th day of May, 1872, the Senate adopted the following resolution:

"*Resolved*, That the Committee on Privileges and Elections be authorized to investigate the election of Senator S. C. Pomeroy by the legislature of Kansas in 1867, and the election of Senator Alexander Caldwell in 1871; that the committee have power to send for persons and papers; that the chairman or acting chairman of said committee or any subcommittee thereof have power to administer oaths; and that the committee be authorized to sit in Washington or elsewhere during the session of Congress and in vacation."

In obedience to this resolution the Committee on Privileges and Elections have had under consideration the election of Alexander Caldwell to the Senate of the United States in January, 1871, have taken testimony, and beg leave to submit the following report:

It is testified by Mr. Len. T. Smith, a former business partner of Mr. Caldwell, his active friend at the time of his election and during this investigation, that he made an agreement with Thomas Carney, of Leavenworth, by which, in consideration that Mr. Carney should not be a candidate for United States Senator before the legislature of Kansas, and should give his influence and support for Mr. Caldwell, Mr. Caldwell should

* Taken from Senate Reports, 3d sess. 42d Cong., No. 451. The evidence accompanying the report is here omitted.

pay him the sum of $15,000, for which amount notes were given and afterward paid, at the same time taking from Mr. Carney a written instrument in which he pledged himself in the most solemn manner not to be a candidate for the office of Senator in the approaching election.

This instrument is in the words following:

"I hereby agree that I will not under any condition of circumstances be a candidate for the United States Senate in the year 1871 without the written consent of A. Caldwell, and in case I do to forfeit my word of honor hereby pledged. I further agree and bind myself to forfeit the sum of $15,000, and authorize the publication of this agreement.

"THOS. CARNEY.

"TOPEKA, *January* 13, 1871."

Mr. Smith's testimony is fully corroborated by that of Mr. Carney, who admits the execution of the paper, the making of the arrangement, the taking of the notes, and the subsequent receipt of the money. The notes for the money were signed by Mr. Smith, but paid by Mr. Caldwell; and one of them, for $5,000, was made contingent upon Mr. Caldwell's election. The substance of the whole agreement, only a part of which was expressed in the writing, was that Mr. Carney should not be a candidate for the Senate against Mr. Caldwell, that he should use his influence for Mr. Caldwell, go to Topeka, meet the legislature, and do all he could to secure his election.

The first question to be considered is: Was this arrangement corrupt? Was it the use of corrupt means on the part of Mr. Caldwell to procure his election? The committee are of opinion that it was corrupt; was against public policy; was demoralizing in its character; directly contributed to destroy the purity and freedom of election, and not to be tolerated by the Senate of the United States as a means of procuring a seat in that body.

To understand the full nature of the transaction we must consider the character and position of Mr. Carney. He had been a governor of Kansas; he had once been elected a Senator of the United States by the legislature of that State, but the election was premature, being at the wrong session; he had been a candidate for the Senate at another time, and had come within 10 votes of being elected. He was well known throughout the State, had a large body of active friends, many of whom were warmly devoted to his political fortunes. His being a candidate would greatly endanger the success of Mr. Caldwell, if not certain to result in his defeat. He was from the same city with Mr. Caldwell, and his candidacy would be the more dangerous on that account. When Mr. Caldwell agreed to give him $15,000 under this arrangement it was an attempt to purchase the votes of the friends of Mr. Carney. He doubtless expected that Mr. Carney, through his influence over his friends, could bring them over to his support. They would naturally become friends to the man with whom Mr. Carney was friendly. It was, at least, a tacit part of this arrangement that Mr. Carney should conceal the mercenary part of the transaction, and place his withdrawal from the canvass and his support of Mr. Caldwell upon personal and political considerations that were honorable to himself and would be attractive to his friends; and this he did. Mr. Carney went to Topeka before the Senatorial election and remained there until it was over, working industriously for Mr. Caldwell, and exerting all his personal and political influence to secure his election. Looking at the transaction in its real character it was a sale upon the part of Mr. Carney of the votes of his personal and political friends in the legislature, to be delivered by him to Mr. Caldwell as far as possible. If it were legitimate for Mr. Caldwell to buy off Mr. Carney as a candidate, it was equally legitimate to buy off all the other candidates and have the field to himself, by which he would exert a quasi-coercion upon the members of the legislature to vote for him, having no other candidate to vote for. It was an attempt to buy the votes of members of the legislature, not by bribing them directly, but through the manipulations of another. The purchase-money was not to go to them but to Mr. Carney, who was to sell and deliver them without their knowledge. That Mr. Caldwell did procure the votes of members of the legislature, friends of Mr. Carney, ignorant of the fact that Mr. Carney was making merchandise of his political character and influence, and of their friendship for him, for which he was to receive a large sum of money, the evidence leaves no reasonable doubt.

Buying off opposing candidates, and in that way securing the votes of all or the most of their friends, is in effect buying the office. It recognizes candidacy for office as a merchantable commodity, a thing having a money value, and is as destructive to the purity and freedom of elections as the direct bribery of members of the legislature.

A candidate for the Senate without strength or merit may by purchasing the influence and support of all or a part of his competitors and withdrawing them from the canvass succeed in an election, thus not only committing a fraud upon the friends of

the candidates who were purchased off, but a greater fraud upon the people of the State, who may be thus saddled with a representative in the Senate of the United States about whom they know little, for whom they care nothing, and who possesses little ability to represent their interests.

Mr. Smith, the friend of Mr. Caldwell, testifies that he paid Mr. Carney the further sum of $7,000 while at Topeka and just before the Senatorial election to meet Mr. Carney's alleged expenses while there, and through fear that Mr. Carney would after all withdraw from the arrangement and become a candidate.

Upon the check for this sum the money was drawn from the bank at Topeka in the evening by one T. J. Anderson, who testified that he gave it to Mr. Carney, and that he was ignorant of the consideration for which it was paid. Other testimony impeaches that of Mr. Anderson and raises a strong presumption that he was engaged in the purchase of votes for Mr. Caldwell, and for which this $7,000 was used, and that for his services he afterward received the sum of $5,000 from Mr. Caldwell. Mr. Carney swears positively that he did not receive this $7,000 or any part of it, but he indorsed the check at the request of Mr. Smith to enable him to procure the money from the bank; that the money was to be used in procuring votes for Mr. Caldwell, and that a package containing this money, as he believes, was placed by Mr. Anderson on a table in Mr. Carney's room, where it could be and was conveniently carried off by the parties for whom it was intended.

Taking all the testimony together, the probability is that Mr. Carney did not get the $7,000, as no good reason was presented by Mr. Smith why when Mr. Caldwell was holding Governor Carney's written promise not to be a candidate and Mr. Carney holding notes to be paid by Mr. Caldwell for $15,000 a new arrangement should be made by which Mr. Smith should pay Mr. Carney $7,000 more, making $22,000 in all.

We now come to the consideration of the transaction with Mr. Sidney Clarke. He had been a member of Congress, had been a candidate for the United States Senate during the preceding canvass before the people, and many members of the legislature were elected upon personal pledges to vote for him for Senator. When the first vote was taken in the separate houses Mr. Clarke received 27 votes, the largest number given for any candidate but one; but the votes satisfied him and his friends that he could not be elected. An arrangement was concluded between Mr. Caldwell and a Mr. Stevens, a friend of Mr. Clarke, at a late hour in the night before the joint convention of the two houses, by which Mr. Caldwell was to pay Mr. Clarke's expenses in the canvass, estimated at from $12,000 to $15,000, and Mr. Clarke was to withdraw in favor of Mr. Caldwell. At a caucus of the friends of Mr. Clarke, held at 9 o'clock on the morning of the joint convention when Mr. Caldwell was elected, Mr. Clarke made a speech and urged them to vote for Mr. Caldwell, and in joint convention his name was withdrawn and all his friends but one voted for Mr. Caldwell. Subsequently in this city Mr. Clarke had several conferences with Mr. Caldwell, in which the latter promised to comply with his engagement with Mr. Stevens and pay Mr. Clarke's expenses, estimated at from $12,000 to $15,000, but never did. Mr. Clarke was unwilling to admit that he had made an agreement to transfer his friends to Mr. Caldwell in consideration of the latter's promise to pay this money, but taking all the testimony together the committee have no doubt that the transaction between him and Mr. Clarke was as has been stated. Mr. Caldwell's subsequent refusal to pay the money to Mr. Clarke does not relieve the character of the transaction, and very probably resulted in the exposure of Mr. Caldwell and the institution of this examination.

There was nothing in the evidence to show that Mr. Clarke's expenses in the Senatorial canvass or in the preceding canvass before the people amounted to half the sum which Mr. Caldwell was to pay him.

Mr. Carney and Mr. Clarke each testifies that Mr. Caldwell told them after the election that his election had cost him $60,000. Mr. Anthony, the mayor of the city of Leavenworth, testified that Mr. Caldwell admitted to him that the election had cost him over $60,000. Mr. Burke, editor of the Leavenworth Herald, and a supporter of Mr. Caldwell in his canvass, testifies that after the election Mr. Caldwell told him that the money he had paid Mr. Carney was not more than 10 per cent. of the whole amount which the election had cost him, and on another occasion that the election had cost him more than twice his entire salary.

The committee have had much difficulty in tracing the money transactions; but the evidence shows that various sums, amounting to over $50,000, were drawn under circumstances that make it probable they were used to procure Mr. Caldwell's election. The sum of $15,000 paid to Mr. Carney has already been stated. The second sum of $7,000, which Mr. Len. T. Smith swears was paid to Mr. Carney, and which Mr. Carney denies receiving, and testifies to circumstances showing it was used for the bribery of members of the legislature, has also been referred to. It is further shown that three or four days before the election took place Mr. Caldwell's agent went into the banking

house of Scott & Co., at Leavenworth, and drew the sum of $10,000 upon Mr. Caldwell's check for the avowed purpose of taking the money to Topeka by the train that morning, which was given as the reason for presenting the check before bank hours. Mr. Jacob Smith, banker at Topeka, testified that at 9 o'clock in the evening before the election took place, Dr. Morris, of Leavenworth, a very active friend of Mr. Caldwell, drew $5,000 from his bank, and that Judge Crozier, of Leavenworth, an influential supporter of Mr. Caldwell, and then at Topeka laboring for his election, drew $1,200 from the bank after banking hours at the request of Mr. Smith, which was handed over to Mr. Smith. The testimony left no doubt upon the minds of the committee that the bankers who honored these different checks at Topeka after banking hours understood that the money was to be used for political purposes. The evidence further shows that Mr T. J. Anderson subsequently received from Mr. Caldwell the sum of $5,000 for his services in the election. A draft for $10,000, drawn by the solicitor of the Kansas Pacific Railroad Company upon the treasurer of that company, was presented at the Kansas Valley Bank of Topeka by Mr. T. J. Anderson on the 23d of January, the day before the election, and the money drawn upon it under circumstances which taken in connection with other testimony make it probable that the money was used for Mr. Caldwell's election. The committee have no reason to believe that they have traced all the money that was used, and in the foregoing statement have taken no account of several small sums shown to have been paid by Mr. Caldwell for the expenses of his friends while at Topeka.

Mr. William Spriggs, a former treasurer of Kansas, testified in regard to a self-constituted committee of six of Mr. Caldwell's leading friends who met from time to time at Topeka during the day and evening for five or six days before the election to confer and report progress in electioneering for Mr. Caldwell; that during the meetings of this committee it was reported by Mr. Smith what members of the legislature had been secured to vote for Mr. Caldwell, how much was offered to others, and how much was asked by others. We quote from his testimony:

"We usually met at 10 o'clock in the morning. We had a roll of the senate and of the house and kept them, and we would compare notes, and then such a member of the committee would be sent that day or at such a time to see such members of the house and such another one to see somebody else, whoever we thought would be the best man for that particular place, and then we would meet again at such another hour and report what we had done and what success we had had, and in some quite a number of times—I do not know how many. In making the report and comparing notes there was one member of the committee would report; in calling over the names he would come to such and such a man and he would say, 'We had better not count that man yet; that is under negotiation and he is a little too high; I think I can bring him down some.'"

This witness testified to several interviews with Mr. Caldwell, and we quote from his testimony:

"I will just tell you what Mr. Caldwell said to me about it. He asked me if I knew any members of the legislature that could be influenced by the use of money for their votes, and I told him that I knew two members I believed that had the reputation of having been influenced in their votes on former occasions."

And further on:

"He said if I found any members that wanted a little money for votes to send them to him and to Len. Smith.

"Mr. Caldwell said there was another class of high-toned gentlemen there in the legislature that would not sell their votes, but they put it in this way: that they had been to a pretty heavy expense in carrying their election and they would want their expenses paid, and if I met with any of that class to send them to him or to Len."

The testimony of Mr. Spriggs is very full and shows that the canvass of Mr. Caldwell was thoroughly corrupt and that money was the chief argument relied upon. Among many other things he stated that T. J. Anderson told him that he had paid Mr. Crocker, a member of the house, $1,000 for his vote; that Mr. Crocker afterward backed out and handed the money over to a Mr. Carson to be returned to Mr. Anderson; that Carson got on the cars, went home, and kept the money. Carson was afterward called by the committee and corroborated the statement, admitting that he had received the $1,000 back from Mr. Crocker to be returned to Mr. Anderson, but that he had kept the money himself for his services to Mr. Caldwell. Mr. Carney testifies that in an interview with Mr. Caldwell after the election in which he was urging him to procure an appointment for one of Mr. Carney's friends who had voted for him, Mr. Caldwell took from his pocket a memorandum-book and appeared to run over a list of names, and coming to the man referred to, said, "That man has been paid;" and Mr. Carney understood from his manner that he had in this memorandum-book a list of members with the sums paid to each; that Mr. Caldwell told him upon another occasion that he had paid Mr. Bayers the sum of $2,500 for his vote and Mr. James F Legate the sum of $1,000 for his

vote. Mr. Anthony also swears that in a conversation with Mr. Caldwell that gentleman admitted to him that he had paid $2,500 for the vote of Mr. Bayers. There is much testimony showing that Len. T. Smith, Frank Drenning, James L. McDowell, George A. Smith, and T. J. Anderson, among the most active friends of Mr. Caldwell during the canvass, admitted at different times that they had offered money to members of the legislature to vote for Mr. Caldwell, in some cases specifying the members to whom it was offered and paid and in other cases that offers had been made that had not been accepted, and that negotiations were on hand with others which had not been completed. These men have denied before the committee all conversations and admissions of this character and all payment of money to members or offers to pay them, and several members of the legislature who were implicated have expressly denied that they received the money or that offers were made them.

Mr. Caldwell offered testimony showing that Mr. Carney had made threats to have him ousted from the Senate; that Mr. Anthony was hostile to him; that Mr. Burke had a lawsuit with him growing out of money furnished to Mr Burke about the time of the election; and to contradict several statements of Mr. Clarke. The most important contradictions of the testimony produced against Mr. Caldwell are made by members of the legislature who were themselves implicated or by the agents of Mr. Caldwell who were directly charged with taking a part in these corrupt practices; and there are some contradictions made by witnesses against whom there is no cause of suspicion. But taking the testimony altogether, the committee can not doubt that money was paid to some members of the legislature for their votes, and money promised to others which was not paid, and offered to others who did not accept it.

By the Constitution, each House of Congress is made the judge of elections, returns, and qualifications of its members.

If a person elected to the Senate has not the constitutional qualifications, or if the election is invalid by reason of fraud or corruption, the jurisdiction to examine and determine is expressly vested in the Senate.

Another clause of the Constitution authorizes the Senate to expel a member by a two-thirds vote. The causes for which a Senator may be expelled are not limited or defined, but rest in the sound discretion of the Senate.

It has been a subject of discussion in the committee whether the offenses of which they believe Mr. Caldwell to have been guilty should be punished by expulsion or go to the validity of his election, and a majority are of the opinion that they go to the validity of his election and had the effect to make it void. Wherefore the committee recommend to the Senate the adoption of the following resolution:

Resolved, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas.

In conclusion the committee remark that while Mr. Caldwell did things to procure his election which can not be tolerated by the Senate, they believe he was as much sinned against as sinning. He was a novice in politics and evidently in the hands of men who encouraged him in the belief that Senatorial elections in Kansas were carried by the use of money.

[Special session of Senate, March, 1873.]

THURSDAY, *March* 6, 1873.

Mr. Morton submitted the following resolution for consideration:

"*Resolved*, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas."

MONDAY, *March* 10, 1873.

The Senate proceeded to consider the resolution, &c.

[The debate is found on pages 30–38 of the Congressional Record, vol. i, special session of the Senate, 43d Cong., 1873.]

TUESDAY, *March* 11, 1873.

On motion by Mr. Morton, the Senate resumed, &c.

[The debate is found on pages 41–47 of the Congressional Record above referred to.]

WEDNESDAY, *March* 12, 1873.

The Senatee resumd, &c.

[The debate is found on pages 48–62 of the Congressional Record above referred to.]

THURSDAY, *March* 13, 1873.

The Senate resumed, &c,

[The debate is found on pages 66–77 of the Congressional Record above referred to.]

March 13, 1873.

Mr. Alcorn submitted the following resolution for consideration:

Resolved, That Alexander Caldwell be, and is hereby, expelled from his seat in the Senate of the United States.

* * * * * * * *

Mr. Alcorn submitted the following resolution for consideration:

Resolved, That the Senate, acting as the judge of the election, returns, and qualifications of its own members, has the power under the Constitution to reject Senators-elect whose election shall have been proved to the satisfaction of the Senate to have been tainted by bribery, fraud, or intimidation.

FRIDAY, *March* 14, 1873.

The Senate resumed, &c.

[The debate is found on pages 80–90 of the Congressional Record above referred to.]

MONDAY, *March* 17, 1873.

The Senate resumed, &c.

[The debate is found on pages 90–102 of the Congressional Record above referred to.]

TUESDAY, *March* 18, 1873.

The Senate resumed, &c.

[The debate is found on pages 101–113 of the Congressional Record above referred to.]

WEDNESDAY, *March* 19, 1873.

The Senate resumed, &c.

[The debate is found on pages 118–125 of the Congressional Record above referred to.]

THURSDAY, *March* 20, 1873.

The Senate resumed, &c.

[The debate is found on pages 126–134 of the Congressional Record above referred to.]

FRIDAY, *March* 21, 1873.

The Senate resumed the consideration of the following resolution, submitted by Mr. Morton on the 6th instant, viz:

"*Resolved*, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas."

On motion by Mr. Ferry, of Connecticut, to amend the resolution by striking out the following words, "was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas," and in lieu thereof inserting "be, and he hereby is, expelled from the Senate of the United States."

After debate,

On motion by Mr. Sherman, the Senate proceeded to the consideration of executive business.

[The debate is found on page 137–154 of the Congressional Record above referred to.]

SATURDAY, *March* 22, 1873.

The Senate resumed the consideration of the following resolution, submitted by Mr. Morton on the 6th instant:

"*Resolved*, That Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas."

The question being on the amendment yesterday proposed by Mr. Ferry, of Connecticut, viz, strike out the following words, "was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Kansas," and in lieu thereof insert "be, and he hereby is, expelled from the Senate of the United States,"

On motion by Mr. Ferry, of Michigan, to amend the amendment by striking out the words, "expelled from the Senate of the United States," and in lieu thereof inserting "declared to have been elected a Senator of the United States by the legislature of the State of Kansas,"

After debate,

On motion by Mr. Morton, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 154–164 of the Congressional Record above referred to.]

MONDAY, *March* 24, 1873.

The Vice-President laid before the Senate a communication from Alexander Caldwell informing the Senate that he had transmitted to the governor of Kansas his resignation as a Senator of the United States from that State; which was read.

[The letter of resignation and a statement by Mr. Morton is found on pages 164, 165 of the Congressional Record above referred to.]

INVESTIGATION OF THE CHARGES OF BRIBERY PREFERRED AGAINST MR. POMEROY IN THE SENATORIAL ELECTION OF 1873.

[Third session of the Forty-second Congress.]

MONDAY, *February* 10, 1873.

Mr. Pomeroy rose to a question of privilege, and having addressed the Senate upon the subject of certain charges made in connection with the recent Senatorial election

in the State of Kansas, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the charges of bribery and corruption in the late Senatorial election in the State of Kansas, relating to the alleged purchase by the Hon. S. C. Pomeroy, United States Senator from Kansas, of the vote of A. M. York, a member of the senate of that State, be, and the same are hereby, referred to a special committee to be appointed by this body, consisting of five members; and that the said committee be, and are hereby, authorized and directed to investigate the same; and for that purpose to send for persons and papers, summon witnesses, employ a stenographer, and make such report to this Senate as in their judgment shall be justified by the law and the facts."

Whereupon

The Vice-President appointed as such committee Mr. Frelinghuysen, Mr. Buckingham, Mr. Alcorn, Mr. Thurman, and Mr. Vickers.

[Mr. Pomeroy's remarks are found on pages 1214, 1215 of the Congressional Globe, part 2, 3d sess. 42d Cong.]

THURSDAY, *February* 13, 1873.

Mr. Frelinghuysen, from the select committee to inquire into certain allegations against Hon. S. C. Pomeroy, reported the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That the sum of $8,000, or so much thereof as may be necessary to pay the expenses of the select committee appointed on the 10th instant to inquire into certain charges of bribery and corruption in connection with the recent Senatorial election in Kansas, is hereby directed to be paid out of the contingent fund of the Senate, under the order of the chairman of said select committee, the vouchers therefor to be approved by the Committee to Audit and Control the Contingent Expenses of the Senate."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time by unanimous consent.

Resolved, That it pass.

MONDAY, *February* 17, 1873.

Mr. Frelinghuysen submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the select committee appointed to inquire into charges of bribery and corruption in the recent Senatorial election in Kansas have leave to sit during the sessions of the Senate.

TUESDAY, *February* 18, 1873.

The Vice-President laid before the Senate the memorial of B. F. Simpson, representing, as attorney, A. M. York and others before the select committee of the Senate to inquire into certain allegations against the Hon. S. C. Pomeroy, praying that said committee be authorized to receive the statements of certain members of the legislature of the State of Kansas that they were offered money or other valuable considerations by the agents and friends of the said Pomeroy at the recent election of Senator in Kansas.

On motion by Mr. Sherman that the said memorial be referred to the select committee to inquire into certain allegations against Hon. S. C. Pomeroy,

After debate,

Mr. Sherman having withdrawn the motion submitted by him,

Mr. Ferry, of Connecticut, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the committee charged with the investigation of the charges against Hon. S. C. Pomeroy be directed to inquire into any allegations of bribery or corruption by said Hon. S. C. Pomeroy in the recent election for United States Senator by the legislature of Kansas."

[The debate is found on pages 1448–1454 of the Congressional Globe, part 2, 3d sess. 42d Cong.]

SATURDAY, *February* 22, 1873.

The Vice-President laid before the Senate a resolution of the legislature of Kansas, declaring that it is due to the dignity and honor of that State that Hon. S. C. Pomeroy should resign his office of United States Senator; which was referred to the select committee to inquire into certain allegations against Hon. S. C. Pomeroy.

MONDAY, *March* 3, 1873.

Mr. Frelinghuysen, from the select committee appointed to inquire into certain allegations against S. C. Pomeroy, submitted a report (No. 523) thereon.

Mr. Vickers and Mr. Thurman, members of the committee, each submitted his views

concerning the charges against Mr. Pomeroy; which were ordered to be printed to accompany the report (No. 523).

REPORT OF COMMITTEE ON THE CHARGES OF BRIBERY PREFERRED AGAINST MR. POMEROY IN THE SENATORIAL ELECTION OF 1873.*

IN THE SENATE OF THE UNITED STATES.

MARCH 3, 1873.—Ordered to be printed.

Mr. Frelinghuysen, from the select committee to inquire into certain allegations against Hon. S. C. Pomeroy, submitted the following report:

The committee appointed to investigate the charges of bribery in the recent Senatorial election of Kansas, preferred against Senator Pomeroy by A. M. York and by B. F. Simpson, respectfully report:

That without any avoidable delay they have performed the duty imposed upon them.

The charges preferred by Mr. Simpson consist of a number of alleged specific acts of bribery or attempts to bribe. The charge of Mr. York is that of a single act of bribery.

I. Attention is first invited to the charges of Mr. Simpson.

Mr. O'Driscoll, a member of the legislature, testifies to four different attempts to bribe him. These charges are contested by the testimony of Asa Lowe, David Payne, J. S. Hoke, S. P. Brown, and other witnesses referred to hereafter.

Frank Bacon, a member of the Kansas legislature, speaks of two attempts to bribe him, and his charges are contested by Albert H. Horton and other witnesses referred to hereafter.

William H. Bond, a member of the Kansas legislature, speaks of three attempts to influence him improperly. These charges are contested by the testimony of John J. Murphy, Albert H. Horton, C. A. Rohrabacker, and two other witnesses referred to hereafter.

C. A. Rohrabacker makes the allegation in his testimony that Senator Pomeroy told him to give Mr. Davis, a member of the legislature, two or three hundred dollars. That this charge is entitled to no weight sufficiently appears by the examination of Mr. Rohrabacker's evidence.

The committee are unanimously of the opinion that even if the foregoing transactions were made out as cases of bribery, there is no sufficient evidence to connect Senator Pomeroy with any of them. Mr. William Simpson, a member of the legislature from the neutral lands of Kansas, testifies that he went to Senator Pomeroy's rooms on the 28th of January, as the election was to occur on the 29th and 30th of January, to inquire about the bill in Congress for the relief of the settlers on those lands, and that Senator Pomeroy told him that if he would vote for him he would pay the expenses of Mr. Laughlin, the agent of those settlers at Washington, and who was supported by the voluntary contributions of those settlers; that the number of settlers is about 25,000, and that Mr. Laughlin's compensation is small. On this charge there is some difference of opinion in the committee; the majority of the committee holding that if the charge was uncontradicted and unexplained, while it would unquestionably present the case of an improper appeal to "motive," it is at least questionable whether it would be the crime of attempting to bribe—not because of the small distributive amount of Mr. Simpson's contribution, but because he was under no obligation to pay anything. If the sum Mr. Simpson was to pay was a tax, the case would be different. But Senator Pomeroy opposes his evidence to that of Mr. Simpson, and testifies that Mr. Simpson told him how little money Mr. Laughlin, the agent, had, and that he had so written him, and that he had no means to continue at Washington save by voluntary contribution, and that he (Pomeroy) told Simpson he was a friend of the settlers and would in any event contribute to his support, and that when he reached Washington he did accordingly give Mr. Laughlin $50; and Mr. Pomeroy then adds in his testimony, "and hence it is certain that my contribution had no relation to any man's vote."

A majority of the committee are of opinion that under this state of facts, and under the evidence, this charge of bribery is not affirmatively sustained. The witnesses, Judge Albert H. Horton, George T. Anthony, John A. Martin, and Mr. Legate, the confidential friends and advisers of Mr. Pomeroy in the canvass, and in a position where they would naturally know, state that they have no knowledge of Mr. Pomeroy using, or authorizing to be used, any improper influences in the election.

And Mr. Pomeroy most positively denies that he ever, directly or indirectly, paid or promised to pay any individual one dollar, or any other sum, for his vote for him at the late Senatorial election.

* Taken from Senate Reports, 42d Cong., 3d sess., No. 523. The evidence accompanying the report is here omitted

A majority of the committee are of opinion that none of the charges preferred as aforesaid by Mr. B. F. Simpson against Mr. Pomeroy have been sustained.

II. We now come to the consideration of the specific charge of bribery made by Mr. A. M. York.

Mr. York's statement is that Mr. Pomeroy gave him, on Monday, the 28th of January, $2,000, and on Tuesday, the 29th of January, $5,000, as a bribe to vote for him in the joint convention on Wednesday.

Mr. Pomeroy's statement is that he did give him the money at the times and in the amounts stated, not as a bribe, but to carry to Mr. Page as a loan from Pomeroy to aid Page in the purchase of thirty bonds of the United States of the denomination of $1,000, Page having $25,000 in currency.

The question the committee is to determine is not which, if either, of these two statements, painfully irreconcilable, is in all its details true; but the question is whether, taking all the testimony together and weighing it, Mr. York has sustained his charge.

There are circumstances that legitimately affect the credibility of Mr. York in this transaction. John M. Holmes testifies to hearing Mr. York say after the Senatorial election that "he had determined to defeat Mr. Pomeroy, cost what it might, and that his exposure of Mr. Pomeroy was the work of time." Mr. York testifies that he, W. A. Johnson, G. C. Horton, Major B. F. Simpson, spoken of as a candidate for the United States Senate, had a consultation on Monday evening, January 28, and it was agreed that if Pomeroy should offer York money he was to take it and expose him in the convention on Wednesday. It was, in the language of Mr. York, the conclusion of those gentlemen there, at that time, that there was no other way of defeating him, and that he would be elected; and it was further there agreed that the money should be appropriated to the school fund of Kansas, and they pledged themselves to secrecy.

Chester Thomas says that Mr. B. F. Simpson, who acted as counsel for Mr. York in this investigation, and is named by him as above, said to him, "Well, we could not afford to have Pomeroy elected; we had to defeat him some way; we were beat, and we had to do something."

I. L. Sharp gave like testimony. It appears that the plan was kept secret until Wednesday at the joint convention, when an excited exposure was sprung upon that body and the money was exhibited by Mr. York, and he made the statement that members of the legislature had Mr. Pomeroy's money burning in their pockets, of which fact we not only have no proof, but it appears that Mr. York had no such knowledge. It appears that an effort was made by members to adjourn and also to have a recess for an hour or two, that the truth of the allegations made might be ascertained, and that Mr. York resisted these efforts, for fear, as he says, that Mr. Pomeroy might be able to appoint his own successor. Thus, even if Mr. York's, and certainly if Mr. Pomeroy's, statement be taken as true, Mr. York was the principal actor in an effort not only to betray and defeat Mr. Pomeroy, but to deprive the State of Kansas of its free and deliberate choice of a Senator.

These circumstances do not prove that Mr. Pomeroy did not bribe Mr. York, but they do impair the credibility of Mr. York as a witness, for when a line of deception has been entered upon no one can say when it is dropped and the golden thread of truth adopted.

The truth which the committee seek is as to what occurred in the room on Monday and Tuesday when Pomeroy delivered the money to York. They were alone, and contradict each other. There is, however, evidence relating to Mr. York's purpose in going to Mr. Pomeroy's room. Mr. York says that Mr. Hairgrove told him that Mr. Pomeroy would be glad to have a business interview with him, and that invitation assured him (York) that Mr. Pomeroy was about to offer him money, and was the reason of the private consultation, before alluded to, with William Johnson, B. F. Simpson, and J. C. Horton, when the plan of operations was adopted. William Johnson says Mr. York said at that consultation that Hairgrove had invited him to Pomeroy's room on a business matter, or to have a business interview, that night, and from that they all concluded that that meant a money proposition. J. C. Horton says York did not give the name of the person who had invited him to Mr. Pomeroy's room. B. F. Simpson, the other person present at the consultation, acted as counsel for Mr. York before the committee, and was not sworn.

Mr. Hairgrove says he did not give any invitation to Mr. York to call at Mr. Pomeroy's room; that he had a conversation with Mr. York and told him that if he wanted to see Mr. Pomeroy he would so tell Pomeroy, but that he never took any message from Mr. Pomeroy to Mr. York.

Mr. J. Q. Page testifies that after his interview with Mr. Pomeroy on this Monday he saw Mr. York and told him that Mr. Pomeroy would probably give him a package of money for him (Page) and that he wanted him (York) to bring it to him. This York denies.

Mr. York's testimony is, in effect, though not in words, that on Monday evening be-

fore he had the interview with Pomeroy he not only supposed he was about to bribe him, but was so certain and so assured of it that a pledge of secrecy as to it was entered into with his associates as to the coming event; that it was determined that the bribery should not be disclosed on Tuesday in the senate or house, but should first be made known in joint convention on Wednesday; that it was assumed the amount was to be so considerable that it would be a suitable contribution to the school fund, to which it was by agreement destined, and that to make proof thereafter clear that he had received the money from Mr. Pomeroy he was searched at 7 p. m. and found to have but about $40 on his person; after which search, it may be remarked, York went about the town and saw some two hundred persons before he saw Mr. Pomeroy at 12 p. m., and the only foundation for this assurance of the coming bribe, according to Mr. York, was the fact that Mr. Hairgrove had invited him to a "business interview" to be had with Mr. Pomeroy that evening; and this, as before stated, Mr. Hairgrove denies.

The committee are at a loss to discover from whence Mr. York derived this assurance that he was to be bribed, and that it was to be that night, and to be in a large sum, from any fact consistent with his statement. If it be true, as Mr. Page testifies, that he had that afternoon told him that Mr. Pomeroy would probably give him a package of money to bring to him, one can more readily understand this confidence that he was to receive money. But that he had any such notice Mr. York denies. If Mr. York was acting on information Page gave him, there is no evidence that he communicated that information to his associates.

Another improbability in Mr. York's statement is that Mr. Pomeroy gave him $7,000 in cash, not for his unconditional support in the senate on Tuesday and in joint convention on Wednesday if there should be a vote there, but that on Monday night he agreed to give him $8,000 for his vote under a stipulation that he might vote against him in the senate on Tuesday (when his vote might be as desirable as on Wednesday), and that he was at liberty even to reconsider his conclusion as to voting for him on Wednesday, and that on such an understanding he paid him on Monday $2,000, and on Tuesday, after he had that day voted against him, $5,000 more. And Mr. Pomeroy did this while it appears in evidence, beyond question, that he was either honorably refraining from all corrupt influences to promote his election or that he was carefully on his guard against being entrapped in the use of money, and while it appears that Mr. York was attending the anti-Pomeroy caucus, acting as its secretary, and known by Mr. Pomeroy to have been opposed to him.

Now we come to the consideration of the statement of Mr. Pomeroy that he gave Mr. York this $7,000 to take to Mr. Page to enable him to purchase bonds of the United States to aid in the establishment of a national bank.

In considering this statement Mr. Pomeroy is entitled, to the extent that other men are, to the presumption of innocence—a presumption somewhat strengthened by the fact that his accusers have failed to sustain their other charges of bribery against him in the same election.

Mr. Page was a man of means and a banker, living at Independence. Mr. McBartney, of the national bank at Junction City; Mr. Shaw, of the Paola National Bank, and Mr. Legate, the clerk of Mr. Pomeroy's committee, all heard Mr. Page conversing with Mr. Pomeroy during the Senatorial canvass at Topeka about starting a national bank at Independence, part of the conversation relating to the amount of capital required, but not as to Mr. Pomeroy advancing any part of the capital.

Mr. Maxson testifies to Mr. Pomeroy inquiring of him prior to 27th January as to Mr. Page's pecuniary responsibility; that he told Mr. Pomeroy that he was responsible and trustworthy.

Mr. Page lived in the same town with Mr. York, and they were friends. It appears by Mr. York's testimony that he called on Mr. Pomeroy with Mr. Page some ten days before the occurrence to which our investigation is directed. Mr. Page testifies that he requested Mr. Pomeroy's influence to obtain a national bank at Independence; that Mr. Pomeroy told him it would require $50,000, but if he had $30,000 in United States bonds he could pay the balance in installments. Page said that he could raise $25,000 in currency, and that Mr. Pomeroy said he would help him to the balance, as he had helped other young men, and that Mr. Pomeroy said he expected to have money before the election, and would let him have it.

On Monday, Mr. Page says, he went to Mr. Pomeroy and told him he was going home, and it was arranged that Mr. Pomeroy was to send him the money by Mr. Bell or Mr. York. It is to be observed that Mr. Pomeroy then had in his possession the $7,000; and that fact should receive its weight as affecting Mr. Pomeroy's statement. And Mr. Page says that, on the same day, he told Mr. York that it was probable that Mr. Pomeroy would hand him (Mr. York) a package of money for him; and if so, he wished him to bring it to him.

Mr. Page says that he on Monday told Mr. Hairgrove, who was also a promoter of Mr.

Pomeroy's election, that he was going home, but was persuaded by Mr. Hairgrove to stay; that he did not stay at the same hotel with Mr. Pomeroy, and did not see him again to speak with him while at Topeka, though he did see him from the door of Mr. Pomeroy's room.

Mr. Pomeroy states, on his oath, that Monday evening, January 27, Mr. York called on him, having sent word that he was coming, and informed Mr. Pomeroy of what was going on at the anti-Pomeroy caucus; spoke of the favor Mr. Pomeroy had granted his friend Page, and said that Page had requested him to get the money and forward it to him at Independence, and that he (York) would leave soon after the election for home.

Mr. Pomeroy told him he was not prepared at that time to furnish it, although he said he had promised it to Page before he (Pomeroy) left the city. Mr. York said perhaps Mr. Pomeroy had no confidence in him. Mr. Pomeroy assured him of his confidence and said that he could furnish $2,000 at any time, and thought he should be able to pay the $5,000 next day, and paid him $2,000 then. It is proper to notice that on this Monday Mr. Pomeroy had the $7,000 with him.

During the next day, Mr. Pomeroy says, he sent Mr. Knight and Mr. Lemuel Pomeroy to look for Mr. Page to inform him of the transaction, if he had not left the city, and to see if it was all right. They could not find him. Neither Lemuel Pomeroy nor Knight was examined on this point. That on the afternoon of that day (Tuesday) Mr. Pomeroy paid Mr. York the $5,000 in currency, in packages of $1,000, with the bank-mark on them.

When the alleged exposure was made in the convention, Judge Horton, who was present, says that when a recess was refused, as soon as he could get out of the crowded house, he went to Mr. Pomeroy's room and told him what had happened; that Mr. Pomeroy was overwhelmed; that no one defended him, and said he had done nothing wrong; that while they were talking a messenger came in and said that the convention was voting for Senator; that there being much excitement at the hotel, Mr. Pomeroy went to a private house, and as soon as there Mr. Pomeroy told him substantially what Mr. Pomeroy has stated before this committee—that Mr. Pomeroy said that he supposed Mr. Page, now thinking he was going to lose the money, might go back on him and he would have trouble; but if Page would stand up to the agreement there was no question that before the country and his friends he would be fully vindicated.

There are several questions that arise in this transaction which are not satisfactorily explained.

Why did not Mr. Pomeroy deliver the entire $7,000 to Mr. York on Monday, instead of $2,000 on Monday and $5,000 on Tuesday?

It is true Mr. Pomeroy says the $5,000 was locked up in his valise and the key with his clerk, but the clerk was near; and it is also true that Mr. Pomeroy says he sent out on Tuesday to find Mr. Page, if he was in town, to see that it was all right, and could not find him; and he says that when he hesitated in paying Mr. York anything on Monday evening he considered it a want of confidence. The same difficulty exists, too, if we adopt Mr. York's statement. On the theory of his story, why did not Mr. Pomeroy pay the whole $7,000 on Monday? He says he only paid him then $2,000.

Why did not Mr. Page, who was present at the convention when the alleged exposure was made, state that Mr. York was to bring him a package of money from Mr. Pomeroy?

It is true it was not certain the money was to be sent; the sum was not definitely fixed; it was to be from eight to ten thousand dollars. Neither was it known to him whether it would be sent by Mr. Bell or Mr. York; and yet it would seem natural for him to have spoken.

How did it happen that no one was present at either of the two interviews between Mr. York and Mr. Pomeroy? Mr. Pomeroy speaks of that fact as merely accidental, he not being entirely certain whether any one was present or not. It is clear, however, that they were alone, and it is unfortunate for the solution of this question that they were so.

How did it happen that Mr. Page and Mr. Pomeroy, holding their relations, did not meet when both in Topeka from Monday to Wednesday? This may have been accidental, if such was the fact. Mr. Page says that he did go to Mr. Pomeroy's rooms, but that there was a great press of people there, so that he could not reach him.

Why did not Mr. Pomeroy deliver the $7,000 to Mr. Page himself when he called on Monday? He then had the money.

Why did not Mr. Pomeroy give Mr. York the money he was to take to Mr. Page in a sealed package?

Mr. Pomeroy may have desired, in view of the coming election, to conciliate Mr. York by showing him that he was assisting his friend Page, by showing him that he was aiding in establishing a bank in his town, and by reposing confidence in him; but even the suggestion of this improper motive is not a satisfactory answer to these questions.

There are also some discrepancies between the statements of Mr. Pomeroy and Mr. Page, such as to whether it was in the morning or in the afternoon of Monday that Mr.

Page last called on Mr. Pomeroy; perhaps they are not other than such as show the absence of arrangement between them as witnesses. These are questions, and there may be others, to which the committee do not find satisfactory answers.

The committee, some of whom were absent on other duty from time to time as the evidence was being taken, did not receive the printed testimony until the morning of Saturday, the 1st instant, and have given the evidence such examination as in the press of business they have been able, which has been by no means as thorough as was desirable.

The committee, bearing in mind while examining the evidence that the whole transaction, whatever view be taken of it, is the result of a concerted plot to defeat Mr. Pomeroy, and remembering that the burden of proof is on the party making the accusation, have come to the conclusion that Mr. York has not sustained his charge by sufficient proof, contradicted as it is by the evidence of Mr. Page and Mr. Pomeroy.

The committee report herewith the evidence taken and the briefs of the respective counsel.

FRED'K T. FRELINGHUYSEN.
WM. A. BUCKINGHAM.
J. L. ALCORN.

VIEWS OF MR. VICKERS.

I cannot forbear saying that this case is not entirely free from difficulty and embarrassment; but as a preliminary remark, I can say that I do not think any connection has been proved between the persons alleged to have offered bribes, being the friends of Mr. Pomeroy, and that Senator. Most, if not all, these instances of attempt to bribe have been denied by the persons who it was said made the offer. Nothing has been traced to Mr. Pomeroy, and there is no difficulty in acquitting him of all charges of that character. The counsel for the prosecution, when the testimony was admitted, proposed to connect Mr. Pomeroy with them, directly or circumstantially. The result proved a failure to do so. I do not think that the offer of Mr. Pomeroy to assist Mr. Laughlin, an agent of certain poor settlers upon neutral lands in Southern Kansas, if Mr. William Simpson would support him for Senator, in connection with the surrounding circumstances, is of such a character as to amount to a direct offer to bribe, although the motive held out to Mr. Simpson cannot be approved. Mr. Pomeroy denies substantially any motive or attempt to influence Mr. Simpson's vote, in the conversation held between them.

I dismiss this part of the case, and come to the charge of actual bribery made by Mr. York against Mr. Pomeroy. Mr. York has testified before the committee, unequivocally, to the offer of a bribe by Mr. Pomeroy to him for his vote, as a member of the legislature of Kansas, for Mr. Pomeroy for the place of United States Senator; that Mr. Pomeroy paid him $2,000 on Monday night preceding the election on Tuesday, and $5,000 on Wednesday, before the meeting of the joint convention of the legislature on that day; that he (Mr. York) produced the money before the convention, stated all the circumstances, and declared that he knew of five or six members of the convention who had Mr. Pomeroy's money burning in their pockets, and he would disclose their names at the proper time. Mr. Pomeroy, in his testimony before the committee, denied emphatically the truth of Mr. York's statement, and averred that he handed him $2,000 and the $5,000 to him to be delivered to Mr. Page, a banker at Independence, to whom he had promised to loan the money to aid in establishing a national bank at Independence, in Kansas. Mr. Page swears that he told Mr. Pomeroy to send the money by Mr. York, or Mr. Bell (a member of the legislature), and that he told Mr. York that he had told Mr. Pomeroy, on Monday preceding the election, to hand the money over to him, to be carried to Mr. Page. Mr. Page also swears that he did not leave Topeka till Thursday, the day after the election, but did not converse with Mr. Pomeroy after Monday. Mr. Page had several conversations with Mr. Pomeroy upon the subject of establishing a national bank—some of them in the presence of others.

The following is a statement of part of the cross-examination of Mr. Pomeroy before the committee:

"Question (to Mr. Pomeroy). You say that on Monday night you gave to Mr. York $2,000; where, at that time, were the $5,000?—Answer. They were in my valise; not in my trunk.

"Q. Why did you not give him the $5,000 as well as the $2,000?—A. I had not it with me in the room at the time, and I intended to see Mr. Page the next morning.

"Q. In what room was it that you gave Mr. York the $2,000?—A. In what they call my private room.

"Q. Your reception room?—A. No; back of that.

"Q. Where was your valise that contained the $5,000?—A. It was in a closet, or in a place which I extemporized for a closet, behind my trunk.

"Q. In the same room?—A. Yes, sir.

"Q. Then why did you not give him the $5,000 at the same time that you gave him the $2,000?—A. For the reason that I wanted to see Mr. Page.

"Q. Had Mr. Page told you, Mr. Pomeroy, you could give the money to Mr. York?—A. Yes, sir; he had told me I might send it to him by Mr. York; that he was going to leave town, and to send it by Mr. York or by Mr. Bell.

"Q. When was it that Mr. Page told you to send the money by either of those gentlemen?—A. On Monday.

"Q. In the forenoon?—A. In the forenoon, the same day.

"Q. You say you did not give him the $5,000 because you expected to see Mr. Page the next day?—A. Yes, sir.

"Q. You knew, then, that Mr. Page had not left Topeka then?—A. I did not know whether he had or not. He had told me he thought he should go. I sent out for him on Tuesday twice, to find out whether he had gone.

"Q. As he had told you you might send the money by Mr. York, why did you hesitate to give Mr. York the whole $7,000?—A. For two reasons: First, I wanted to know if it was all right from Mr. Page; and then I had not the $5,000 accessible at that time.

"Q. Did I not understand you that the $5,000 were in the same room?—A. Yes, sir; but in a valise. I kept money and private papers in a valise which Mr. Lemuel Pomeroy, my clerk, had the control of and key of; but the trunk I had the key of myself.

"Q. You had not the key of the valise in which the $5,000 were?—A. No, sir; I had not.

"Q. Where was Mr. Lemuel Pomeroy at that time?—A. He was in the reception room or abed. He was about the hotel.

"Q. I understand you took no memorandum from Mr. York that you had delivered the money to him?—A. I did not.

"Q. Was this a subscription to the stock of that bank?—A. No, sir.

"Q. It was a loan?—A. It was a loan.

"Q. Interest-bearing or not?—A. I had made no particular arrangement. I told him I would help him to money enough with what he had got to buy thirty bonds. He was to settle with me after he got the currency here.

"Q. How long was he to have the money?—A. I think it was thirty or forty days. It generally takes thirty days after putting the bonds in to get the currency from the Department."

I have not referred to all the testimony, but only a small portion of it, the whole being printed, and to which the Senate is referred; but I have noticed the material portions of Mr. York's and Mr. Pomeroy's and Mr. Page's, so as to bring the point at issue more distinctly and prominently into view. It will be seen that Mr. York stated to the joint convention that he knew of five or six members of that body who had Mr. Pomeroy's money burning in their pockets, and at a proper time he would disclose their names. A few days subsequent, when told by a member that his statement of that fact, and the manner of making it, impressed his mind with the supposition or belief that he (York) had received his information from Pomeroy, he made no reply nor entered into any explanation. Mr. York, when interrogated before the committee, does not remember the statement made in reference to the bribery of other members, and pleaded excitement as an excuse for his defect of recollection. That part of the declarations of Mr. York before the convention had, no doubt, its effect upon their minds, coupled with the revelations about the money transaction and the production of the funds, and doubtless he intended it should have. He had Mr. Pomeroy's defeat in view, and as auxiliary to other statements they were introduced. This additional charge of bribery of other members was of such a notable character which, if true, could not so soon be forgotten. It would require the largest measure of charity to believe that Mr. York could have forgotten them, or the charge which he made. The conclusion is inevitable that he stated as facts what he did not know, or, in other words, that he manufactured the statement for the occasion. Mr. Pomeroy denies all the material facts, and asserts that the money was handed to Mr. York to be taken to Mr. Page. He denies explicitly every offer directly or indirectly to bribe Mr. York, or the offer or delivery of money for his vote. But there are circumstances connected with the transaction that cast a sombre hue over portions of it. The lateness of the hour; the place, the room of Mr. Pomeroy; the absence of all witnesses; the fact that Mr. Page was then in Topeka; the delivery of a portion of the money, and the balance on Wednesday morning, the day of the meeting of the convention; the limited acquaintance of the parties; no receipt or memorandum taken; the fact that Mr. Borland loaned Mr. Pomeroy $5,000 on the Friday preceding (Mr. Pomeroy states, in his testimony, he wanted it for Mr. Page); the fact that on Saturday following he did not inform Mr. Page he had the money; that on Monday he told Mr. Page that he expected to receive the money before he left Topeka, and was told by Mr. Page to send it by Mr. York or Mr. Bell (Mr. York residing in the same town with Mr. Page—Independence), when he had the Friday before borrowed the money from Mr. Borland,

and had it in his possession at the time he told Mr. Page he expected to receive it; and that the money was not inclosed in any envelope; the fact that Mr. Pomeroy states nothing was said about security or interest (although the parties had not known each other for more than one or two years, and resided at different and distant points); that Mr. Page states he was to have it without interest; the additional facts elicited in the cross-examination of Mr. Pomeroy by one of the committee, that the reason he did not pay over the whole $7,000 to York on Monday night, but only $2,000, was that he wanted to see Mr. Page first; and, on further cross-examination, that he had not the key of the valise where the $5,000 was placed; first that the money was not in the same room (the back room) where the parties were, and afterwards that it was. These and other circumstances connected with the affair show discrepancy apparently irreconcilable. Mr. Pomeroy, when testifying, would naturally state the case as favorable to himself as it could be done consistently with the facts.

On the other hand is to be considered the circumstances leading to, attendant, and consequent upon the alleged receipt of money by Mr. York from Mr. Pomeroy. Four persons conspired to defeat Mr. Pomeroy's election to the Senate of the United States; the plan of operations was concocted at night, and Mr. York, as the chief conspirator, was selected or volunteered to carry out the programme. He went to Mr. Pomeroy's rooms very late at night. His object was to obtain Mr. Pomeroy's confidence and his money, and then betray him. He induced Mr. Pomeroy to believe that he would be his friend, but that he wanted money. He asserts that he sold his promised support to Mr. Pomeroy for $7,000; received the $2,000 before he left, and the balance, of $5,000, the next day; that he took the money to the joint convention, made an exciting speech and exposure, and strenuously opposed all motions for adjournment or recess to allow Mr. Pomeroy an opportunity for denial or explanation. Although a witness who acknowledges the turpitude of his conduct, and the iniquitous means he resorted to to deceive and induce another to commit an offense that he might betray him, may possibly be believed, yet the mind cannot relieve itself of the unfavorable effect which the facts stated and the moral taint of the witness must produce. Detectives, it is said, are employed by governments and by individuals, and to use stratagems and devices to detect suspected offenders. But the cases, I presume, are not exactly parallel. Mr. York and Mr. Pomeroy were personal and political friends, and Mr. York admits that he sought Mr. Pomeroy and exerted his influence to induce him to commit a crime by the offer of a very valuable consideration. A detective may lay his plans and place temptations in the way of one he wishes to entrap, but I do not suppose that he solicits and bargains for its commission. I should be reluctant to credit the testimony of one who confessed to such practices, unless he was strongly corroborated. The true theory should be that the evidence of one who acknowledges his own wrongful and vicious purposes and acts to seduce another into the commission of crime should be corroborated in the essentials of his testimony. While he may be competent to testify, his credibility is sensibly and materially affected. Unless some such rule prevail, any citizen in the community might be unjustly convicted upon the false testimony of a sharp but unprincipled witness. Character alone will sometimes outweigh the charge of an accuser, unless corroborated. In my opinion, neither governments nor individuals should countenance the violation of truth or morality to accomplish any purpose.

Taking all the testimony and circumstances into consideration, and weighing them carefully in equal scales, I cannot decide that the guilt of Mr. Pomeroy is established beyond a reasonable doubt. If I were a judge or a juror, I could not convict upon such testimony. The duty of the committee was to take the testimony and report upon it to the Senate, with their convictions of its bearing and effect. They have, in the short time allowed, and under difficulties and incoveniences arising out of their Senatorial duties and engagements on other committees, and some delay in receiving the printed testimony, been prevented from giving as thorough a consideration of the evidence as they desired to do. But considering the nature and character of the testimony for the prosecution and defense, with all the surrounding circumstances, I have not been able to conclude, beyond a reasonable doubt, that the charges against Mr. Pomeroy have been sustained.

G. VICKERS.

VIEWS OF MR. THURMAN.

I cannot agree with the report of the majority of the committee. I think that the testimony proves a corrupt offer by Mr. Pomeroy to Senator Simpson, of the Kansas legislature, to obtain the vote of the latter.

I also believe that the testimony convicts Mr. Pomeroy of having attempted to bribe Senator York, of that legislature, to vote for him; that Pomeroy delivered to York $7,000 is not denied. The only material issue between them is, for what purpose was the money

delivered? York says that it was a bribe for his vote. Pomeroy says that it was handed to York to carry it to one Page, whom Pomeroy had promised to assist in starting a national bank. In my judgment the statements of Mr. Pomeroy on this subject are contradictory, are inconsistent with Page's statements; are so opposed to the usual circumstances attending a business transaction, and are so improbable, especially in view of the circumstances attending the Senatorial election, that reliance cannot be placed upon them. Perceiving no good to result from an elaborate statement of the testimony and reasons that bring me to these conclusions, I refrain from making such statement. Were there time for the Senate to consider the subject fully I should feel it my duty to give at large the reasons for my convictions. But this is the last day of the session and of Mr. Pomeroy's Senatorial term. Before the reports can be printed, much less considered, the session will be at an end. I therefore say no more than to repeat the conclusions to which my mind, has, reluctantly and painfully, been brought.

[Second and third sessions Forty-second Congress, and special session, March, 1873.]

POWELL CLAYTON,

Senator from Arkansas from March 25, 1871, till March 3, 1877.

January 9, 1872, the Joint Select Committee to inquire into the Condition of the late Insurrectionary States reported to the Senate that certain testimony taken by them tended to impeach the official character and conduct of Mr. Clayton; that the committee had not prosecuted the inquiry beyond taking the testimony of two witnesses, deciding that the subject-matter did not come within the limits of the investigation they were directed to make; that they reported to the Senate this testimony, recommending that the Senate take such action as it deem proper. The Senate resolved that the report and testimony be referred to a select committee to investigate and report upon the charges. June 10, 1872, the committee reported that the investigation was completed, but that the committee were unable at that time to arrange the testimony and report back such parts of it as were relevant; that they held it but the plainest justice to Mr. Clayton that they should make known the general result of their investigation; that they consequently submitted a partial report, reserving the right to submit a final report with the testimony, and recommending that the Senate delay action on the subject until such time; that the charges were not sustained, and that the testimony failed to impeach the Senator's official conduct or character. There was a minority report, which did not enter into the merits of the case, but held that the action of the committee in reporting at that time was premature. February 26, 1873, the committee submitted the evidence, and made a final report, recommending the adoption of a resolution that the charges referred to the committee were not sustained, and that they be discharged from the further consideration of the subject. There was a minority report holding that the charge made of procuring his seat by the corrupt use of money was sustained by the evidence, and that he also obtained 5 votes, which made his majority, by giving to electors lucrative offices when he was governor, as a consideration for their votes. March 25, 1873, the resolution was agreed to.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 42d Cong., 2d and 3d sess., and the reports of the committee from Senate Reports, 3d sess. 42d Cong., No. 512.

Special references to the debates of each day are inserted below.

[Second session of the Forty-second Congress.]

TUESDAY, *January* 9, 1872.

Mr. Scott, from the Joint Select Committee to investigate Alleged Outrages in Southern States, submitted the following report (No. 15):

At a meeting of "the Joint Select Committee to inquire into the Condition of the late Insurrectionary States, so far as regards the execution of the laws and the safety of the lives and property of the citizens of the United States," convened at their room in the Capitol on the 22d of September, 1871, Messrs. Scott, Pool, and Blair were appointed a subcommittee to examine the witnesses then in attendance; which subcommittee organized on the 23d of September, 1871, and examined Edward Wheeler, of Arkansas. On the 25th of September, 1871, said subcommittee examined William G. Whipple, of Arkansas.

The testimony of these witnesses tends to impeach the official character and conduct of a member of the United States Senate from the State of Arkansas, and also to affect the right of a member of the House of Representatives from that State to retain his seat in the House. Other evidence of the same character was offered, and one of the gentlemen affected by this testimony claimed the right to bring witnesses before the committee to contradict or explain the same. The committee, however, upon consideration decided that the subject-matter to which said testimony related did not come within the limits of the investigation they were directed to make, and therefore declined to prosecute the inquiry any further, discharging a witness who had been subpœnaed and was then awaiting an examination.

The joint select committee, pursuing what they deemed to be the proper parliamentary course, at a meeting on December 21, 1871, adopted the following resolution:

"*Resolved*, That the committee report the testimony taken before the committee affecting Senator Clayton and Mr. Edwards, a Representative from Arkansas, to the Senate and House of Representatives, with a recommendation that each House take such action as it may deem proper."

Agreeably to this resolution of said joint select committee, the undersigned, the chairman on the part of the Senate and the chairman on the part of the House of Representatives, beg leave to submit the testimony* hereto annexed of Edward Wheeler and William G. Whipple, both of the State of Arkansas, said Wheeler and Whipple

* Found on pages 2–38 of report No. 15, 2d sess. 42d Cong.

having been the only witnesses from that State who were examined by the committee, to the Senate and House of Representatives respectively, for such action as each House may deem advisable.

JOHN SCOTT,
Chairman on the part of the Senate.
LUKE P. POLAND,
Chairman on the part of the House of Representatives.

The Senate proceeded, by unanimous consent, to consider the report, and Mr. Clayton, having addressed the Senate on the subject thereof, concluded his remarks with the request that a select committee be appointed to investigate the allegations against him therein referred to;

Whereupon

Mr. Wright submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the report of the committee and the testimony accompanying be referred to a special committee of three, with power to send for persons and papers, to investigate and report upon the charges therein contained against Hon. Powell Clayton, a member of this body."

Ordered, That the committee be appointed by the Vice-President.

[The debate, including a statement by Mr. Scott and a speech by Mr. Clayton, is found on pages 311–318 of the Congressional Globe, part 1, 2d sess. 42d Cong.]

WEDNESDAY, *January* 10, 1872.

The Vice-President appointed Mr. Wright, Mr. Morrill of Maine, and Mr. Norwood the select committee authorized by the resolution of yesterday to inquire into certain allegations against Hon. Powell Clayton.

MONDAY, *January* 15, 1872.

Mr. Wright, from the select committee to investigate alleged charges against the Hon. Powell Clayton, reported the following resolution:

"*Resolved*, That the committee appointed under the resolution of the Senate of the 9th instant to investigate the charges against the Hon. Powell Clayton have power to employ a clerk, and that there is hereby appropriated out of the contingent fund of the Senate the sum of $2,000, or so much thereof as may be necessary, to defray the expenses of said investigation."

The said resolution was read the first and second times, by unanimous consent, and considered as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

THURSDAY, *March* 28, 1872.

Mr. Wright, from the select committee to inquire into certain allegations against Hon. Powell Clayton, submitted the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That the sum of $3,000, or so much thereof as may be necessary for the expenses of the committee to investigate the charges against the Hon. Powell Clayton, is hereby directed to be paid out of the contingent fund of the Senate under the order of the chairman of said committee, the vouchers therefor to be approved by the Committee to Audit and Control the Contingent Expenses of the Senate."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

MONDAY, *June* 10, 1872.

Mr. Morrill, of Maine, from the select committee to inquire into certain allegations against Hon. Powell Clayton, submitted a report* (No. 232) thereon.

Mr. Norwood asked and obtained leave to submit the views of the minority of the committee on the allegations of Mr. Clayton; which were ordered to be printed with the foregoing report (No. 232).

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* This report is embodied in the one made by the same committee February 26, 1873.

[Third session of the Forty-second Congress.]

FRIDAY, *January* 10, 1873.

Mr. Wright submitted the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That the sum of $1,000, or so much thereof as may be necessary, is hereby appropriated out of the contingent fund of the Senate for the use of the select committee to inquire into certain allegations against the Hon. Powell Clayton."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

WEDNESDAY, *February* 26, 1873.

Mr. Wright, from the select committee to investigate certain charges against the Hon. Powell Clayton, a Senator from the State of Arkansas, submitted a report (No. 512) accompanied by the following resolution:

"*Resolved*, That the charges made and referred to the select committee for investigation affecting the official character and conduct of the Hon. Powell Clayton are not sustained, and that the committee be discharged from their further consideration."

Ordered, That the report and testimony taken before the said committee be printed.

[Remarks by Mr. Wright are found on page 1785 of the Congressional Globe, part 3, 3d sess. 42d Cong.]

SATURDAY, *March* 1, 1873.

Mr. Norwood asked and obtained leave of the Senate to present the views of the minority of the select committee to inquire into certain allegations against Hon. Powell Clayton; which were ordered to be printed to accompany the report of the committee (No. 512).

REPORT OF COMMITTEE.*

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 26, 1873.—Ordered to be printed.

Mr. Wright, from the committee to inquire into certain allegations against Hon. Powell Clayton, submitted the following report:

The undersigned select committee, to whom was assigned the duty of inquiring into certain charges against the Hon. Powell Clayton, a member of this body from the State of Arkansas, have had the same under consideration, and submit the following final report:

On the 10th of June last they submitted what they denominated, and which was accepted as a partial report, which they here incorporate to avoid repetition, and that the conclusion at which they have finally arrived may be the more readily understood:

JUNE 10, 1872.—Ordered to be printed.

Mr. Morrill, of Maine, on behalf of the chairman, Mr. Wright, of Iowa, from the committee to inquire into certain allegations against Hon. Powell Clayton, submitted the following report:

The special committee on whom was imposed the duty of investigating certain charges against the Hon. Powell Clayton, a member of this body, beg leave to submit the following partial report:

On the 9th of January, 1872, Mr. Scott, from the "Joint Select Committee to inquire into the Condition of the late Insurrectionary States," &c., reported to the Senate that in the prosecution of their inquiries the testimony of certain witnesses (Edward Wheeler and William G. Whipple, of Arkansas) "tended to impeach the official character and conduct of a member of this body," but as they held that "the subject-matter to which said testimony related did not come within the limits of the investigation they were directed to make," they declined to hear other witnesses, and thereupon adopted the following resolution:

"*Resolved*, That the committee report the testimony taken before the committee affecting Senator Clayton and Mr. Edwards, a Representative from Arkansas, to the Senate and House of Representatives, with a recommendation that each House take such action as it may deem proper."

The testimony of Wheeler and Whipple referred to in the report and resolution they also reported to the Senate for such action as might be deemed advisable, and on the same day the Senate adopted the following resolution:

"*Resolved*, That the report of the committee and the testimony accompanying be referred to a special committee of three, with power to send for persons and papers, to investigate and report upon the charges therein contained against Hon. Powell Clayton, a member of this body."

Pursuant to the command of the resolution, and the powers thereby conferred, the committee met on the 18th day of January, and entered upon the discharge of their duties.

James L. Hodges, esq., of Arkansas, appeared before them and asked leave to prosecute the charges, and was permitted to do so, and accordingly appeared by himself and counsel, S. M. Barnes, esq.

* The testimony, pages 21–377 of the report, is here omitted.

Senator Clayton also asked to appear as well in person as by counsel, which request was granted, and he designated as such counsel the Hon. Thomas M. Bowen and Hon. John McClure of Arkansas.

Witnesses were subpœnaed from time to time, upon the request of the parties and as the committee deemed necessary. It is proper to state that the parties each demanded the attendance of many other witnesses, which demand was declined, but not until the committee were thoroughly satisfied that they were possessed of the essential facts touching the matters submitted for their investigation. They held almost daily sessions from the date last named until and including the 11th day of May, when the testimony closed. During this day they examined thirty-eight witnesses, and have before them, in form of documents and the testimony of said witnesses, matter covering about 5,000 manuscript pages.

We are justified in saying that much of it was taken and received *de bene esse*. In other words, for the prosecution it was claimed that they would be able to show certain combinations, conspiracies, and corrupt agreements which, if established, would make such testimony competent and relevant. For the defense it was insisted that this state of case could not be shown, and in no event could such testimony be admissible under the resolution of the Senate and the matter submitted for our investigation, but in view of the possibility of its being so held they submitted their testimony to meet the case supposed by the prosecution.

As it was impossible to say in advance what, in this respect, the testimony might finally establish, and as witnesses were in many instances here from a great distance and anxious to leave, we deemed it better to take the testimony, leaving the question of its ultimate relevancy to be determined when deciding the whole case. This state of the record rendered it necessary to examine with care the testimony of very many of the witnesses to enable us to determine just what was and was not competent in view of the issues made.

This work, to some extent, remains unperformed. It could not well be otherwise when we refer to the time the testimony closed, and the other and constant duties pressing upon each member of the committee. As the session is drawing to a close, however, and we hold it but the plainest justice to a member of this body that it should at least be known what was the general result of our investigation, we have deemed it best to submit the same to the Senate. We say this is due him, the Senate, and the country, and shall assume that this will be accepted as true by all, without entering into argument in support of a proposition so plain. The charges affect the standing and influence of one who has the equal dignity and responsibility of any other member of this body before the country and his constituency. If not sustained, it is eminently proper that he should be relieved. If sustained, then the Senate owes it to itself, its own dignity, its own purity, its own self-respect, that he should be removed, and the people of Arkansas have upon this floor one who may be their fit, proper, and chosen representative.

Thus impressed and influenced, though unable, for reasons above stated, to arrange the testimony and report back such parts as they hold to be proper and relevant, and yet able to reach a conclusion, to them satisfactory, from their recollection of the evidence at the time it was being submitted, and their subsequent examination—we say, thus impressed, we have deemed it our duty to submit this partial report, reserving the right, at a time when the pressure of other duties shall not be so great, to submit with the testimony a further and final report.

If it should be asked, Why not now submit all the testimony? we answer: First, because we know that much of it can have no possible bearing upon the question before us and the Senate, and its publication would involve a large and most unnecessary expense. Second. No useful end is to be gained by giving to the country a mass of testimony which only serves to show the bitterness of personal feeling existing between those prosecuting and their friends on one side, and the party accused and his friends on the other, which had its birth in the zeal of opposing political factions, to blacken and disparage the party integrity of those opposing them; which would only tend to still further disturb and distract the citizens of the State where they reside, and render more difficult the restoration of that peace and quiet so essential in all the States, and especially those so lately in insurrection. And this course is the more justified from a conviction, which we cannot now escape, that not a little of it was offered by the parties more with the view of making political capital against each other than in the hope or belief that it could have any influence upon the committee, or throw light upon the subject-matter under investigation. We do not propose to be the instrument of a purpose so foreign, and we most respectfully submit that the Senate should not and will not lend itself to the publication in advance of a mass of testimony which in no manner tends to elucidate the real question before them, and which, if published, while it might gratify the malevolence of parties, could not possibly serve any useful end. It would be worse than waste-paper.

We therefore submit this report, at present withholding the testimony, recommending that action shall be delayed until we are able to more carefully arrange the immense record before us, and present it in a form which will enable the Senate to act with greater safety and intelligence.

And now having stated something of the work performed and the grounds which seem to us to justify the course pursued, we come to the consideration of those matters which were submitted for our investigation and a statement of the conclusion reached. In doing this it seems to be eminently proper, and indeed logically necessary, to ascertain and settle the nature and scope of the charges made and the powers of the committee under the order of reference.

It will be seen that the report of the committee, which led to the present inquiry, states that the testimony submitted to them tended to impeach the official character and conduct of Senator Clayton. The resolution under which this committee is acting directs that the report of Mr. Scott and the accompanying testimony be referred, with power to send for persons and papers to investigate the charges therein contained. We therefore necessarily go to the report thus referred in the first instance, to see what the charges are. But here we find nothing, for it is only stated generally that the testimony before them tended to impeach the official character and conduct of Senator Clayton. All that is of particular value thus far or in this language is that the charges related to his official character and conduct. This of course must mean his official character and conduct as a Senator. With his official acts in other positions we have nothing to do, except as they may bear upon his office as Senator. To illustrate, he was governor of the State of Arkansas up to the time of his election as a member of this body. Now, whether his conduct and character in the gubernatorial office was such as to merit condemnation or praise, whether his administration of that office was honest or dishonest, wise or unwise, corrupt or otherwise, is a matter of no moment whatever, except as it may bear, in some legitimate manner, upon his conduct and character in his present position.

Assuming for the present that our inquiries are limited to matters subsequent to his election, not, of course, rejecting those antecedents, so far as they reflect light upon subsequent acts, we are led to inquire what these are; and here we are remitted to the testimony of Wheeler and Whipple, for as there are no specific charges in the report itself, the testimony of these witnesses must alone stand in the place of charges, the information, or indictment. Than this, few things could be more indefinite or unsatisfactory. Without, by any means, conceding that any one should be held to answer charges thus made, so entirely wanting in everything approximating conciseness, clearness, or definiteness, we advert very briefly to some matters to which these witnesses most vaguely refer.

First. It is suggested rather than strongly claimed that Senator Clayton was indicted by the grand jury of the United States circuit court for Arkansas, in April, 1871, for a violation of the twenty-second section of the enforcement act (16 Stat. at Large, page 145), in granting a certificate of election, as governor, to General John Edwards, showing his election as a member of the House of Representatives in the Congress of the United States. The facts in connection with the issuing of this certificate will come under review in a subsequent part of this report, and we content ourselves at present with stating conclusions. And, first, the mere finding of the indictment would not of course so tend to impeach his official character and conduct, nor of course actually impeach it, as to demand action at the hands of the Senate. In the next place, if such finding possessed any significance, it would lose it all, where, as the testimony and the record here conclusively show, he was discharged therefrom by the judgment of the court at a subsequent term (in October last) under a demurrer to the indictment; not for any formal or technical defect, but upon the broad and substantive ground, to state it briefly, that the governor of a State is not an "officer of election," within the meaning of said election.

This being so, by the judgment of the court he stood acquitted and discharged of course of all legal wrong. Then, if an officer, and the act was not fraudulent—that is, if he did not "fraudulently make any false certificate"—there was no criminal liability, and if there was no corrupt conduct or fraudulent act in this connection, it is submitted that all inquiry in this direction may be dismissed. But more of this hereafter.

In the second place, it is suggested, again most vaguely—it cannot be conceded to have the dignity of a specific charge—that he, by himself or friends, tampered with the grand jury finding the indictment. Senator Clayton was in Washington City at the time the indictment was found, and there is scarcely a scintilla of evidence that he had knowledge that such a thing was contemplated or threatened. There is certainly no pretense of proof that he, by himself, or others acting for him, or at his instance or request, made even the least attempt to influence the action of the grand jury presenting the indictment, and least of all would it be claimed that anything was done by himself, or any one ever so remotely connected with him, which could by possibility be regarded as either criminally or morally wrong. And when we add that it is worse than the sheerest pretense that anything there attempted was in the least connected with his official conduct or character, we dismiss this part of the case.

In the next place it is attempted to be shown that he improperly used his official position and influence as Senator to procure the removal of the witness (Whipple) from his office of district attorney, and General Catterson as marshal of the district of Arkansas. Whipple was district attorney and Catterson marshal at the time of finding the indictment. Both these gentlemen had been more or less active in their opposition to Senator Clayton's election to the Senate through a contest almost unprecedented in its bitterness, whether viewed politically or personally. This was particularly true of Colonel Whipple. Senator Clayton may have been influenced, and doubtless was, not a little, in his efforts to procure their removal by their known opposition to him, as also by what he esteemed their unwarranted course in connection with the procurement of the indictment.

It is not material to inquire whether there was anything in their conduct touching the latter matter to warrant his feelings and judgment, since he did no more than what other Senators are constantly in the habit of doing touching the displacement of their enemies and the appointment of their friends. That the action of these parties in connection with the indictment was not the moving cause of his opposition is clear enough from the fact that he was seeking their removal before it was presented, as abundantly appears from their own testimony, wherein the alleged charge is found. In his conduct in this respect we fail to see any official misconduct, and especially so as it appears that since these removals the Executive and Department of Justice have been successively, and more than once, appealed to by Colonel Whipple and General Catterson and their friends for reinstatement, and have been as frequently unsuccessful. Whether it is right or wrong for one in his position to use his official influence to procure removals is not for us to say. We only state and find that he exercised the right or privilege taken by, if not conceded to, others; an act which, if regarded as tending to "impeach his official character and conduct," would be equally so, probably, of every member of this body.

Turning now from these matters arising subsequent to the election of Senator Clayton we come to the case made touching his election, and here a preliminary inquiry arises: What have we to do with that election? Recurring to the resolution raising the committee, and which must be accepted as the charter of our power, we remark again that the report of Mr. Scott says that the testimony (and to which we must go to ascertain the charges, for there is nothing else) "tends to impeach his official conduct and character." Then, the resolution under which we are acting directs us to investigate the charges therein contained against Senator Clayton as a member of this body. Now, giving to the record a fair and just construction, have we anything to do with his election or the circumstances connected therewith? Upon this subject at least one member of the committee entertains the gravest doubts. The argument suggesting and supporting these doubts is as follows:

In respect to the subject-matter referred to a committee, the rule is that they are not at liberty to entertain any proposition or go into any inquiry which does not come within the direct purpose for which the committee was appointed, as expressly or clearly implied in the authority conferred upon it, or which is not grounded upon some paper which is referred to the consideration of the committee. (Cushing's L. and P. of Leg. Pro., ss. 1906.) This is upon the clear principle that a committee, being a creatnre of the body giving it life, is bound by and is not at liberty to depart from the order of reference. If any other rule were adopted, and it could depart from the order of reference, all business would, of course, be at an end, and endless confusion and contests between the body and the committee would ensue (ss. 1907).

Now, it is suggested that inasmuch as the report of the "joint select committee" by Mr. Scott referred alone to testimony tending to impeach the official character and conduct of Senator Clayton, the order of reference took in and contemplated such matters alone, and that the resolution raising this committee must be construed in the light of that report and the subject-matter of inquiry be thus limited; and hence, when it is directed that the committee shall investigate the charges contained in said report (including the testimony of Wheeler and Whipple), it was intended to cover and include only those bearing upon such official conduct and character, for in that report there is nothing said about fraud or illegality in his election. But here it is, perhaps, answered that the proposed inquiry is grounded upon the paper (the testimony aforesaid) referred for our consideration. To this the reply is: true, but that paper must properly be construed as referring to such charges only as relate to or are connected with the principal inquiry; that is, official conduct or character. If not, why did the committee omit all reference to his election and the circumstances attending the same? The answer is they had power and authority themselves to inquire into all matters bearing upon the state of affairs in the State, including frauds in elections, but not to such as bore upon the conduct of a member of the Senate or House after his election.

Conceding, however, that this view limits the inquiry unjustly, let us look at the charges themselves. And here the already great length of this report admonishes us to brevity, and especially so as, when the testimony shall be finally summed up, it will necessarily demand a large portion of

our attention. This part of the case suggests two inquiries: First. As to matters occurring antecedent to the assembling of the general assembly which elected Senator Clayton. Second. Those immediately leading to and connected therewith.

Upon the first we are not disposed to enter. Our warrant for this is found in the principle obtaining and the nature of the testimony, or rather the absence of it. It seems to us that upon principle we cannot enter upon the numberless inquiries which would always be suggested in cases of this character preceding the election of the members whose duty it is to elect a Senator, unless such conduct and transactions clearly relate to and bear immediately upon the alleged frauds connected with such Senator's election. Not only so, but it would seem that they must so color the transaction of the final election of the Senator as to lead to the conclusion that but for them the result would have been different. Thus, suppose Senator Clayton used reprehensible means with the hope of securing the election of some member or members in one or more districts, and such persons were either not elected or failed to vote for him, or, if voting for him, he had a clear majority outside of those improperly elected, would any one say or claim that his seat could be declared vacant? Or suppose, as in the case before us, that the two houses of the Arkansas legislature, being the judges of the election, qualification, and return of their own members, have heard and investigated all alleged frauds and given the members their seats, can this committee or the Senate go back of that action, and in this inquiry, whether treating it as a proceeding direct or collateral, say that such members were improperly elected, returned by the use of corrupt means, even if originating with Senator Clayton himself, and that therefore he was not legally elected? The statement of such propositions furnishes its own answer. Neither legally nor logically could it be claimed that this committee would be called upon to go into a field so boundless, and which when explored would throw no legitimate light upon the controversy before us. And therefore we now incline to the opinion that all the testimony bearing upon the transactions before the assembling of the legislature, except as it is connected with and gives color to the election of Senator, except as it tends to show that it was brought about by fraudulent and corrupt means then used, may be dismissed. A large portion of the testimony is of this character. As we read the record Senator Clayton received a clear majority in each branch of the general assembly outside of those claimed to be thus fraudulently elected, and some of those whose elections are thus assailed voted against him, and this alone is all that need be stated upon this subject. The efforts in this direction have been most extraordinary—the statements of numberless persons having been introduced upon the theory that, as they were friends of Senator Clayton, friendly to his election and exerting themselves in his behalf—so there was a so-called conspiracy, and what all and each of said conspirators said would bind all. To admit that a conspiracy has been shown in any legal sense would be to set at defiance all the rules of law governing in such cases, and make every candidate in a bitter and protracted ntest of this character responsible for all that was said and done by all his friends, the foolish and the discreet, the good and the bad, the honest and the dishonest, alike. While we would do nothing to encourage fraud or to shield from responsibility any one seeking official position, and especially a position so high as a seat in this body, we would not enter a field of mere speculation and adopt a rule which is the most doubtful in theory and finds no support in practice or precedent.

It only remains to inquire into the alleged frauds connected with the election. And here the principal, if not only one, is that Senator (then Governor) Clayton issued to Hon. John Edwards a certificate of election to the House of Representatives of the present Congress, upon a corrupt bargain or agreement that he was to receive in return for the same the support of the Democratic members of the general assembly. If this charge is not maintained, we hazard but very little in saying that there is nothing left of this case. And a very brief statement will show how utterly groundless it is in fact.

With the question whether Edwards was or was not in fact elected we have nothing to do. He was accepted and recognized as the Democratic candidate for Congress, his competitor being Hon. Thomas Boles. Governor Clayton supported Boles in that election by his voice and influence. At one time there were two Republican candidates in the district for Congress (Judge Boles and Judge Searles). Through the influence of Governor Clayton and his friends, Judge Searles was induced to withdraw, leaving the field to Judge Boles, and this, too, notwithstanding Judge Searles was recognized as the more pronounced friend of the governor. That the object was to promote harmony and secure ultimate political success seems to be fairly well established.

In Pulaski County especially the Republican party was divided, one side being the warm and devoted friends of Governor Clayton, the other his bitter enemies. To some extent this state of things obtained in other parts of the State. At the election in this county in 1870, and particularly in the city of Little Rock, it was alleged that certain frauds intervened whereby illegal votes were cast for Boles, or if the votes were not illegal they were received and counted by judges selected without authority of law, and that their action was both illegal and irregular. Into all these matters we do not propose to enter, as our purpose in this connection is to state some facts generally, and then leave this part of the case.

By the statute of Arkansas it is the duty of the secretary of state, in presence of the governor, within thirty days after the time allowed for making the returns of the election, if the returns are all received, to cast up and arrange the votes from the several counties for member of Congress; and of the governor, immediately thereafter, to issue his proclamation declaring the person having the highest number of votes to be duly elected, and he is also required to grant a certificate under the seal of the State to the person so elected.

From the returns made to the office of the secretary of state there was no question as to the result. Boles was clearly elected. The duty of the governor under the law is ministerial, not judicial. By strict law he has no power to reject votes, nor to direct the counting of those returned by other than the proper officers. In this case, however, it was brought to his attention that frauds had been perpetrated, or, at least, irregularities had intervened, which should be examined into. In our opinion, under the law he had no power to enter upon such an inquiry; nor do we understand that he did.

A case was pending in the supreme court of the State involving the legality of the returns made from certain wards in the city of Little Rock and some precincts in the county, the determination of which was regarded as important in settling whether Boles or Edwards was elected to Congress.

The governor determined to wait, and did wait, that decision. The same question was brought to the attention of the legislature and referred to a committee, and he declared his purpose to await that action. In the wards referred to two polls were opened, one by the judges selected by the bystanders, the other by the judges regularly appointed or chosen. At the first the votes were almost unanimously for Boles, at the other very largely for Edwards. Counting the first and excluding the second, Boles was undoubtedly elected; if the latter were counted and the first excluded, and excluding votes for Boles in some other places, which it was claimed were fraudulent, then it was insisted that Edwards was elected.

By the decision of the supreme court and the report of the committee in the legislature, the elections held by the regular judges were determined to be the only legal ones, and following these decisions in part the governor gave the certificate to Edwards. In this he may have been mistaken.

But it would certainly be most extraordinary to say that the executive of a State may not follow the decision of its highest judicial tribunal—that he may not act upon the proceedings of the legislative branch.

As to the returns and the election, there was intense excitement. Factions were arrayed against each other, and each charging frauds without stint upon the other. If Governor Clayton mistook his duty, it was, at least, quite as much on the side of law and order as to have acted without investigation and in disregard of the action of the other co-ordinate departments of the State government. If it is said—and this is the effort, from the testimony—that the judges and legislature were actuated by base, unworthy, and corrupt motives; that they were all moved by him and in his interest, we can only answer that a charge so serious is neither probable nor reasonable. It would certainly require the very strongest proof to justify us in believing a charge so sweeping, affecting, as it would, almost the legality and validity of the entire acts of its officers, legislative, executive, and judicial.

But this is not all. General Edwards was given the certificate on the 20th of February, 1871. Governor Clayton was not elected until the 15th of March. True, he was elected at what is known as his first election on the 11th of January, 1871. But this election he declined. He holds his place now under the second election. At this but one Democrat (and he of doubtful political status) in the house voted for him, and he swears most positively that his vote was not influenced by the Edwards matter in the least. In the senate, if any voted for him, he had, without counting them, a clear majority of all, and as to those voting for him, if any, there is no evidence that they cared anything more for Edwards than Boles.

It appears, then—

First. That Clayton was the political friend of Boles and favored his election.

Second. That in issuing the certificate he discharged what seemed to be, and what he had good reason to believe to be, his duty, in following the decision of the supreme court and the action of the legislature.

Third. Nothing approximating a corrupt motive in exercising the power to inquire into the legality of the returns is shown.

Fourth. He gave Edwards the certificate before he was elected the second time, and after he had announced, at least, a contingent purpose of remaining in the office of governor.

Fifth. There was no necessity for a bargain with the Democrats in the legislature, for they were but too willing; being in the minority and without hope of being able to elect one of their own political friends, in view of what they considered to be their wrongs and the wrongs of their friends at the hands of the governor, we say they were but too willing to have him elected to the Senate and thus secure his resignation as governor, trusting and believing that a change could not possibly be worse for them.

Sixth. He did not receive any votes under any such agreement, and, least of all, any number sufficient to influence the result. And hence we conclude that nothing can be plainer or more manifest than that this charge is totally and entirely unsustained.

Something is said in the testimony of Whipple about railroad subsidies and bonds, and the action of Governor Clayton in that connection. This relates rather to his action as governor, with which we have nothing to do, than to the Senatorial election. So it is attempted to show or start the theory that he procured the resignation of White as secretary of state, and appointed Johnson, the lieutenant-governor, to the place made vacant by White, also the election of Hadley as president of the senate—all in pursuance of a corrupt arrangement by which he was to be elected to the Senate. It must be admitted that the stroke was a bold and most successful one. Governor Clayton had said to his friends from the stump and elsewhere that, while he was a candidate for the Senate and was desirous of success, he would never take an election and leave the State administration in the hands of Lieutenant-Governor Johnson. He was elected Senator in January and an effort was then being made in the courts to remove the lieutenant-governor. This was unsuccessful, and Governor Clayton declined the office of Senator. At the first election several of the Democratic members voted for him for reasons already stated. At this time and for weeks all parties were excited; the members were leaving the legislature to break a quorum; crimination and recrimination were the order of the day, and each party was struggling for supremacy. Everything was in disorder and confusion. The result no man could tell. At times they were apparently on the eve of an outbreak, if not of revolution. Then it was that White resigned his office of secretary of state. He was the friend of Governor Clayton, but apparently not more than of the other side—wanted to and was willing to serve him. Johnson was willing to take that place and vacate that of lieutenant-governor, and he was accordingly appointed. Hadley was elected presiding officer of the senate; Clayton was made Senator, and Hadley became governor.

If in all these changes there was nothing corrupt upon the part of Governor Clayton, then they are as harmless, so far as this investigation is concerned, as if they had occurred years before, or in another State, and without his suggestion or knowledge. The only testimony which tends to show anything of the kind is that of White, who swears that months afterward he received some money through Senator Clayton, but he explains what it was for, and states positively that it was not in consideration of his vacating the office of secretary of state.

But, without more, we here leave the case. In our opinion the charges, if such they can be called, are not sustained. The testimony fails to impeach the Senator's official conduct or character. All which we shall take occasion to show by a fuller reference to the testimony and record, when other duties will permit and it may be the pleasure of the Senate to receive the same.

Respectfully submitted.

GEO. G. WRIGHT.

I concur in the foregoing, as touching the testimony which "tends to impeach the official character and conduct of a member of the United States Senate," reserving a recurrence to the mass of testimony when opportunity offers for a full report.

LOT M. MORRILL.

VIEWS OF THE MINORITY.

JUNE 10, 1872.—Ordered to be printed, to accompany the report of the committee to inquire into certain allegations against Hon. Powell Clayton.

Mr. Norwood submitted the following as the views of the minority:

Protest against the report of the majority of the committee appointed to investigate the charges against Hon. Powell Clayton.

As a member of the special committee of three, appointed by the Senate to investigate certain charges made against Hon. Powell Clayton, United States Senator, and to report the result of such

investigation to the Senate, I most respectfully protest against the action of the majority of that committee in submitting their report at this time; and in justification of my course and in support of this protest, I beg herewith to submit the following facts and considerations:

This investigation, as stated in the report of said majority, commenced on the 18th day of January last and continued almost daily (Sundays excepted) until the 14th day of May. Thirty-eight witnesses were examined, and their testimony averages, each, about 125 manuscript foolscap pages. During the examination but two of the committee were generally present. Sometimes all were present, and often, by consent of Senator Clayton and James L. Hodges, who occupied the positions before the committee of prosecutor and defendant, but one of the committee was in attendance, the three alternating, so that no one member of the committee was present during the whole of the investigation. Hence no one member of the committee heard the whole testimony. Duty compelled our attendance in the Senate Chamber, and at no time did we sit while the Senate was in session. And as we sat generally from 10 a. m. to the opening of the session, many other duties made it necessary for one and another of the committee to be absent.

A few days after the majority of the committee determined to close the investigation, the chairman convened the committee to determine what course should then be taken. The resolution fixing the day of adjournment on the 29th of May was then in force, and we supposed Congress would adjourn on that day. In view of the immense volume of the evidence, which no one member of the committee had read through, in consideration of the brief time to elapse before the day then set for adjournment, and also of the determination of the committee to revise the record before having it printed, for the purpose of expunging such as might be irrelevant and much that was conversational between the counsel and the committee during the examination of witnesses, and thus to reduce the volume to a condensed and readable form, the committee at that time divided the manuscript into three parts, and each member took a third for the purpose of revising it and noting such portions as he considered might be expunged without detriment to the record. We discussed the probability of being able to make a report at the present session, and in view of this preliminary labor of expurgation, the shortness of the time allowed, as the day for adjournment was then set, and of our engagements in the Senate, then convening at 11 a. m. and holding night sessions, we saw no prospect of completing our labor so as to report before the next session of Congress. It was further agreed that we should, after examining the evidence and noting the irrelevant matter, come together at a time left indefinite, and consider well whatever each had marked as in his judgment unnecessary to the record, and the remainder would then be printed. We would then examine and weigh the relevant testimony, and make a report to the Senate.

Thus the matter remained until about a week ago, when the chairman assembled the committee and suggested that a report be made. In consideration of all that had occurred, as stated above, and of the fact that the committee had taken no action on the testimony preparatory to making a fair, full, and final report, I moved that the testimony be printed and that the original purpose of the committee be carried out, and that a report should be made at the next session of Congress. This suggestion was not adopted, and on the 3d day of June instant the chairman submitted to the committee for its action the document now presented to the Senate as the report of the majority.

The majority admit that a careful examination of the testimony has not been made; that they submit "a conclusion reached from their recollection of the evidence at the time it was submitted and their subsequent examination;" that the report is only "partial;" that they intend to make "a further and final report;" that they withhold the testimony, and recommend that the Senate take no action on their report until it can "act with greater safety and intelligence."

I do not intend to enter on a consideration of the merits of this case. I regard the action of the majority of the committee as premature (as they admit) and unprecedented. What power has a special committee to make a report by halves? Besides, what necessity exists for a report at this time? It is true the majority say that justice to the Senator accused requires it. But why and how? What injury can follow by waiting until our labor could be completed? Confessedly it is incomplete. Confessedly the evidence must be thoroughly examined and another report must be made.

The report submitted refers to but a small portion of the material evidence taken by the committee, and while I will not express an opinion as to the effect of the testimony until I shall have given it that careful and serious consideration which the gravity of the charge and the dignity of the Senate require and demand, I will say that I think the conclusion of the majority very hastily drawn.

Referring to the testimony of Wheeler and Whipple, they extract the following as constituting the charges (if such they can be called) upon which this investigation was instituted.

CERTIFICATE TO EDWARDS.

[Extract from the testimony of Edward Wheeler.]

"Examined by Mr. BLAIR:

"Question. What was the reason assigned for Clayton acting as he did?—Answer. It was generally regarded that he expected by supporting Edwards to gain some Democratic votes in the legislature for United States Senator.

"Q That it was for his own interest and to secure his own election as Senator?—A. It was so understood; yes, sir.

"Q. That is the explanation of it?—A. That is, the object of the frauds in Hot Springs County was to put Clayton men in the legislature; the object of the frauds in Pulaski County was to put Democrats in the legislature, for the Clayton faction had a very small vote in that county and the Democrats were given seats in the legislature. It was claimed, and it has been sworn to by some prominent Democrats, that General Edwards was given the certificate upon a trade made by Senator Clayton that certain parties would not contest certain seats in the legislature. That was the testimony developed in the investigation made in the Boles and Edwards contested-election case."

[Extract from the testimony of William G. Whipple.]

"Examined by Mr. BLAIR:

"Question. What was the motive of the governor in giving this certificate to a man

who was not elected?—Answer. Of course it is very hard to tell what his motive was. It is generally understood that it was done in pursuance of a trade.

"Q. Of a trade?—A. Yes, sir; that is the general understanding.

"Q. What was the trade?—A. That the Democratic members of the legislature should support him for the Senate of the United States.

"Q. Did they do it?—A. Yes, sir; they did.

"Q. And the governor carried out his part of the bargain?—A. Yes, sir; it seems very plain that he did that.

"Examined by the CHAIRMAN (Mr. Scott):

"Q. There was a majority of Republicans in the legislature that elected Governor Clayton to the United States Senate?—A. Yes, sir.

"Q. And when these two divisions came into conflict in regard to electing a United States Senator, you say the Clayton men entered into a corrupt combination with the Democrats by which the Democrats agreed to vote for Governor Clayton for the Senate of the United States in consideration of Governor Clayton giving a certificate of election to the Democratic candidate for Congress in the third Congressional district of the State?—A. That is believed by many persons.

"Q. You have already stated that here as the general belief in the State?—A. Yes, sir.

"Q. Is that your belief?—A. Well, it is my belief that Clayton made some trade with the Democrats. Precisely what were the terms of the trade I would not undertake to say.

"Q. You have already put it in that form in your testimony. I want to understand if that is your belief.—A. I do not think I put it in exactly that form.

"Q. You stated that to be the general belief.—A. I think it is the general belief.

"Q. Do you include yourself among those who entertain that belief?—A. Well, I have reason to believe it, and I know of no reason why it is not true."

ELECTION TO THE SENATE.

[Extract from the testimony of William G. Whipple.]

"Examined by Mr. BLAIR:

"Question. What condition of affairs in Pulaski County was disclosed by the investigation, so far as it went?—Answer. There were shown many instances of fraudulent registration; parties who were not voters were awarded certificates by the registrars; there were many cases of parties registered in the wrong ward of the city or the wrong precinct in the county. For instance, parties would present themselves in the Second ward to be registered, and would be registered in Big Rock Township. There were many instances of that kind, where parties were registered in the wrong places.

"Q. In whose interest were these frauds perpetrated?—A. In the interest of what was known as the Clayton party.

"Q. For the purpose of electing men who would support him for Senator of the United States?—A. Yes, sir; and in many cases to defeat the Republican candidates.

"Q. Who would not vote for him as Senator?—A. Who would not pledge themselves to support him for the United States Senate. That was the case in Pulaski County, where the Clayton vote was understood to have been thrown to secure the election of Democratic candidates for the legislature as against the Republican candidates, because the former were expected to support Clayton and the latter were not.

"Q. Did they support him?—A. They did support him; yes, sir, they voted for him for United States Senator.

"Q. As I understand, Governor Clayton was elected Senator, and declined to accept?—A. Yes, sir.

"Q. What was his reason for declining to accept when first elected?—A. What reason did he assign?

"Q. Yes.—A. The reason that he assigned was that the interests of the Republican party in Arkansas required that he should remain governor. But that was not the general understanding at all.

"Q. What was the general understanding on the subject?—A. The general understanding was that he declined the election to the United States Senate because, if he went to the Senate at that time, he could not leave the government of the State in the hands of his friends.

"Q. Who would have been governor if he had not declined to go to the Senate at that time?—A. The lieutenant-governor, James M. Johnson.

"Q. Was he a friend of Clayton?—A. He was not a friend of Clayton at that time; he was a Republican.

"Q. How did Clayton subsequently arrange that, when elected the second time?—A. On the eve of the second election, I think the day before, Lieutenant-Governor Johnson

resigned his office as lieutenant-governor, and was appointed secretary of state by Governor Clayton, Secretary White, the previous secretary, having resigned. Thereupon, Senator Hadley was elected president *pro tempore* of the senate, and became acting governor of the State upon the election of Governor Clayton to the United States Senate.

"Q. He is understood to be a friend of Clayton?—A. Governor Hadley?

"Q. Yes.—A. Yes, sir; he is understood to be a Clayton man, out and out."

INDICTMENT.

[Extract from the testimony of Edward Wheeler.]

"By Mr. BLAIR:

"Question. Were you a member of the grand jury of the United States court last spring?—Answer. Yes, sir; and its foreman.

"Q. When was the sesion of that court held?—A. It commenced on the 10th of April last.

"Q. Were any indictments found by that grand jury under the act of Congress known as the 'enforcement act?'—A. Yes, sir; there were several found.

"Q. Against whom? Who were indicted?—A. There were six or seven different parties indicted in Hot Springs County; judges, and clerks of elections, and registrars; also some six or seven in Clark County for frauds in elections; and Governor Clayton, of Pulaski County, was indicted.

"Q. What was the offense for which Governor Clayton was indicted, and what was the evidence upon which he was indicted?—A. The evidence was entirely documentary, being the returns in the office of the secretary of state. The witnesses were the ex-secretary of state and the deputy secretary of state. They brought the returns, or a tabular statement of them sworn to, and laid it before the grand jury.

"Q. Those returns were of what election, and in what counties?—A. In the election for members of the Forty-second Congress, and in the counties composing the third Congressional district of the State of Arkansas. I do not now remember all of the counties by name. It is the district in which the county of Pulaski is embraced; our county is one of the counties of the third Congressional district.

"Q. What was the action of Governor Clayton that led to his indictment?—A. The first that I, or any member of the grand jury, knew of the matter was the bringing of the case to our attention by the district attorney; he came to me with a list of witnesses, three in number, which he wished to have subpœnaed. He said the case had been called to his notice, and he wanted it brought before the grand jury for examination. I subpœnaed the three witnesses: the ex-secretary of state, the deputy secretary of state, and General Edwards, the person to whom the certificate of election for Congress had been given by Governor Clayton. It was claimed that Governor Clayton had violated certain sections of the enforcement act in giving the certificate of election to General Edwards, when the returns, as exhibited to us by the secretary of state, showed that Judge Boles had been elected. General Edwards presented a copy of his certificate of election, and of the proclamation of the governor, stating that, according to the returns on file in the office of the secretary of state, General Edwards had been elected. But the returns, as exhibited to us, showed that Judge Boles was elected by some 2,130 votes, I think it was, on the full vote, counting the votes at both polls. There were allegations of fraud on both sides. But giving the governor the benefit of every doubt, the least majority for Judge Boles that we could figure out was some 800 or 900; I forget the exact figures. That was according to the returns shown to us; and upon that showing the indictment was found.

"Q. Under what part of the act was the indictment found?—A. I think it was the twenty-second section of the enforcement act. And our State laws require the canvass of the returns to be made by the governor, assisted by the secretary of state; the governor is made the canvassing officer. The law was explained to us by the district attorney, and it was claimed that the governor had violated the twenty-second section, I think it was, of the enforcement act; the one providing that if any officer shall issue a fraudulent certificate of election to any party, he shall be amenable, &c."

Again:

"Q. And the grand jury found that that was a fraudulent certificate?—A. They found that this proclamation of the governor, issuing the certificate of election to Edwards, was not in accordance with the returns in the office of the secretary of state as laid before us."

"By the CHAIRMAN:

"Q. What was the specific offense with which the governor was charged?—A. I think the district attorney, who is in this city, has a copy of the indictment, and he can probably explain these matters much better than I can."

Again:

"Q. The other case of indictment you have referred to is one against Governor Clay-

ton, for giving the certificate you have read?—A. For furnishing a certificate of election to John Edwards.

"Q. The State law, you say, makes the governor the canvasser of the returns?—A. It makes it the duty of the governor, within thirty days after the election, to make a canvass of the votes, make proclamation, and issue certificates of election.

"Q. In the discharge of that duty is the secretary of state associated with him in any capacity which would invest him with authority to decide; or does the governor merely consult him?—A. His duty is merely clerical; the governor is the canvassing officer proper. I think the law states that the canvass shall be made by the secretary of state in the presence of the governor, and the governor shall, by proclamation, announce the result.

"Q. It makes it the duty of the governor to award the certificate to the persons whom he judges to be elected?—A. Yes, sir.

"Q. The responsibility of the decision is upon the governor?—A. Entirely.

"Q. And it was because, upon the evidence presented, you believed that the governor had decided wrongfully?—A. Yes, sir, according to the returns laid before us.

"Q. You found a true bill against him?—A. Yes, sir.

"Q. And that case is now pending for trial in the United States court?—A. Yes, sir."

Again:

"Q. You heard, of course, nothing but the evidence on the part of the Government; there was no defense?—A. Of course there was no defense.

"Examined by Mr. POOL:

"Q. You sought for no facts as explanatory of the governor's action?—A. No, sir, we knew of nothing; we could get at nothing but the returns.

"Q. Was any witness sworn before the grand jury other than the secretary of state, the—— A. The ex-secretary of state. The present secretary of state was not then in the city. He had but recently entered upon the duties of his office, and his chief clerk was made deputy secretary of state, and he was before us in regard to the records.

"Q. In relation to the authenticity and correctness of the report?—A. Yes, sir. And General Edwards was before us as to the correctness of a copy of the certificate which had been furnished us.

"Q. And you examined no witnesses outside?—A. No, sir."

These witnesses testified more at length before the "joint select committee," &c.; but the foregoing it is believed contains all that is necessary to show the precise charges made. They may be considered under three heads, to wit, certificate to Edwards, election to the Senate, and corrupt bargain.

Without discussing what would be the effect if any or all these charges were sustained, or the propriety or power of this body to consider the same, interesting and important though such a question might be in a proper case, we proceed at once to state our views of the case as submitted to us without reaching the inquiry indicated.

Disregarding, then, chronological order, we shall consider first the matter of the indictment.

It appears that Senator Clayton was indicted for the violation of the twenty-second section of the enforcement act, in fraudulently giving the certificate of election to General Edwards when, as is claimed, it should have been given to his competitor, Judge Boles. He was governor, and as such did give the certificate of election to General Edwards. The language of said section, so far as here material, is that "any officer of any election at which any Representative or Delegate in the Congress of the United States shall be voted for * * * who shall * * * fraudulently make any false certificate of the result of such election in regard to such Representative or Delegate * * * shall be deemed guilty of a crime," &c. By the law of Arkansas it is provided that the secretary of state shall in the presence of the governor, or, &c., cast up and arrange the votes of the several counties, or persons voted for as members of Congress, and that the governor shall immediately thereafter issue his proclamation declaring the person having the highest number of votes to be duly elected, and that he shall grant him a certificate thereof under the seal of the State.

It seems that the secretary of state did thus cast up and arrange the votes in the election between Boles and Edwards. It also appears that by the showing thus made Boles and not Edwards had a majority of the votes, and was hence apparently entitled to the certificate.

This canvass of the votes took place within thirty days after the election (the election being on the 8th of November, 1870), and yet proclamation was not made nor was the certificate issued until in February, 1871.

Immediately after the election divers affidavits and some documentary evidence were presented to the governor, tending to show that in one of the counties (Pulaski) of said Congressional district frauds had intervened which, being considered, would exclude a

large number of votes cast for said Boles and thus elect Edwards. About the same time proceedings were instituted in the supreme court involving the validity of said election, and the votes thus claimed to be fraudulent or irregular, and they were afterward by the judgment of said court determined to be fraudulent and illegal. To state the claim more particularly it was maintained in said affidavit and evidence, as also in said proceedings in court, that the polls in some of the wards of the city of Little Rock (Pulaski County) and some precincts in this county were taken possession of by force, violence, and contrary to law, judges of election installed without right, and other illegalities and irregularities practiced, and notwithstanding the proper and legal judges also held an election at the appointed places, the votes received at the illegal polls and by the judges illegally chosen were the votes received and canvassed. When the legislature met the same questions were there made as to the members of the house and senate voted for in said localities at the same time, and claiming seats under such alleged illegal election, and it was determined adverse to their claims. After all this the governor issued the certificate to Edwards.

It is claimed by those prosecuting the charges here that even excluding the so-called illegal returns Boles was still elected. This we are not prepared to concede, for it seems very clear that there is one method of canvassing the returns, and not at all without warrant in the figures if certain facts are admitted, which would elect Edwards.

This will be seen in the following statement:

By the returns from all the counties, as canvassed by the secretary of state, it appears that Boles received 10,344 votes; Edwards received 8,211 votes. The governor excluded from the count the votes cast in the First and Third wards in the city of Little Rock, and in certain precincts or townships in the county of Pulaski, in all of which the election had been declared illegal by the legislature, of which excluded votes there had been cast for Boles 2,385, which being deducted from the above number, counted for Boles, left him 7,959, and of which excluded votes there had been cast for Edwards 202, which being deducted from the above number counted for him left him 8,009; thus showing a majority for Edwards of 50 votes.

But conceding that Boles was actually elected and hence entitled to the certificate, it would by no means follow that this indictment was well founded, nor that Senator Clayton was consciously and willfully violating his duty or conniving at a violation of the law.

We concede that in strict law the functions of the governor in relation to the proclamation of the result and granting the certificate were ministerial and not judicial. His duty was simply to declare the result and deliver the certificate of his election to the party appearing to have a majority by the canvass thus made. He had no power strictly to go behind the canvass and inquire into the alleged frauds; for the returns were to all appearances legal and formal, and the evidence *aliunde* was for Congress if the question was raised of their illegality, and not for the executive. But it by no means follows that he was guilty of the fraudulent act forbidden by the enforcement act if he did go behind the returns.

In the first place he was not amenable under the statute for this act, because in our opinion he was not an "officer of any election" within the meaning of the statute. This was expressly so held by the circuit court of the United States for the district of Arkansas, his honor Judge Dillon presiding—a jurist of the clearest head, the most incorruptible integrity, and the finest legal attainments—when the question came before him in the indictments, and of its correctness we think there can be no reasonable doubt.

But if such officer, the governor might well in the utmost good faith, though without strict legal warrant, esteem it to be his duty to go behind such returns if it was brought to his attention that fraud had intervened. A mere mistake as to his powers and duties—the exercise of judicial instead of ministerial powers in that connection—would by no means establish the required fraudulent intent. And when we remember the circumstances that such frauds were brought to his attention; that he supported Boles and not Edwards in that election; that he exerted himself to procure the declination of a third candidate (Judge Searles) who claimed to be a regular Republican candidate, and whose candidacy endangered the election of Boles and rendered more probable that of Edwards; that Boles was recognized as the candidate of the party with which the governor has continually acted, and that Edwards was the candidate of the opposition; that at least some evidence was furnished to him of the alleged frauds; that the highest judicial tribunal of the State had declared against the validity of such returns; that the legislature had reached the same conclusion—we say when all these things are remembered we should be compelled to overturn all rules of evidence to say that, while he acted without warrant of law, he also acted fraudulently. A party may mistake the plainest legal duty, and yet have no criminal intent. And so we find in this case that the governor, if an officer of election, did not act fraudulently, hence was not guilty of the

offense charged, and that thus far there is nothing to "impeach his official character or conduct as a member of this body."

Second. Alleged frauds leading to and connected with his election as Senator.

We inquire in the second place into the charge of fraud leading to and connected with his election as Senator.

By reference to the testimony of Whipple (set out above) it will be seen that this is based upon alleged fraudulent registration, and some supposed bargain or arrangement by which Johnson resigned his office as lieutenant-governor, taking the place of White, who resigned as secretary of state, Hadley becoming governor and Clayton Senator. Than this few things could be more vaguely stated so far as the testimony of Whipple discloses, and yet this is all, it is believed, to be found therein approximating a charge in this connection. We have sought not to put too narrow a construction upon the language used, nor have we been in the least inclined to limit the investigation within limits even so narrow as the charges here contained under the most liberal construction. And hence, upon the theory of the prosecution, that Senator Clayton, with many others, his friends, had conspired by the use of unlawful and corrupt means to secure his election to the Senate, much testimony was received as to appointments to office figuring in and preceding the conventions which nominated candidates for the legislature, the issuing of State bonds to railroad companies, certain influences which it was claimed were brought to bear on members of the legislature looking to his election, and other like matters, though nothing of the kind was charged or pretended in the testimony referred to us.

Of course a most material preliminary inquiry would be to what extent a party thus charged is to be affected by the acts, conduct, admissions, pledges, or promises of his friends, and hence the theory was that there was a conspiracy for the purpose indicated, and that what was said or done by one in furtherance of the common purpose was said or done by all, and that upon such hypothesis Governor Clayton was bound by all that was said or done by those engaged in the common design.

As stated in the "partial report," much of the testimony was received upon this theory of the prosecution—it being conceded that if the so-called conspiracy was not established it was in every respect incompetent. Since making that report we have carefully examined the testimony, and feel bound to hold that it falls far short of establishing the alleged combination, and hence that a large portion of the testimony should be excluded. We therefore report only such as we believe to be competent in this view of its scope and effect.

We shall be pardoned for stating the familiar proposition that to constitute a conspiracy there must be a combination of two or more by concerted action to accomplish a criminal or unlawful purpose or to accomplish a purpose not in itself criminal or unlawful by unlawful or criminal means. The conspiracy is the gist of the offense, and it is not necessary that any act should be done in pursuance of such unlawful agreement. To make the acts or declarations of another evidence against the party charged the common design must first be established, and it will not do to connect the party charged or bring him into the alleged conspiracy by the admissions of others without his knowledge or without at least some recognition by him of their right to speak for or bind him.

In this case the purpose to be accomplished was neither criminal nor unlawful. The parties confederated, if at all, to accomplish a proper purpose by the use of unlawful or criminal means. And the whole of the case is, to put it in its strongest light, against Senator Clayton; that he is to be bound by all that was said and done by his friends, and simply because they were such, whether at the State capital or elsewhere, in their efforts to secure his election. We do not stop to determine whether these acts were or were not illegal, whether they can or cannot in all respects be defended; we only hold that there is no particle of testimony warranting the conclusion that he ever combined with them to use unlawful or criminal means. And if he is to be held responsible for every indiscreet remark made by overzealous friends, by every inducement just or otherwise held out by them to members of the legislature, for every appliance made use of by political and personal friends in the election of the members thereto, for the alleged combinations made in connection with proposed legislation, for all the alleged frauds in connection with registration in some parts of the State near and remote alike—we say, if this be the rule, few men would want friends in such a contest, or would be safe, however honest and upright their own conduct.

Many things were said and done by friends of Senator Clayton which we might not approve. Nor would we for a moment recognize any rule which would not exact or require the highest integrity and most honorable conduct in contests of this character. On the contrary, we would condemn without reserve every step, every word, every movement, which would seem to tend to the least fraud or corruption in an election so important. And yet, in view of the duty assigned us, we have nothing to do with mere matters of personal propriety, nor are we to determine whether all the plans, plots, and counterplots of these opposing factions were in all respects to be justified by a code of

ethics ever so desirable, and yet perhaps too seldom practiced. We have to do with the practical question whether Senator Clayton was himself a party to such fraud and corruption as invalidate his election or impeach his official character.

In the whole mass of testimony there is but little to connect him with the various schemes which it is alleged were corrupt in their inception and consummation, touching his election. Witnesses, it is true, did testify as to what others said, but that they spoke with the knowledge or concurrence of the party charged is left entirely without proof in many instances, and when the proof is supplied it relates to matters so entirely immaterial or foreign that it is scarcely worthy a moment's attention. One witness (McConnell) undertakes, we know, to bring all the matters detailed by him, or many of them, home to the Senator. But we feel bound to say that in many respects his story is improbable, and he stands before us in such an attitude that we are constrained to discredit much that he says. While before us he was almost a wreck from long-continued dissipation, and we were compelled to put him under treatment for several days before his testimony could be completed. Add to this that several witnesses, having the means of knowledge, testify unhesitatingly that his reputation for truth and veracity is bad, and it seems to us that no tribunal would be justified in condemning any one upon the mere recollection of such a witness, months after the transactions occurred.

That which approximates nearest any improper action on the part of Senator Clayton, in this connection, relates to the steps taken to induce White to resign the office of secretary of state. It will be seen that Clayton was governor and Johnson lieutenant-governor. When the former was first elected to the Senate, Johnson was still lieutenant-governor, and would, if the governor accepted the Senatorial position, succeed to the gubernatorial office. Clayton had pledged his friends, both before and after the meeting of the legislature, that he would not accept the position of Senator if Johnson was to be left as governor. At the time proceedings were pending in the supreme court of the State to oust Johnson, but the proceedings failed, and thereupon Clayton declined the Senatorship. He still desired to be Senator, and yet determined to maintain his pledge to his friends. After much consultation among his friends and others, an arrangement was effected by which White resigned. Johnson was appointed by Clayton to his place as secretary of state, and then Hadley was made presiding officer of the senate, and, upon Clayton's election again to the Senate, which followed soon after the above resignations and appointments, he became governor. Months afterward White received, as we find, through Senator Clayton, $5,000 in money and $25,000 in railroad bonds.

In the resignations and appointment themselves there was nothing wrong. There is no testimony that Clayton made use of improper means to bring them about. White, who is the only witness who seems to know much about it, says that he was a friend of Governor Clayton—was anxious for the harmony of the party—had frequently expressed his readiness to do anything to bring about quiet and peace; that he had for months, because of the condition of his family, expressed his intention to resign; that he had some business relations with the opposing faction, which was in such a situation that he knew he must suffer if by his resignation Johnson could be got out of the way; that he did thus suffer, and that this $5,000 was paid to indemnify him for this loss. He expressly denies that this money or his resignation was any part of any corrupt or other improper agreement or prior arrangement touching the Senatorial election. To this view of the transaction there is no direct opposing testimony. Who furnished the $5,000 and the bonds is not shown, except that they were deposited by Jackson E. Sickels to the credit of White, and the certificates of the deposit were sent to him by Senator Clayton. To conclude that it was paid in pursuance of a corrupt agreement, under and by which Governor Clayton secured his election, we should have to proceed upon presumption in the face of positive statement; and this, too, without any evidence that the vote of any member of the legislature was influenced by it, at least to his advantage; and when, also, it had been demonstrated more than once that he had at the time a clear majority of both houses of the legislature. What he wanted was not votes, for he had them, but he wanted such a condition of things as that he could take the office and keep faith with his friends.

By the retiring of White, Johnson would go to an office more desirable in tenure and emolument than the one he held, which was apparently sufficient to induce the step. The votes of the members of the legislature did not seem to have been involved in the movement, and White was content to see the matter arranged and to retire from a position that had become irksome to him. There was no necessary connection between the arrangement with White and the votes of members of the legislature. In itself there was nothing either criminal or corrupt. Certainly there is no law, State or national, punishing such an act. If not a part of a corrupt agreement, by which votes were obtained, or intended to be secured, we cannot see how the arrangement can be made to affect his official character. Then, too, it must not be forgotten that the conference touching White's resignation was not with Clayton, nor ostensibly on his account, but quite exclusively between Hadley and White, and that Hadley was deeply interested on

his own account in bringing about White's resignation, for, in that event, the chances were, if indeed it was not certain, that he (Hadley) would become governor, and while the money passed through the hands of Clayton, in view of the other interests involved, we cannot say that others may not have contributed it; and, in a matter so important and so vitally affecting the character and official position of a member of this body, we should not indulge in mere presumptions nor upon impression condemn him. Without giving our approval to the course pursued, we find nothing in it of such a corrupt or criminal nature as to vitiate the election, or to warrant a disturbance of his present official position.

But one matter remains to be considered, and that relates to the alleged corrupt bargain by which Senator (then Governor) Clayton issued the certificate of election to General Edwards, in consideration of receiving votes for his present position in the legislature of Arkansas.

This charge, though the one in which this prosecution mainly originated, has less apparent support than either of the others. Much that has been heretofore said is applicable here. The testimony, instead of showing the corrupt bargain, abundantly establishes that the Senator (then governor), though acting from an incorrect view of the law and his duty, nevertheless was carrying out what he had at least fair reasons to believe the will of the people, as expressed by their votes. He had evidence tending to show frauds. He had the solemn judgment of the highest court of his State, and the action of the law-making power touching the very point upon which he seemed to doubt; and he but followed such judgment and action. To say that he acted corruptly or fraudulently under such circumstances, we would have to conclude that not only he had the fraudulent purpose, but that the other co-ordinate departments of the State government were corrupt, or governed by a like fraudulent intent. These charges, as applied to the court and the legislature at least, are too grave to be believed upon this record, or in any case where the evidence is not of the most conclusive and satisfactory character. This conclusion should not be based upon mere presumptions—upon the impression of witnesses—upon the understanding of parties influenced not a little by their political and personal feelings and animosities. And yet, divested of all extraneous matter, this is all there is of this claim.

But, going one step further, the charge certainly fails from the fact that there is not a particle of evidence that any member in either house of the legislature was induced to cast his vote in consideration of giving the certificate to Edwards. The claim is that he was to receive the votes of Democratic members in return for his action; and yet he received but one vote that can by possibility be classed among the Democrats (and even his political status is left doubtful). This person was a witness before us, and he says positively that he voted for Clayton, but that there was no understanding or agreement that in consideration thereof Clayton was to issue the certificate to Edwards. And there is no evidence nor a single circumstance in the whole record in the least in conflict with his statement. There is therefore absolutely nothing in the least supporting this charge.

We are therefore brought to the conclusion, after a careful examination of all the facts, that there is nothing disclosed touching the charges made as found in the testimony of Wheeler and Whipple before the "joint select committee" impeaching the official character and conduct of Senator Clayton. We accordingly recommend the adoption of the following resolution:

Resolved, That the charges made and referred to the select committee for investigation affecting the official character and conduct of the Hon. Powell Clayton are not sustained, and that the committee be discharged from their further consideration.

Respectfully submitted.

GEO. G. WRIGHT.
L. M. MORRILL.

VIEWS OF THE MINORITY.

Mr. Norwood submitted the following as the views of the minority:

As the minority of the committee of three appointed by the Senate to investigate and report upon certain charges made against Senator Clayton, I have been unable to agree with the majority in the conclusions to which they have come, and I therefore beg to submit to the Senate the conclusions to which I have arrived after a careful review of all the facts.

I regret that the majority of the committee did not see fit to lay before the Senate, embodied in their report in abstract form, more of the facts, as it would have enabled me to express my views in much shorter compass. I will, however, embrace none which I do not consider necessary to a correct understanding of the case as made.

The general charge made against Senator Clayton is that he used corrupt means to secure his election to the United States Senate. This general charge embraces several specifications, to wit:

1st. That he corruptly used his executive power as governor of Arkansas in 1870 in

appointing registrars of election to register votes for members of the general assembly, by which he was elected a United States Senator, who as his friends and in his interest would register with a view to elect candidates in favor of him for the Senate.

2d. That when primary meetings were being held in the counties to nominate candidates for that legislature he went about the State and, in person and by his friends and agents, manipulated these nominations in his own interest; and to effect this end used his executive patronage to intimidate candidates opposed to his election to the Senate.

3d. That he either in person or through his friends and supporters for the Senate made a corrupt engagement, express or understood, by which his influence was to be given in favor of the election of General John Edwards, the Democratic candidate for Congress, in consideration of the support to him of Edwards and his supporters for the Senate.

4th. That in pursuance of this understanding he issued to Edwards the certificate of election in the face of a clear majority, according to the official election returns in his (the executive) office, in favor of Judge Boles, the Republican candidate opposing Edwards.

5th. That being under a pledge publicly and privately made to his political friends that he, if elected United States Senator, would not leave the governorship in the hands of Lieutenant-Governor J. M. Johnson, a Conservative, he corruptly instituted through his friends and supporters a proceeding by *quo warranto* to depose Johnson from office in order to clear the way to the Senate.

6th. That being elected Senator while the *quo warranto* was pending, when that was decided in favor of Johnson, he resigned the Senatorship, and afterward secured his reelection by inducing R. J. T. White, secretary of state, in consideration of a large sum of money, to resign and inducing Johnson to take White's place.

7th. That he corruptly procured the votes of many members of the legislature in support of himself for the Senate by paying money; by appointments of themselves and friends to lucrative offices; by granting to them and their friends State aid to railroads in which they and their friends were interested.

Before proceeding to state the testimony bearing upon and sustaining these specifications, I will remark, in order that the Senate may appreciate the extent to which Senator Clayton must have wielded his executive power, the energy he must have displayed, and the means he must have employed to make sure his election, and to increase the probability of the truth of witnesses who detail these means, that his contest for a seat in the Senate extended over a period of two years. This fact he states near the close of his own testimony when endeavoring to explain the statement made by H. L. McConnell, his former private secretary and political supporter, that Clayton told him the day after the second election "the fight had cost him (C.) in the neighborhood of $20,000." His extreme desire to be a Senator likewise throws much light on many acts whose full force might not otherwise be realized. In a conversation held by Clayton, Lieutenant-Governor Johnson, Thomas M. Bowen, Joseph Brooks, and J. L Hodges, a short time before Clayton's second election, Brooks and Hodges both testify that Clayton stated he had long earnestly desired to be a Senator; that it was the dream of his life; that he was as ambitious as Cæsar; and that had he his way he would sway the scepter of universal empire.

I would further state that by the laws of Arkansas under her new constitution the governor is clothed with unusual power and patronage. It is sufficient in this connection to say that, with all the other power and patronage incident to the executive of each State, he has the power of appointing judges, sheriffs, and justices of the peace. We will have frequent occasion to remark with what vigor, if not rigor, such power, energized by such desire and ambition, was brought to bear in his Senatorial contest on friend and foe.

The contest was exclusively Republican. Clayton had two opposing aspirants, McDonald, former United States Senator, and a negro named White, both Republican. The legislative, executive, and judicial officers were all Republican. There was no hope for a Democrat to succeed. Of eighty-one members of the house in 1871 fifty-eight were Republicans and twenty-three Democrats, as stated by Tankersly, the speaker. The oppressive disqualification of votes excluded a sufficient number of Democrats from the polls to throw the power (except in a few counties) into the hands of the Republican party. And such was and is the extraordinary power confided to registrars of election to receive or reject a voter's name—and to the board of review to retain or erase the names of voters registered—that the control of a governor over an election by appointing his friends and supporters on those two boards was only limited by his own integrity and that of his appointees.

In this contest the Republican party, being overwhelmingly strong, split by its very weight into two factions. They came to be known respectively by the names of "Brindletails" and "Minstrels." Either claimed to be the elect. Governor Clayton led the lat-

ter while Joseph Brooks was the acknowledged head of the former. The hosility felt toward each other was very bitter. Around either leader were gathered many ardent defenders. And as exemplars of the characters who were from first to last the warm and confidential friends of Governor Clayton I beg to give what the evidence shows to be the *morale* of the most prominent of those whose acts and sayings during the Senatorial struggle are very important in determining the charges made against Senator Clayton. For from their confidential relations to him, from their constant conference with him during and before and after the session of the legislature which elected him, from their interest in his success and dependence on him for office and other favors, we are enabled to decide to what extent their acts and sayings were the acts and sayings of Governor Clayton. We learn also with what kind of men Governor Clayton used to accomplish his purposes. His chief adviser and constant attendant was Thomas M. Bowen. There is scarcely a witness who testifies to an interview with Governor Clayton during that contest, extending through two and a half months, who does not speak of Bowen being present. He attended all the caucuses of Clayton's friends, was a regular lobbyist during the session for Governor Clayton, was most of his time in the executive office, and was present at several long, protracted interviews held at night between Governor Clayton and others of the opposition whom Governor C. was endeavoring to appease. Judge Bowen's motto, as testified to by Brooks and Hodges and undenied, was, "politics is but a game," and that the admission or non-admission of a contestant for his seat in the legislature is a mere question of party policy. This declaration of political ethics will be seen bearing its fruit in the subsequent conduct of its author.

Another adviser and confidential friend was John McClure, chief-justice of the supreme court, the appointee of Governor Clayton. The testimony shows that he was frequently with Governor Clayton during his contest; that he was editor of a partisan gazette in Little Rock, advocating Governor Clayton's election to the Senate while occupying the supreme bench; that as such editor he accepted a large sum of money from the friends of a bill to silence his opposition to the bill; and that he during that time engaged, or offered to engage for a large sum, to lobby a bill through the legislature. These facts, except the last, he establishes by his own testimony in this investigation. A third warm and zealous co-worker for Governor Clayton's election was Judge Bennett, also of the supreme court of Arkansas, and appointed by Governor Clayton. The testimony of W. R. Rogers throws much interesting light on his character. He was a hotel-keeper in Illinois, failed, joined the Federal Army, went to Arkansas as a captain, resigned, and read law; was appointed about a month after his admission to the bar by Governor Clayton as circuit-court judge, and was soon after (during the session of that legislature) appointed by Governor Clayton to the supreme bench. His influence with Governor Clayton was supposed (says Rogers) to be greater than that of any man in the State, and hence during that session of the legislature, while Bennett was on the supreme bench, he accepted from Rogers and others interested in a large railroad bill a proposition to use his influence with the board of railroad commissioners (composed of Governor Clayton, White, secretary of state, and one Thomas) to procure a grant of State aid to the road, and charged $70,000 ($1,000 per mile) for his influential service. His influence was effective. The aid was granted, the bonds were issued, and Bennett received from Mr. Dorsey (interested with Rogers) $35,000. During the Senatorial contest he was very often in Governor Clayton's office and on the floor of the house.

Another scarcely less conspicuous character and equally zealous supporter of Governor Clayton for the Senate was Charles W. Tankersly. He is a Virginian; joined the Confederate army; deserted; joined the Federal Army; "misappropriated public property" (a horse); was dismissed the service, and retired to private life in Philadelphia till the war closed. He then went to Arkansas; enlisted under Governor Clayton in his contest for the Senate; was elected a member of the legislature; was nominated by Clayton's friends for speaker and elected. McLane swears that Tankersly told him Governor Clayton sent for him (T.) before the legislature assembled and requested him to run for speaker. It will be seen that in this contest he was not a deserter, but was true to his colors, and received, after Clayton's election, his reward in his appointment as superintendent of the penitentiary.

Another and very prominent actor in these scenes, and a devoted friend of Governor Clayton, was O. A. Hadley. He was a senator in that general assembly. He was General Clayton's agent to make the offer to R. J. T. White to pay him a large sum of money to vacate his office, and thus remove an insurmountable obstacle to Clayton's election to the Senate, as I shall show hereafter. That being accomplished, Hadley was elected president of the senate (*vice* J. M. Johnson, who took White's place), and while governor he continued to preside over the senate until certain bills (such as the levee and others) were passed. As this dual service as president of the senate and governor was contemporaneous, and the first office was resigned just after these immense money bills were passed, it may not be amiss to state that the witness McLane swears that Chancy

Stoddard, who paid McLane a large sum ($5,000) in bonds to silence his newspaper and to get his services as a lobbyist for the levee bill, and who, by his own testimony, stands convicted of bribing other members of the legislature to vote for the levee bill, told him McLane) that he (Stoddard) paid Hadley $20,000 in bonds for signing the levee bill. This Hadley denies, while Stoddard says he does not know the name of but one member, named Prigmore, who got the bonds, though he had reason for knowing that others shared them. As, however, the fact is not denied by any witness, not even by Clayton or Hadley, that Hadley bought off White, it is not much of a strain on even human charity to believe that a man in the market to buy will not arouse a sleeping conscience to stand guard against his being bought.

There are other actors in this drama whose moral figures would not compare unfavorably with those already but partially delineated; but as I have sketched the chiefs, I leave the others to speak for themselves through their own and the mouths of other witnesses, and will now proceed to a summary statement of the facts. And in doing so, as a matter of convenience, and to economize time and space, after once introducing a party or witness by his full name, I will employ only his surname.

I will take the specifications in the order in which I have arranged them, and while I treat each separately for the purpose of grouping like facts, that they may be seen at one view, as will be seen hereafter, I resolve the seven specifications into three charges, all and each of which I think the testimony and evidence sustain.

And, first, as to the corrupt appointment and use of registrars. It is not unreasonable to assume that Governor Clayton after the canvass of over a year, according to his own statements, prior to the summer of 1870 (for in March, 1871, he stated that it had extended for two years), with his ambition to be a Senator, selected his own friends to register the electors of the general assembly, and of officers to be elected in November, 1870. This assumption is borne out by the testimony.

In the county of Pulaski he appointed James V. Fitch and E. H. Chamberlain registrars. There is much evidence *pro* and *con* as to the fraudulent registration made by that board, and without stopping to settle the point of veracity, it is sufficient to say that without any prior announcement of his intention, Chamberlain, who was one of the most zealous of the partisans of Clayton, and worked from first to last for his election, and who was introduced as Clayton's witness in this investigation, just after registration closed, and within five days of election, on the 8th of November, announced himself as a candidate on the Clayton ticket for the legislature; and while by the returns, as set forth in the testimony of the witness J. L. Hodges, he (Chamberlain) received but 1,892 votes from the counties of Pulaski and White, constituting his district, out of a vote of about 5,000, he was returned by the secretary of state to the lower house as one of the members-elect, and obtained his seat. And from that time to the end of the disgraceful struggle, carried on in and out of the legislature for near two and a half months, for the election of United States Senator, he was not only the supporter but the confidential agent and adviser of Governor Clayton. James V. Fitch was rewarded by an executive appointment to the office of circuit clerk of Pulaski County and clerk of the criminal court, which court was created at that session of the legislature.

The witness A. A. C. Rogers says that in Columbia County Clayton appointed a boy from Illinois, named Ryan, registrar, and that in Hot Springs County he appointed Z L. Cotton as registrar, who, it was generally understood, lived in the county above and out of the district, though by the law of Arkansas the governor is required to appoint a resident of the county, who has resided in the county six months before the registration.

The witness Met. L. Jones states that Clayton appointed a man named George A. Wilkins registrar in Columbia County, and that Wilkins was afterwards appointed justice of the peace. A justice of the peace in Arkansas has jurisdiction up to $500, and the fees of office are high. That W. H. Atkins, registrar for Union County, was also afterwards apppointed a justice of the peace.

The witness Jones states that Cotton was a resident of Mount Ida, Montgomery County, while acting as registrar in Hot Springs County, and was afterward appointed clerk of the Montgomery County court.

As evidence of the sympathy existing between these registrars and Governor Clayton, I refer to an interview detailed by the witness Met. L. Jones, between himself, Governor Clayton, and Judge Bearden. He says such were the frauds being committed by the registrars in Columbia and Union Counties, that many citizens of those two counties met in convention and appointed Jones and Bearden a committee to wait upon the governor and make complaint and petition for redress. He stated the case; told Governor Clayton that he had affidavits of fifteen substantial men in his county to the facts. Governor Clayton said, at first, that was *ex parte*. Witness offered to put them in proper form. Governor Clayton then said it was too late to investigate (though the witness states the interview was fifteen days before the election, and the law of Arkansas is that

registration closes only ten days before the election). Jones then asked him to remove the registrar. Clayton replied he did not have the power; to which Jones rejoined he had already removed some. Clayton said he had, but that he thought he had transcended his authority, and that he would refer the matter to the courts. When asked if he would not interfere then, he said he would after the election. Jones said then he would apply to the courts, and Clayton told him he would not submit to that interference by the courts before the election; and if he (Jones) attempted to arrest the registrars before the election, he would treat the act as insurrectionary, and would employ force, i necessary. Met. L. Jones was an intelligent man and a lawyer.

In this connection I will give the first and second sections of the act of July 15, 1868, regulating registration of electors in Arkansas, page 52, statutes of 1868, and will state that there is nothing further in the whole act, or any other law of Arkansas, brought to the notice of the committee, which abridges the power therein conferred on the governor.

"SECTION 1. That on or before the 1st day of August, 1868, and every two years thereafter, the governor shall, with the advice and consent of the senate, appoint three loyal, competent, and discreet citizens in each county, who shall have resided at least six months in the county next preceding their appointment. Said persons shall be styled and called board of registration, one of whom shall be designated by the governor as president of said board: *Provided*, That in case no such person can be found in each county within the State, then and in that case they shall be appointed from the county most convenient thereto, each of whom shall serve two years, unless removed as provided hereinafter: *And provided further*, That the governor, in lieu of one of the citizens to be appointed as above provided for in this section, may designate a justice of the peace, notary public, or constable as one of the members of the board of registration, who shall in every such case be designated as the president of said board; and every justice of the peace, notary public, or constable that may be designated by the governor as a member of said board for any county in this State shall, in addition to the duties now imposed upon him by law, discharge the duties of president of such board of registration according to the provisions of this act.

"SEC. 2. The governor shall fill any vacancy occurring in any of the appointments made by him, and may in his discretion remove any one so appointed by him for incompetency or other sufficient cause. The secretary of state shall cause notice by certificate to be given to each of the persons, and shall also transmit to the clerk of the county court of each county the names of the persons so appointed as board of registration."

With this act before him, and the fact brought to his notice that he had already removed some of the registrars, he stated to Jones as a reason for not desiring to interfere with that alleged fraudulent registration in Columbia and Union Counties that he did not have the power to remove them. His first answer was it was too late; second, I have not the power; third, go to the courts for redress; and, fourth, you shall not resort to the courts until after the election, and if you do I will consider you an insurrectionist and put you down with a military force.

To show the discretion and power of these registrars, as well as to illustrate the beneficence of the then existing government in Arkansas, and the freedom of opinion thereby tolerated at that time and now, so far as I am advised, I will quote the eleventh section of the act above referred to:

"SEC. 11. That no person shall be registered who during the late rebellion took the oath of allegiance to the United States, or gave bond of loyalty or for good behavior, unless he shall show by satisfactory evidence that he has ever kept this said oath or bond inviolate, or that he has openly advocated or voted for the reconstruction measures of Congress, or voted for the constitution at the civil polls at the constitutional election of 1868."

I will remark this act was passed during Governor Clayton's term of office and was of course approved by him. Referring to the words in the last section quoted and italicized by me, I challenge all Christendom to produce its parallel for anti-republicanism and tyranny.

It is very easy to see how, with such harsh and at the same time mobile power lodged in the discretion of the instruments and favorites of a governor acting in the capacity of registrars, they could manipulate the election of a legislature to secure an overwhelming majority.

As evidence as to how Governor Clayton was disposed to use that power I refer to the statements of the witness A. A. C. Rogers. Rogers was a candidate for Congress against O. P. Snyder at that election. In August, 1870, before Rogers entered the race, knowing, as he says, how registration had been conducted in the former election for Congress in 1868, he called upon Governor Clayton to know if the people of Arkansas would have a fair election. He says Clayton smiled and said that depended very much on circumstances. What those circumstances were will appear hereafter. Rogers states that

about two weeks before the election he complained to Governor Clayton of the abuses in registration in his district, told him that out of about 2,200 voters in Union County there had been registered but about 700 to 800, and that in Chicot County they were registering about 1,200 railroad hands, non-residents, who were there employed by one Jackson E. Sickles, a railroad contractor. Rogers states, as does Sickles also, that Sickles was a personal and political friend of Governor Clayton and desired him to be Senator. Governor Clayton said to me, "I have no control over my registrars and I cannot do anything with it." Rogers replied, "Governor Clayton, you have attempted to control; in two or three instances you have removed registrars and appointed others, and now you tell me you cannot do it." To which Clayton replied, "Damn it, I do not know but what I did wrong, but the damned rebels there ought not to vote anyhow." Rogers replied, "Governor Clayton, you are not the constitution of the State. It is your business to enforce the law if it dooms every man in the State, and when you assume to be the constitution you assume too much." Rogers called his attention to two hundred sworn certificates of persons debarred the right to register. Clayton replied, "I have not time to correct it now." Rogers says this was about nineteen days before the election. Much more was said with which I will not encumber my remarks, but which illustrates the manner in which Governor Clayton conducted that registration. Governor Clayton admits the conversation and does not deny the language, but explains by saying that he referred to Ku-Klux outrages existing at the former election, in 1868, and that he said to Rogers that if they were to be repeated he would control the registration to prevent them, or words to that effect. The Senate will be enabled to judge between the two statements when this conversation is given more in detail. Rogers states that Clayton removed Judge Alexander, in Ouchita County, after registration was complete, and appointed a man named Thompson registrar, who lost the registration book and ran away; that he removed Hicks, a registrar in Hempstead County, and appointed Beldin, the uncle or father of D. P. Beldin, senator from Hot Springs County, who was one of Clayton's strongest friends during his Senatorial contest.

The second specification is as to how the nominations for members of the legislature were manipulated by Governor Clayton and his friends in his own interest. On this point I will be brief, contenting myself with one transaction by way of illustration. The witness Judge Story testifies that he was a candidate for the legislature from Columbia County; that a man named Archer, a supporter of Clayton, came into the county and said that Governor Clayton did not desire him to go to the legislature and asked him if he intended to persist in his candidacy; he replied that he did. Archer then produced from his pocket an order or proclamation issued by Governor Clayton and threatened Story that if he did not desist and allow Clayton's friends to be elected that the public printing, which Story, a Republican, was then doing in the Magnolia Flower (a gazette of which he was editor), would be taken from him and given to another paper. He was then doing the public printing for two counties, Union and Columbia. The public printing was afterward given to the South Arkansas Journal, printed at Camden, Ouachita County, forty miles off, not more than fifteen copies of which the witness states were taken in his county. This patronage consisted of publication of notices from the probate courts, executors' and administrators' sales, &c., and for the two counties was worth to Story $3,000 per year. This printing was taken away after the delegation from that county reached the legislature and persistently opposed the election of Governor Clayton. The witness asked Governor Clayton why it was done. He gave no reason, but referred to the course the delegation had taken toward him. Several other witnesses besides Story also testified that while the primary meetings were being held for nominations throughout the State, Clayton was going about the State providing for the nomination of men favorable to his election. The witness J. T. White testifies that after the nomination was made in his county, Clayton appeared there and insisted upon a renomination, which was carried out and the ticket elected. The witness, who was nominated the first time, was retained on the ticket as a friend of Governor Clayton.

The third and fourth specification charges a corrupt agreement with the Democrats, and particularly with General John Edwards, Democratic candidate for Congress, in pursuance of which the Democrats were to support Governor Clayton for the Senate, and Governor Clayton was to aid in the election of Edwards, and to give him the certificate of election. The inception of this transaction occurred in October, 1869, as testified by the witness A. A. C. Rogers. He says that at a meeting of the most prominent Democrats in Little Rock, assembled to consider the political situation of the State, Judge T. M. Bowen appeared with a written proposition from Governor Clayton to form a combination with the Democrats for their support. He said he was right from Governor Clayton, who approved it, and that he was there in Clayton's interest. His proposition was that Governor Clayton would control the election so as to secure a legislature favorable for him for the Senate, and that Clayton, in consideration of the Democratic support, would recommend to the legislature such measures as would relieve the people from the

disfranchisements of the constitution; that in the counties where Clayton's friends had the majority he was to name the candidates; in the counties where the Democrats were so greatly in the majority that he could not control them, they were to name the candidates. There was no Republican present except Judge Bowen. Bowen said that the witness (Rogers) was to acquiesce in this arrangement. Another meeting was held at Mr. Garland's office that night, and a consultation ensued. Rogers dissented to Clayton's proposition, and withdrew from the meeting. Witness met Governor Clayton the next day at the fair grounds. Clayton referred to the meeting the night before; said that the arrangement proposed was "about the best thing that could be done." Bowen stated distinctly, in answer to an inquiry propounded by A. H. Garland, one of the Democrats present, that this proposition and the terms upon which it was made came directly from Governor Clayton. The proposition shows very clearly two things: first, his anxiety to combine with the Democrats for his election, and, secondly, that he was perfectly willing to use the executive power in manipulating the election of members of the legislature to the same end. It also reflects much light upon the two charges made against him, that he did conduct the registration for that election unlawfully, and, therefore, corruptly, if to secure his election; and that he agreed to issue the certificate of election to Edwards, in consideration of the support of Democrats.

As Governor Clayton required that the witness Rogers should accede to this proposition, and as he dissented, there is no evidence before the committee that the combination then proposed was ever carried out in that form; that is to say, there is no evidence that the Democrats allowed him to name their candidates. But as to whether his purpose was carried out as revealed in that proposition will be seen when we come to consider his conduct and motives in issuing the certificate to General Edwards.

There are other similar facts disclosed in the evidence, but I will now proceed to collate the facts bearing upon the charge of issuing the certificate of election to General Edwards.

There were two Republican conventions held at Fort Smith to nominate candidates for Congress. Judge Thomas Boles was nominated as the regular Republican candidate E. J. Searle was nominated by the other. Edwards states that he ran as an independent candidate—a quasi-Republican—but supported by the Democrats and Conservatives. In a short time Searle withdrew, leaving Boles and Edwards to run the race. The majority of this committee, in their report, assume as an uncontroverted fact that Governor Clayton supported Boles, the regular Republican; but there is hardly any fact in the whole investigation about which witnesses differed more, as I will now proceed to show, and if the evidence does not establish the fact that Clayton was supporting Edwards, it undoubtedly shows that if supporting Boles, Edwards was the subject of much well-plied coquetry; for Edwards and his friends were certainly under the impression that Edwards had the executive favor. The witness H. L. McConnell swears in terms that Governor Clayton supported Edwards. And just here, as an attempt was made, in consequence of the strength of McConnell's testimony against Clayton on this and other points, to impeach his veracity, and as a majority of the committee in arriving at their conclusion have entirely ignored his testimony, I will state the reasons why I give credence to his statements. He went to Little Rock in 1869, with a letter of introduction to Governor Clayton, going from Leavenworth, Kans., where Governor Clayton formerly resided. Being an editor, and evidently a very intelligent man, he was engaged by Governor Clayton as his private secretary. He commenced advocating, in a public gazette, Governor Clayton's election to the Senate, and continued in both capacities until Governor Clayton's election. These facts are not denied by Clayton himself. They were certainly on the most intimate terms. Sustaining those relations to Governor Clayton for two years, he certainly had full opportunty to ascertain during that time whether McConnell was a man of veracity; for let it be borne in mind that his testimony is not discredited by contradiction, but, on the other hand, is corroborated in many points by several witnesses. The attempt to discredit him was made by introducing two or three parties, unknown to the committee, who swear that McConnell's reputation while in Leavenworth, and afterward in Little Rock, for veracity was bad. That he was the holder of the political secrets of Governor Clayton is fully sustained by Clayton's own testimony, for, some time after the Senatorial election, and in 1871, two witnesses, Mr. and Mrs. Parish, whose voluntary affidavits were admitted in evidence by consent, swear that Governor Clayton during McConnell's absence from his room, which was in Parish's dwelling, entered McConnell's room, opened his trunk, ransacked it, and examined a large number of letters therein, and took away a large bundle of papers. The witness says they were letters which show Governor Clayton's relations to Edwards. Clayton says they were letters which he had given to McConnell to answer, and which McConnell had not answered. McConnell, who says that he occasionally—two or three times a year—gets on a drunken spree, was at that time drunk, and had been absent from his room for a day or two. Their relations were certainly extremely confidential, not only

from the testimony of other witnesses, but from the admissions of Governor Clayton himself; besides as to several material statements Governor Clayton corroborates the testimony of McConnell. As, for instance, McConnell testifies that Clayton offered Grady, a member of the legislature, the sheriffalty of his (Crawford) county to vote to impeach Lieutenant-Governor Johnson, and about that Clayton says he has an indistinct recollection of McConnell's speaking to him about the sheriff's office of the county, but does not remember that he made any promise or pledge.

Again, McConnell says that Clayton told him his election had cost him $20,000. Clayton admits he told him that it cost him a great deal of money, and explains in what way he spent it; and it is most noteworthy in determining the credence to be given to McConnell, that Governor Clayton, while testifying in his own behalf, and being represented by two counsel supposed to be learned in the law, and to understand how to conduct a defense, to wit, John McClure, chief-justice of the supreme court of Arkansas, and Thomas M. Bowen, ex-justice of the same bench (McClure appointed by Clayton, no doubt on account of his judicial learning), did not in all of his testimony refer, by denial, to any of McConnell's statements, which are numerous and very damaging if true, except the two instances that I have referred to above.

And now to resume the evidence bearing upon Edwards's case.

McConnell, who by editorials and correspondence was advocating Clayton's election, and was on such terms of intimacy with Clayton, publicly and privately opposed Boles and advocated Edwards's election. He produced five letters written to him by Edwards during the campaign, the first dated as early as the 19th of January, 1870, in which he says, "We are bound to sweep the State and elect Clayton to the Senate; most of the Democrats will vote for us. I am glad you are with us for Clayton." The second, dated November 25, 1870, says: "If we can succeed in getting the returns of the legal polls sent up, I am satisfied the governor will disregard the bogus returns and give me the certificate." In another letter, written before Clayton's first election, Edwards says: "I have succeeded admirably in squelching out several contests in other counties, urged on by the 'Brindle-tails' in order to compromise the contest from Pulaski." * * * "If Clayton should count the five townships and give Boles the certificate, a howl would be raised by Conservatives and Republicans, that would let in Brooks and Hodges (two Republican candidates for the legislature, who were contesting for their seats, and opposed to Clayton, one of them, Brooks, a very influential man), and keep out the others who had publicly pledged to his support." The fourth letter says: "Clayton has the inside track; can be elected, and above all will receive the support of all the Conservatives, but if he should fail to give me the certificate, such a howl as will go up you never did hear." In the fifth letter, dated February 12, 1871, and which was written after Clayton's first election (January, 1871), and before Edwards got his certificate (February 20, 1871), Edwards says: "From the vote ousting the great high priest, Joe (meaning Joseph Brooks, the senator, who had been turned out of the senate by Clayton's supporters), I shall be under more obligations to the governor for the certificate than any one else, and I think I can, in turn, render him essential service, as they intend making war on him on his taking his seat." I call attention to the letter dated November 25, 1870, in order to state in this connection that Edwards swears that he went from Fort Smith, his home, to Little Rock, within ten or fifteen days after the election, which was held on the 8th of November, to see Governor Clayton about his certificate; that Clayton then and there said that he (Clayton) would be governed in issuing the certificate by the action of the courts and legislature. This statement shows that Clayton already had the returns before him, and knew the result of the returns. Boles swears that he first called on Governor Clayton to see about the certificate, after the expiration of thirty days from the election, which must have been after the 8th of December, and that Clayton then told him that he had not examined the returns because he had not been well; that Clayton said nothing about the result of the election as shown by the returns, but said that Boles might go to Washington; he (Clayton) guessed the certificate would be all right.

Boles testifies that he was the regular Republican nominee for Congress; that Searle was the nominee of the other faction; that Clayton considered him (Boles) opposed to Clayton's election to the Senate.

Edwards, witness for Clayton, testifies that he was an independent Republican candidate; that Clayton favored Boles's election; that he (Edwards) was in favor of Clayton for the Senate.

The returns, it is admitted on both sides, in the executive office showed that Boles was elected over Edwards by a large majority; but Clayton refused to give the certificate to Boles. The law of Arkansas requiring the governor to issue the certificate is as follows:

"It shall be the duty of the secretary of state, in the presence of the governor, within thirty days after the time herein allowed to make returns of elections to the clerks of the county courts (*i. e.*, five days after the election), or sooner if all the returns shall have been received, to cast up and arrange the votes from the several counties, or such of

them as have made returns for such persons voted for as members of Congress, and the governor shall immediately thereafter issue his proclamation declaring the persons having the highest number of votes to be duly elected to represent the State in the House of Representatives of the Congress of the United States, and shall grant a certificate thereof under the seal of the State to the person so elected."—(Statutes of Arkansas, 1868, page 325, section 50.)

Governor Clayton refused to issue his proclamation declaring Boles elected, and never did issue to him the certificate of election. His only excuse for refusing to comply with the law above quoted is that a few days after the election certified copies of affidavits, accompanied by a petition purporting to be signed by several candidates for the legislature in Pulaski County, asking him not to count the returns from that county, on account of alleged frauds, were laid before him. These certified copies are signed by Stoddard (brother of Chauncey Stoddard, who bribed Prigmore) and other members of the legislature. When Clayton was on the stand he could not recognize the handwriting of but two of these petitioners, though he knew them all well, and these two are Howard (a Democrat) and Chamberlain (a Conservative, who was his political friend and voted for him for Senator). Why certified copies of affidavits were used no witness explains. Why only the signatures of Howard and Chamberlain are proved (and that by Clayton only) to be genuine the committee were not informed. But here comes in an extraordinary fact which may be, and in my opinion is, the key to the mystery. No one ever saw those affidavits and petition until this investigation commenced, though Clayton says he received them the 17th of November, 1870, so far as the testimony shows, except Clayton and Chamberlain. R. J. T. White, secretary of state, swears he never saw them. Barton, Clayton's private secretary and brother-in-law, and his witness, makes no reference to the existence of these affidavits and the petition. And when Clayton was asked how these papers came to be in his possession now, his significant reply was that when he vacated the executive chair he retained them, "deeming they would probably be of some importance in the future." Boles also swears that in his interview with Clayton, thirty days after the election (about 8th December), when Clayton told him to "go on to Washington; he [Clayton] guessed the certificate would be all right." Clayton did not even refer to the existence of these affidavits and this petition.

Another part of this history necessary to be known is this: Chamberlain and Howard were beaten by the returns first made from Pulaski County. The clerk of the county, McDiarmid, had received two sets of poll-lists; had rejected one and certified the other and sent it to the secretary of state. The one certified defeated Edwards and elected Boles—defeated Chamberlain, Howard, Gantt, Mitchell, and others, and elected J. L. Hodges and others.

It was all-important, therefore, in order to justify issuing the certificate to Edwards, that the rejected polls in Pulaski should be counted, and the polls certified to the secretary of state should be rejected. When Edwards called on Governor Clayton, about ten or fifteen days after the election, they and Chamberlain held a conference, and it was then and there agreed that steps should be taken to get the returns excluded by McDiarmid sent up. Chamberlain sued out from the supreme court, then consisting of McClure, Bowen, and Wilshire (another adherent and appointee of Clayton), a mandamus to this clerk. A case was made and the court decided that the excluded polls were the legal votes. But still the certificate was not issued, though this decision was rendered two days before the legislature met. The election for Senator was yet to take place, and the support of Edwards and the Democrats was to be given. The election occurred on the 11th of January, 1871, and all the Democrats except five voted for Clayton. He accepted the position as Senator and still would not issue the certificate. Two of the candidates for the house in Pulaski County, Gantt and Mitchell, had proposed to Clayton, Edwards, and their friends that they must desist from this contest for seats if Clayton would issue the certificate to Edwards. When Clayton was elected on January 11, as above stated, Gantt (who was authorized by Mitchell to act for him) complained because Edwards was not commissioned. On January 27 Gantt addressed the following letter to the house:

To the honorable the house of representatives of the State of Arkansas:

I learn from the published proceedings of the house of representatives in the city papers of this date that it was announced in your honorable body on yesterday that I had retired from any contest for a seat therein, and that the protest and papers presented on the first day of your session by Hon. L. B. Mitchell and myself to abandon our contest on condition that a certificate of election as member of Congress was issued to General John Edwards. I certainly understood this to be fully assented to, and in compliance with that agreement prepared a formal abandonment of the contest, in writing, to be used only after such certificate should have been issued to General Edwards.

Believing that General Edwards had been legally elected a member of Congress, and

that he could render efficient service in that capacity, but fearing that the issuance of his certificate of election was likely to be delayed, if issued at all, and desiring that it should be issued, we consented to surrender our individual rights in the premises for what we considered to be the public good.

Hon. L. B. Mitchell and I are able to show, by the most indubitable evidence, that we were legally elected representatives from the tenth district, and respectfully ask that we be afforded an opportunity of doing so; that the papers connected with our contest be rereferred to the committee on elections, and that we may have a fair and impartial hearing.

R. S. GANTT.

Before the date of Gantt's letter the court had decided that the excluded polls were the legal votes in Pulaski County, which gave Edwards a majority of 50, and the legislature, by joint committee, had decided the same question in the same way. This result, let it be remembered, was all Clayton said he desired to decide to whom he would issue the certificate. Hence Gantt complained, because the agreement had been carried out by him and the other Democrats and Clayton had not issued the certificate to Edwards.

I will now state some facts which furnish an explanation of this delay or refusal. The fact is sworn to by many witnesses on both sides; indeed, it is admitted by Clayton that during the canvass for the election for the legislature and Congressmen he pledged himself to his political friends that he would not if elected Senator accept the position and leave Lieutenant-Governor Johnson in office to become governor. This pledge was on him at his first election in January. He, as is alleged, had a proceeding *quo warranto* instituted against Johnson to turn him out of office on the sole ground that Johnson, who was elected with Clayton in the spring of 1868, and had been in office for over two years, and presiding over the senate by virtue of his office, had not taken the oath of office as lieutenant-governor within the time prescribed by law. This was more than even the supreme court of Arkansas, constituted, as I have shown it was, could stand. The *quo warranto* failed, and Clayton kept his pledge by resigning the Senatorship.

The Democrats and Conservatives then became furious. Gantt sent in his letter to the house. Articles of impeachment were preferred against Clayton in the house, and fourteen of the friends of Clayton, to prevent their presentation to the senate, deserted the senate and "took to the brush." The certificate was issued to Edwards, and Gantt and Mitchell gave up the contest for their seats. From this time to the date of Clayton's second election, on the 15th March, 1871, two other means were adopted to secure his election. They constitute the foundation on which the sixth and seventh specifications rest.

I will now proceed with the evidence bearing on the Clayton-Edwards agreement.

Boles testifies that Clayton was unfriendly to his nomination; that during the canvass Clayton asked for his support for the Senate, and he told Clayton that he must stand neutral between him and McDonald.

Edwards, witness for Clayton, as has already been shown by his letters to McConnell, was supporting Clayton. He says in substance, "Clayton, Chamberlain, and I agreed on the investigation which was to change the result in Pulaski County by which I would get a majority. Chamberlain agreed to take the matter in hand. Chamberlain may have told me that he was moving in the investigation at the instance of Governor Clayton. Clayton and I agreed on the matter as any two would agree to any proposition. I always saw Clayton privately. Chamberlain told me that he had talked with Clayton and that Clayton desired the investigation to go on—just such an investigation as afterward took place. [Investigation here referred to was the one afterward conducted by a joint committee of both houses, Samuel Mallory, senator, chairman, for the double purpose—first, to furnish a ground for issuing a certificate to Edwards, and, secondly, to exclude certain candidates from Pulaski and other counties who were opposed to Clayton's election, and who by the returns then in the executive office were elected.] Chamberlain always said he desired Clayton's election. I left home on my way to Washington about the 23d of February; was informed by letter before leaving home that I would get my certificate. [Certificate was issued the 20th February.] I heard a rumor of this bargain between Clayton and myself before the certificate was issued; denied it privately but not publicly. Gantt told me that if the investigation (by Mallory committee) was made I would go to Congress and he and Mitchell would in that case withdraw from their contest. The polls which McDiarmid, the clerk of Pulaski County, had excluded were counted by the Mallory committee, and those he returned were rejected; this gave me 50 majority. The Mallory committee reported after Clayton's first election. No one ever approached me on the subject of a bargain further than as to the withdrawal of Gantt and Mitchell. I probably wrote letters urging Clayton's election. My first interview with Governor Clayton about my certificate was ten or fifteen days after the election. He said in that interview he would be governed by the action of the courts

and the legislature. Democrats and Clayton Republicans told me the same thing. Both Clayton and White, secretary of state, told me the election returns were late coming in."

McConnell says: "Governor Clayton supported Edwards in the election. He told me he would issue the certificate to Edwards. Neal, Democrat, told me that there were great complaints among the Democrats that Clayton had not given the certificate to Edwards. I told Clayton of the complaint; there was at that time a coalition between the Democrats and Brindle-tails to unseat Clayton men in the legislature. I told him Whitesides, elected sheriff of Crawford County, had not received his commission, and suggested that he commission Whitesides to conciliate the Democrats. Clayton assented, and informed me that he would issue the certificate to Edwards. He said, however, that commissioning Whitesides would raise a howl among the ultra-Republicans. I saw Gantt on the morning of Clayton's second election; told him Clayton had fulfilled his pledge by issuing the certificate to Edwards and that he (Gantt) ought to do something for him; Gantt said he would go out and do what he could. Judge Walker, of Washington County, sent word by Edwards to Clayton that if he treated Edwards right Walker would urge his representatives, Owen and Caraloff and others, to vote for him.

"While the impeachment was pending against Clayton, Edwards told me he could not do much to relieve him unless he (Edwards) got his certificate, and asked me to tell Clayton that Edwards says that Clayton had promised to give him the certificate and was only waiting for a report from the Mallory committee; that the report had been made and the decision of the court in the mandamus case rendered, and that he wanted his certificate. I told Clayton, and the certificate was given the same or the next day. The impeachment was on the 16th, and the certificate was issued on the 20th of February. I was acting as the medium of communication between Clayton and various parties."

Chamberlain, witness for Clayton, says: "Gantt placed the matter of his resignation to assist Edwards in my hands, and said that he represented Mitchell also. By changing the returns from Pulaski County, Edwards would be seated. I proposed this to Edwards, and, with his approval, saw Governor Clayton about it; when the legislature met a resolution was introduced to raise a committee. Judge Bowen, Tankersley, and Judge Bennett were present when I saw Clayton. Clayton told me to hurry up the mandamus case, and to get the other returns from Pulaski County. I was a supporter of Clayton, and opposed Boles. Edwards was urgent for the investigation. Judge Bowen furnished the names of the committee to me, and I handed them to Tankersley, the speaker. Tankersley left off C. C. Waters and put on Mr. Ham, because Waters was dilatory about the matter. Judge Bennett, then circuit judge, went into the house and urged Waters to act. Soon after Bennett was appointed supreme court judge. Judge Watkins brought a paper to me from Gantt, proposing to decline a contest for his and Mitchell's seats if Clayton would issue a certificate to Edwards. Bennett took the paper to Clayton, returned, and said Clayton would not sign it. Gantt sent in a letter to the house stating he would claim his seat unless the agreement to issue the certificate to Edwards was carried out. The certificate was issued, and Gantt and Mitchell withdrew. Saw paper from Gantt in Judge Watkins's hands containing his proposition about Edwards, and stated the fact to Clayton, Bowen, and Bennett. This was not long before the Mallory committee was raised. I supposed Bennett to be one of Clayton's confidential advisers and friends; almost always saw him in Clayton's office, and saw him frequently on the floor of the house. The main object of the investigation was to seat Edwards in Congress; this was understood all round. It was understood by me in advance, and, I supposed, also by Bowen; that the committee of investigation, whose names Bowen gave me to hand to Tankersley, would report so as to seat Edwards. Bowen was then supreme judge, and I think Judge Bennett knew all about the committee. Edwards left the matter of the investigation with me, requesting me to do all I could, which I promised to do. I told him he might go home and rest perfectly easy; that he would get his certificate. I told Tankersley that those were the names of men he was desired to appoint on the Mallory committee. I think I told him that Bowen sent them."

Battle, Democrat, says: "I voted for Clayton on his first election; after the election my friends told me they had pledged me to Clayton to vote for him before the election; I voted for Clayton to make Johnson governor."

White, secretary of state, says: "Had no evidence of the election in my office, except the returns; the returns in every view showed Boles had a majority; the governor produced no papers on which he relied in issuing the certificate to Edwards; I issued it under his direction. The clerk in my office first informed me that Governor Clayton had decided to issue the certificate to Edwards; I asked him on what ground; if the governor had given any reason. He said none; and I told him to make a written memorandum of the transaction, which was done. There were no affidavits or petition touching the election brought to my notice by Governor Clayton."

W. S. Olivir, witness for Clayton, says: "Clayton advocated the election of Boles and the Republican ticket for the legislature in Pulaski County; Clayton advocated the election of Brooks and Hodges in that county in all his conversations with me." (We will see directly what measures Clayton advocated to keep them from their seats when it was known they were opposed to his nomination for Senator.)

Catterson says: "Isaac C. Mills was Democratic candidate for sheriff in Pulaski County in 1870; he was supported by Clayton's political friends; was afterward appointed United States marshal for the eastern district of Arkansas by President Grant, on Clayton's recommendation. Harrington, now United States district attorney for Arkansas, supported and worked for Mills, and was generally understood to have supported Edwards in his contest for his certificate."

Having presented these facts to show the intention of Governor Clayton in issuing the certificate to Edwards, I will now give, very briefly, the action of the Mallory committee, which was raised in the legislature to investigate the elections in Pulaski County, and framed, as Chamberlain's evidence clearly shows, with a view to decide in favor of Edwards. Being a joint committee, they appointed Senator Mallory chairman, and pretended to proceed with the investigation.

Joseph Brooks was contesting for his seat as senator, and held a certificate of election from the county clerk.

J. L. Hodges, Gantt, and Mitchell were contending for their seats, and held certificates. Chamberlain, Goad, and Pilkington were also contending as opposing candidates. The latter were known as Clayton men. General Upham was appointed clerk of the committee. I should say that, by the returns, the Clayton men were defeated, so the investigation had a double purpose—to seat Edwards in Congress and to seat Chamberlain, Goad, and Pilkington, who favored Clayton's election.

Chamberlain, Clayton's witness, says: "The following-named witnesses, whose testimony appears in the report of the Mallory committee, were never examined by the committee, to wit: J. W. Raybun, Calvin Pemberton, Milo Arbuckle, John W. Mooney, Isham White, Harvey Harrison, and R. R. Carlisle. I took their affidavits myself. I took some in the office of Mr. Fletcher, who was a Democrat. General Upham, secretary of the committee, who was a warm friend of Governor Clayton, told me he desired a quiet place to take the testimony of certain witnesses. He said many desired to testify whose testimony he did not want, among them Joseph Brooks and J. L. Hodges. I got the key to the law-office of Faust & Ratcliffe at Upham's request. The office was in a room in the rear of the building, approached by a dark passage in which there was no light. One member of the committee came that night, Mr. Cohn, I think, member of the house, devoted to Clayton, and who was afterward appointed clerk. The committee had met before in Upham's office, across the street from the State-house." (The witness does not say whether any witnesses were examined.)

Hodges says: "I endeavored to get before the Mallory committee to testify, but never could succeed. I was never notified of the time and place to take proof. I went one night by appointment of the committee, but there was no member of it present. Failing in my efforts to get before the committee, I called upon General Upham, the secretary, and proposed that, as I could do no better, that he should take my testimony. After making my statement for some minutes, I discovered he was taking down what I had not said. I charged it upon him, but he would not allow me to make the corrections. The testimony reported by the Mallory committee as mine was not given by me."

Battle says: "Was a member of the joint investigating committee of which Mallory was chairman. The committee sat a few times, examined *Chamberlain, Hartman*, Webster, John Reigler, N. L. Pears, *S. R. Harrington*, Hagan Green, and *Jas. V. Hitch*. [It will be observed that the witnesses whose names are italicized were no doubt very swift. Fitch did the registration that they were investigating. Chamberlain, after advising with Clayton, Bowen, Bennett, and Edwards, got up the investigation at Edwards's and Clayton's request, and furnished the names of the committee to Tankersley, the speaker, and the committee called in those special friends of Clayton, whose names are italicized, to do the swearing.] The witness says Hodges was not examined before the committee. I did not know that the report of the committee was going to be made until it was announced in the house. I did not unite in it, nor approve it. It was made by C. C. Waters, in the house, who was afterward appointed judge of the criminal court in Phillips County. Waters was never present when the committee sat."

Joseph Brooks says: "In an interview held by Governor Clayton, Lieutenant-Governor Johnson, Judge Bowen, J. L. Hodges, and myself, just before Governor Clayton's second election, that Governor Clayton then stated to him that the Mallory committee and its proceedings were projected simply for the purpose of a counter pressure to a fight, which he understood that we were putting up on him in Washington." Brooks told him "that he and Hodges had been wrongfully and outrageously and unlawfully kept out

of their seats, through his influence chiefly, through the power of the star-chamber Mallory committee." These statements are corroborated fully by the witness Hodges, and are not denied by Governor Clayton. To the account of this interview, as given by Brooks, who is a very intelligent man, I especially invite the attention of the Senate.

As the fifth and sixth specifications of charges both relate to the means employed to remove Lieutenant-Governor Johnson from office, and thus remove the last obstacle to Clayton's coming to the Senate, I will treat them both together.

The proceeding by *quo warranto* has already been referred to. It was instituted for no other purpose than to fulfill the pledge which Clayton had given his friends repeatedly, that he would not accept the Senatorship until he had made way with Johnson. When that proceeding failed, his friends holding him to the pledge, he resigned, under the first election. In the mean time much bitterness had been engendered and division taken place among his friends and opponents in the legislature growing out of—first, the indignation of some at his attempt to overthrow Johnson on so frivolous a pretext; secondly, the attempt made by his partisans to impeach Lieutenant-Governor Johnson; third, his resigning the Senatorship, and, fourth, his delay in carrying out the agreement with General Edwards. The impeachment of Johnson, which was another effort made to get rid of him, was based upon a ground as frivolous, if possible, as the ground upon which the *quo warranto* was instituted. The charge against Johnson was that he was guilty of "high misdemeanors and maladministration," because he swore in Joseph Brooks as a member of the senate on his certificate of election which he presented after having appealed in vain to Senator O. P. Snyder and Senator O. A. Hadley, zealous partisans of Clayton, to present his certificate to the senate. And just here I will break the thread of my views in order to show how this matter was manipulated by Governor Clayton. Brooks says: "I held a certificate of election as senator; I asked both Snyder and Hadley to present my certificate and they declined; I was kept out of the senate until after Clayton's first election; was then sworn in on presenting my certificate; I moved the reference of my credentials to the committee on privileges and elections; the committee reported unanimously that I was entitled to my seat. Eight days after I was admitted I offered several bills; one was to make a disposition of the swamp lands, estimated at several millions of dollars. There were before the legislature what was called the levee bill, intended to appropriate the same lands for railroads. Just after I introduced the bill Senator Mallory moved a recess; it was taken, and at 2 o'clock p. m., when the senate assembled, Senator Young, from the committee on privileges and elections, made another report to unseat me and to seat my opponent, Riley, a Democrat. No evidence had been taken by that committee. I had not received any notice of contest by Riley. The previous question was at once ordered on the resolution to unseat me. I appealed for an opportunity to be heard. I wrote a note to Senator Sarber (a supporter of Clayton) to intervene for me. He said he would consult with Governor Clayton and let me know if I could be heard; he went and returned, saying he had seen Governor Clayton, who was in his office with Judges Bennett, Searle, and Bowen, or McClure (not certain as to which of the last two named), and that they were consulting on the subject; that the governor signified he would let him know in a few minutes; that he would go again and inquire of the governor if they might adjourn the question over till morning.

"I heard nothing more from Sarber. I then sent a message to Clayton by Joseph Myers, who returned no answer. The question was not adjourned over, and I was ejected from the senate that evening."

The above is a mere abstract of a pitiful story told by a man of great intellect, remarkable intelligence, and quick conscience, who, on account of his opposition to Clayton's election and disapproval of his conduct, was thus ruthlessly crushed without even a hearing. But to resume:

These two efforts to depose Johnson having failed, another election being necessary, and his friends being resolved not to vote for Clayton until he got Johnson out of office, another plan was devised. Strategy now came into play. A conference was held. Brooks and Hodges were invited to meet Clayton, Bowen, and Johnson. They met, and the following is Brooks's account of the interview. "Clayton stated that he was pledged not to resign and leave Johnson to become governor; that some arrangement must be made so that he could carry out his promise, in order that he might go to the Senate. The meeting was called to make an adjustment with Hodges and myself and our associates on the ticket in Pulaski and White Counties, and with Johnson. He repeated his often-expressed desire to be United States Senator; the earnest efforts he had put forth to secure it; that it was more than the dream of his life; that he was very ambitious; his heart was set upon it; that he was as ambitious as Cæsar; that he would not only be United States Senator, but that, if he had the opportunity, he would sway the scepter of universal empire. I answered, he knew full well that we had been opposed to his election; that it was a new development in political tactics that the successful party (himself) had to be conciliated; that though he had secured his election by means we did not and could not approve, he should quietly take his seat and we should be permitted to take ours in the

general assembly. Bowen seemed equally interested with Governor Clayton, and to represent Clayton's views and feelings. One condition necessary to adjustment, they both said, was that they should expect and require that our friends in the house, not only those who were to be admitted, but other friends of ours who were then members of the house, should vote and act on the Hot Springs contest with the Clayton men. (This was a contest for seats in the legislature.)

"One of them said that I would be expected to use my influence with those colored members with whom I was supposed to have some influence to have them vote against the contestants in the house. I said they were sworn representatives of the people, and under obligations of the most solemn character to vote and act in that and every such matter in conformity with the facts and evidence as they understood them when presented; that if they found, in their unbiased judgment, that the contestants, agreeably to the testimony, were the members-elect, I could not, of course, counsel them to perjure themselves: for myself I claimed to be lawfully elected; stated to the governor I thought he knew I was. If I was lawfully elected, then I claimed the seat without conditions and without pledges; that I believed myself to be a Republican, not only unquestioned, but unquestionable; that if admitted to my seat, on all political questions I would undoubtedly act and vote with Senator Clayton's friends if they were Republicans; with respect to general legislation I did not regard myself under obligations to Governor Clayton or anybody else, except my constituents. Johnson expressed his wish for an adjustment so that Clayton might go to Washington and take his seat. Clayton and Bowen then suggested that Clayton might retire and let Johnson try his hand as governor. I answered that I thought Clayton's friends were not the men to be consulted with respect to the State administration; that I felt a very great aversion to any such horse-swapping on the subject; that Johnson was as much lieutenant-governor as he was governor; that he had been elected, after the fashion he had been, United States Senator; I thought the law ought to take its course; that we required no conciliation except for Clayton to go on as Senator, let the constitution and laws of the State take their course, and for them to suspend what I designated their star-chamber performances through the Mallory committee: that Hodges and I and our associates on the ticket had been denied the right of a hearing there, and that there could be no harmony or restoration of friendliness of feeling unless they either gave us a chance to be heard fully and fairly before that committee or the committee dissolved and their *ex parte* proceedings were cast into oblivion. Clayton replied that he thought, if other matters could be arranged, that there would be no difficulty with respect to that committee; that it was projected simply for the purpose of a counter-pressure to a fight which he understood we were putting up on him at Washington. I replied no fight had been put up on him, nor was any contemplated; that we and our friends were entirely content that he take his seat unmolested; that while we believed we had been outrageously kept out of our seats, through his influence chiefly, that was passed. Clayton expressed the opinion that if our delegation (from Pulaski County) had been admitted at the organization of the general assembly he would have failed of his election. Finally, late in the night, perhaps day-dawn, Bowen asked me if I would be satisfied with any adjustment made between Clayton and Johnson. I replied I had nothing to do with such an adjustment, and would make no trouble about it. We separated about the crack of day without any further adjustment than I have named.

"I understood Governor Clayton's remarks, that I have in part stated, to be to the effect that the Mallory committee was projected by himself, and its proceedings carried forward under his direction, with a view, as he stated it, to furnish counter-pressures against a supposed fight of ours against him in Washington."

The foregoing statement of Brooks is confirmed entirely by Hodges. This proposition made by Clayton and Bowen to influence votes to seat members without respect to their rights, and, in consideration of such influence to be exerted by Brooks and Hodges, graciously to consent that Brooks and Hodges might take their seats, not being accepted, still another device was hit upon, and that was to secure his seat by the use of money. O. A. Hadley was then delegated to wait upon R. J. T. White, secretary of state, and after a few blandishments he made the direct proposition to pay him $5,000 in money and $25,000 worth of first-mortgage bonds of the Mississippi, Ouichita and Red River Railroad Company to resign his office. It is hardly necessary to say that this masterly stroke was successful. This was just before Clayton's second election. It had been previously arranged that Johnson, who was all along the stumbling-block, if White would vacate his office, would resign and accept it; O. A. Hadley would be elected president of the senate, become *ex-officio* governor; Clayton would be re-elected and accept the place of Senator. Hadley says that White's resignation, Johnson's resignation and appointment to White's place, and Clayton's nomination all occurred within less than an hour of each other. Why these events occurred in such rapid succession and so immediately before Clayton's re-election we will better understand when we come to consider the last charge.

Now as to a few facts bearing upon the purchase of White. I will let Mr. White

tell his own story, premising by saying that it is not only uncontradicted by any witness, but not even referred to by Clayton when on the stand. Referring the Senate to his testimony for the whole story, I content myself with mentioning the material facts: "O. A. Hadley called to see me. He said it was understood and agreed if I would resign I should not suffer pecuniarily, and that parties with whom he had conferred had agreed to see me out, if I suffered pecuniarily, and he mentioned the sums which they supposed I would be a sufferer. He named a sum, $5,000 and $25,000 in $1,000 first-mortgage bonds of the Ouachita and Red River Railroad Company; we separated there. I called on Johnson to know if the thing as represented was true. He said so, and it seemed to turn out that way afterward. I do not think I saw Hadley any more on the subject. I never called on Governor Clayton. He once passed me and asked me whether Senator Hadley had spoken to me on the subject, and I told him he had. We parted, and there was nothing more said. I resigned my office soon after. I met Governor Clayton in New York a short time after that, and spoke to him on the subject; the matter was lightly touched, a mere passing remark; and some time afterward I received a letter from him, inclosing a certificate of deposit on a bank in New York for $5,000, and twenty-five $1,000 first-mortgage bonds of the Mississippi, Ouachita, and Red River Railroad. The letter was signed by Governor Clayton, and contained nothing but, 'I inclose you' thus and so." When asked if he understood what they meant, he says, "I did; the papers showed for themselves what they meant." The witness attempts to show that other matters entered into the consideration for accepting this money and these bonds, but it is a most "lame and impotent conclusion." He admits that when Hadley called on him the subject of conversation was about his losses by resigning his office, and says that his salary and fees of office given up by him under this agreement were worth from $6,000 to $7,000 per annum. The value of the bonds received by White may be estimated by the statement of the witness McLane, who says that he sold the same number of railroad bonds ($25,000) at 32½ cents on the dollar. White's pay for resigning his office, at this estimate, would be over $13,000. By buying off White, and appointing Johnson to his office, an obstacle otherwise insurmountable in Clayton's path to the Senate was removed. To appreciate the value of this success, we have only to bear in mind that witness after witness who voted for him testifies that unless he had removed Johnson he could not have been elected. His own party friends would not have supported him, because they were resolved to do no act that would result in making Johnson governor. So, by removing Johnson, by paying White to resign and appointing Johnson to his place, he virtually bought the votes of his own friends.

The seventh and last charge is that Governor Clayton purchased his election by appointments to office of many of the members of the legislature, and by paying them money. It is answered to this charge, so far as relates to the appointments to office, first, that no such agreement was made, and, secondly, that the appointments, which are not denied, were made by Governor Hadley, who succeeded Clayton. Before stating the facts, I will remark that Clayton was elected on the 15th of March and Hadley was installed as governor on the 17th of March. This will explain why most of the appointments were made by Hadley. Clayton was certainly too shrewd to "pay the piper before the dance was over." Hence he made but few appointments before the votes were delivered. Besides, some of these appointments were made to offices created during that session of the legislature, and some of them by acts passed after Clayton's election, though they and the persons to fill them had been agreed upon in caucuses of the Clayton men before his election. From the split which occurred among his friends in the legislature, from the causes which I have already mentioned, and the decided opposition of the "Brindle-tails," or Brooks faction, and most of the Democrats, his second election was very doubtful. This is shown by the herculean efforts which he and his friends put forth for some time before the second election. Frequent caucuses were held, conferences at night were numerous, and continued up to a late hour the night before the election. The doubtful issue of the contest is further shown by the vote on the second election.

In the house, first election (house journal, page 74):

Votes cast	78
Of which Clayton received	71
Necessary to a choice	40
Majority	31

In the house, second election (house journal, page 715):

Votes cast	78
Clayton received	42
Necessary to a choice	40
Majority	2

In the senate, first election (senate journal, page 44):

Votes cast	25
Clayton received	23
Necessary to a choice	13
Majority	10

In the senate, second election (senate journal, page 272):

Votes cast	23
Clayton received	15
Necessary to a choice	12
Majority	3

Thus it appears that his first majority (41) was reduced on the second election to 5.

Let us inquire now whether there were more than 5 members of that general assembly voting at that last election who received lucrative appointments from Governor Clayton, or from Governor Hadley by agreement with Clayton. We will first take Hadley's own testimony on this point. He says:

"I appointed the following-named members of the legislature to office:

"S. W. Mallory, senator, commissioner of claims and director of the Mississippi and Ouachita Railroad Company.

"John W. Sarber, senator, trustee of the industrial university.

"P. H. Young, senator, to same position.

"Conway Barbour, representative, assessor of Chicot County.

"E. H. Chamberlain, representative, a justice of the peace.

"M. A. Cohn, representative, superintendent of public instruction.

"I. P. Grady, representative, sheriff Crawford County.

"George Haddock, representative, assessor of Clark County.

"W. C. Hazeldine, representative, circuit judge.

"G. H. Joslyn, representative, county and probate judge of Lincoln County.

"Herbert Marr, representative, circuit school superintendent.

"Thoms Orr, representative, assessor of La Fayette County.

"J. A. Robinson, representative, assessor of Desha County.

"C. C. Waters, representative, circuit judge.

"E. R. Wiley, representative, justice of the peace.

"C. W. Tankersley, representative, superintendent of penitentiary.

"A. Hemmingway, senator, was appointed commissioner to locate county site for Lincoln County.

"G. W. Prigmore, representative, circuit court clerk of Jefferson County, March 17, 1871, the day Hadley was installed. Hadley says he does not remember whether he or Clayton appointed him."

I will next take the testimony of E. A. Fulton:

"D. P. Belden, senator, was appointed justice of the peace in Hot Springs County.

"E. D. Rushing, senator, appointed justice of the peace.

"A. O. Espey, representative, appointed justice of the peace.

"Carl Pope, representative, appointed justice of the peace.

"T. G. T. Steele, representative, circuit court judge.

"J. M. Alexander, representative, justice of the peace.

"James V. Fitch, representative, circuit clerk of Pulaski County and clerk and recorder of criminal court of same county."

These offices (Fitch's) are regarded as the best paying in that county, and are worth about $10,000 per year. This criminal court was created by the same legislature that elected Clayton. The act creating the office of superintendent of the penitentiary, to which Tankersley was appointed, was also passed at the same legislature.

We have here the names of nineteen representatives and six senators—twenty-five members of that legislature in all—who were appointed to lucrative offices, and all of whom are recorded in the journals of the house and senate as voting for Senator Clayton in his second election. Of the fifty-seven men who elected him, nearly one-half were appointed to office. The very pregnant question arises just here, How did this come about? Was it by design or by accident? Hadley appointed most of them, but why? What interest had he in rewarding men from whom he had received no favors, so far as the testimony shows? But we are not left entirely to conjecture in solving this question. There is much positive testimony which shows that many of these votes were obtained by contract. Hadley admits that he appointed some of them at the suggestion of Clayton. Some of these appointments were arranged in caucus before Clayton's election.

And just here I will remark that while Clayton says he never attended a single caucus during the session of the legislature, his own witness, W. S. Oliver, says that Clayton was generally present at all the caucuses. He attended them himself and saw Clayton there. Chamberlain, also his witness, says he attended a caucus of Republicans when Clayton and Bowen were present. The levee bills, the penitentiary bill, and certain railroad bills were agreed upon in caucus; so was Clayton's nomination.

Scales, a Democrat who voted for Clayton on the second election, says that in an interview he had with Governor Clayton before his election, and in talking on that subject, Clayton told him if he would name good men to fill the office of magistrate in his county he would appoint them. Hadley was present and said he would agree to whatever Clayton said he would do. That was in the event Hadley became governor. This was after Johnson was appointed secretary of state, and before the election of Clayton. Had a conversation on the same day with Isaac C. Mills, who was supporting Clayton. I think I told him I had assurances from Clayton and Hadley that these appointments would be made; told him I would support Clayton, and told Mills of my conversation with Clayton. I voted for Clayton, and considered when I voted for him that these vacant offices in my county would be filled. I gave the names of some seven or eight Democrats and Republicans to Hadley and he appointed them. Clayton appointed some before he resigned. Hadley did not appoint some I recommended, and that is the only complaint I made against him. Neal, a Democratic member of the house, voted for the articles of impeachment against Clayton. When the resolution was passed, fourteen senators, as before stated, to break the quorum of the senate, and thus to prevent action on the articles of impeachment, "took to the brush" (using the language of the witness) and were gone a week, remaining during that time at the dwellings of W. S. Oliver and Judge Bowen, and visited while there by Clayton. Meanwhile Neal had evidently been manipulated, for the committee managing the impeachment in the house was changed and Neal appointed by Tankersley, the speaker of the house, chairman of that committee. The committee on the second or third day after Neal was appointed, without taking any evidence to support the articles of impeachment, except to examine some records in Clayton's office, reported back to the house that they could find no evidence on which to sustain the charges. Neal had two measures of much importance to him pending before the legislature. He wanted two courts established and desired Clayton's influence to pass the bill. The bill was afterward passed. Neal did not vote for Clayton, and gives the reason why he did not vote at all, that the election came off at 11 o'clock instead of 12 o'clock in the day. The house journal shows, page 715, that the election was held in accordance with the provisions of the act of Congress, which designates 12 meridian as the hour.

McLane swears that he was in the house when the election was going on, and that he saw Neal during the roll-call get up and leave the chamber. Neal was also interested in a railroad for which he wanted State aid, which could only be granted by the board of commissioners, of which Clayton was one of three members.

The negro (White) senator was also a competitor of Clayton's in the election, and was instructed by his constituents to vote for himself. He did so, but before the announcement of the result of the ballot, he rose and said, "I change my vote to Powell Clayton."

McConnell says that Clayton and Bowen called at his room at a late hour the night before the election and stated that they had just seen White (this senator) and another member of the legislature named Mason, and had fixed the matter with them, but that they were very expensive.

McLane swears that White told him he was visited after 12 o'clock the night before the last election of Clayton by Clayton and Hadley; that they staid with him an hour or two and fixed the matter up.

Fulton swears that White boasted that he got $25,000 worth of stock in a railroad while he was senator.

Another witness testifies that White was charged at a public meeting where he was present with having received $25,000 in bonds for his vote, and did not make any denial.

McConnell testifies that Clayton told him to say to Steele (senator), who was considered doubtful, that he (Clayton) would appoint him judge of the circuit court if he would vote for Clayton for Senator. Steele voted for Clayton and was appointed judge of that court, *vice* Searle, resigned.

Chamberlain (projector, with Clayton and Edwards, of the "star-chamber committee," and Clayton's witness) says: "Clayton asked me to vote for him on his second election; said if I would he would make out for me a commission as justice of the peace right then. I voted for Clayton, and got my commission afterward from Hadley." He states, however, that he did not vote in consideration of the commission. *Per contra*, let it be remembered that between the first and second Senatorial elections Chamberlain had broken out the traces. The impeachment of Johnson to depose him, and thus ful-

fill Clayton's pledge, no man can doubt, was Clayton's own work. Here Chamberlain broke. He opposed that assault and voted against it. Hence the necessity for his recapture. McConnell says that Chamberlain told him Clayton had not treated him right, and if Clayton expected his support he must pay for it.

McConnell says Clayton told him just before his second election that Johnson was going to be impeached, and he felt sure of success, and asked witness to assist. Witness saw J. P. Grady, representative, and reported to Clayton that he thought Grady was "bullheaded," meaning stubborn. Clayton said, "Tell Grady he can have the sheriff's office, or anything reasonable"; that he must have his vote. Mr. Grady voted against the previous question when it was ordered on the motion to impeach Johnson (house journal, 231). But he afterward voted for Clayton at his second election, and received the appointment of sheriff. The same witness says that Clayton told him, in the presence of Mills, district attorney, that Scales's (Democrat) vote could be got by giving him the patronage of his county.

To show that these appointments were all agreed upon before the Senatorial election, I will state that McLane testifies he was informed before the election by Tankersley that he (Tankersley) would be appointed superintendent of the penitentiary; by Sarber, that Mallory would be appointed commissioner, and that Neal would get his railroad aid and county bills, and that Waters would be appointed judge of the criminal court.

Thus it will be seen that five members of the legislature, to wit, Scales, a Democrat; Chamberlain, a Conservative, who ran on the ticket in Pulaski County, which was supported by the Democrats; Steele, who was considered doubtful as to his vote; Grady, who had refused to vote for Clayton's measure impeaching Johnson, and White, a rival candidate for the United States Senate, are shown by direct testimony to have given their votes for Clayton as Senator at the election under which he now holds his seat, under promise of a valuable consideration, which they afterward received, while the opposition of Neal, a Democrat, was overcome by some magic influence, supposed to be a grant of State aid to his road by Governor Clayton. Clayton's majority on that election was five; the men whose names are given above, excluding Neal, were five in number, and all voted for Clayton.

There is another very important fact, to which I now call attention. It is that even the majority he received would have been overcome had the delegation from the Hot Springs district and Pulaski and White Counties been allowed to take their seats. They were undoubtedly excluded by the iron hand of Clayton, and to prevent their opposition to his election. He had but one purpose, as shown by the evidence, to accomplish through the aid of that body, and that was to come to the Senate. Everything was subsidized and subordinated to that end.

McConnell says that Clayton told him, when he took Haymaker to see Clayton about his (H.'s) levee bill, that there were four levee bills before the legislature; that they were good to use for political purposes; that he would keep out of the fight for a while, and then favor the bill best suited for political purposes.

Various witnesses testify that many of Clayton's friends and supporters, in the legislature and outside of it, were interested in these bills and several railroad bills. Neal was interested in a railroad; so was Sarber; so was Judge Bowen. Judge Bennett was interested to the extent of a fee of $70,000. And all these were looking to the governor for State aid and his influence.

By the returns in the secretary's office the delegation from Pulaski and White, opposed to Clayton, were elected. But White, the secretary, sent in the roll of members-elect with the names of Clayton's supporters from those two counties upon it. Among those opposed to him and left off the roll were Hodges and Brooks. We have seen that Brooks told Clayton in that remarkable interview that he knew that Brooks and Hodges were opposed to his election, and that he told him further he knew the delegation from Hot Springs district, three in number, were also opposed to him, and that he (Clayton) had originated the Mallory or star-chamber committee, for the express purpose of keeping these opposition candidates out of the legislature; that Clayton did not deny the charge that he raised the committee, but simply stated it was raised to countervail their opposition to his getting his seat at Washington. We further know the proposition that Clayton then made, that he would consent to admit those two delegations in order to remove all obstacles to his election. That he prevented their being seated to secure his election is shown by the following facts: The Hot Springs delegation, after being kept out of their seat through the report of the Mallory committee from the 2d day of January until after Clayton's election on the 15th of March, were finally received into the house. Brooks, of the Pulaski delegation, the most powerful opponent, intellectually and morally, that Clayton had, was kept out until after the first election, was after the election declared by the committee unanimously to be entitled to his seat, was, without notice or hearing before the second election, on the report of the committee on privileges and elections, ejected from the senate, and Riley, his Democratic opponent, seated, while

Hodges and the other candidates for the house from the Pulaski disrtict were never permitted to take their seats. The complexion of the delegation from Pulaski and White, who were seated, is somewhat motley, not to say significant. They were C. A. Whittemore, a Democrat; Robert A. Howard, Democrat; E. H. Chamberlain, Democrat or Conservative; J. W. House, Democrat; and Pilkington and Goad, Republicans. The seats of Goad and Pilkington were contested by Gantt and Mitchell, Democrats, who, it will be remembered, withdrew to insure the certificate of election to Edwards. Goad and Pilkington voted for Clayton.

There are many other facts which illustrate this contest for power and place, but having already extended this review further than I expected, I will refer to but few more.

At the organization of the legislature an armed force took possession of the State-house, and no one was allowed to enter the house or senate except those who held certificates of election. Tankersley entered, as several witnesses say, almost on a run, and took his seat in the speaker's chair before he was nominated. The two houses were organized on the roll furnished by the secretary of state, who, it will be remembered, excluded from the list of members-elect some who, by the returns in his office, had a majority, but who were opposed to Clayton's election. When the articles of impeachment were about to be presented against Clayton, or had been preferred, his attached friends, members of the legislature, and some outside, formed a military company for the purpose of offering resistance. Clayton ordered arms from the arsenal at Little Rock sufficient to arm from one hundred to one hundred and fifty men, and these arms were placed in the executive office ready for use. Even his own witnesses testify that Johnson, who was then considered the head of the opposition, was a very peaceable man, and that they saw no demonstrations of force on the part of either Johnson or any of his friends. One witness, Brooks, says that this armed power had a very discouraging influence on the members who had been appointed to conduct the impeachment. Clayton and his friends, as a pretext for this, threatened bloodshed, saying that they feared Johnson and his friends would endeavor to depose the governor from office in advance of a compliance with the laws of the State, but no witness testifies to any act which showed such an intention.

However much we may differ on the demurrer to these facts, on a calm survey of this whole testimony there is one conclusion as to which, I think, all men will agree. It is that Senator Clayton is responsible for all the acts of that legislature, through its committees and otherwise, which were done to promote his election. He was the doer of many of them, and all the others were done by those who either stood in the most intimate personal relations to him, and were in almost daily conference with him, or others who were bending every energy to accomplish his one purpose. Bowen was the omnipresent and ever present, his mentor and monitor, his man Friday, his very shadow. Hadley was his creature, was made governor by him, and obeyed his mandates to the letter, as shown by the appointments Hadley made. Storey said that when he applied to have the public printing restored to him Hadley answered that he could not do so until he consulted Senator Clayton, then in Washington.

Judge Bennett, appointed by Clayton circuit judge a month after his admission to the bar for his zeal and labor in this contest, was promoted during that legislature to the supreme bench by the same benefactor. He of course was subservient. Judge McClure, the recipient of a like favor, was alike devoted. Judge Searle, who withdrew in the Congressional race, received like honors. Tankersley, whom one witness calls Clayton's candidate for speaker, devoted to the end, was rewarded by being assigned through mistake to a place *over* the penitentiary. And so with many others: Who can doubt that their acts and sayings were Clayton's own so far as they related to his election? Who can doubt, not only from these circumstances, but from the positive evidence in this case, that the five votes of Scales, Chamberlain, White, Grady, and Steele were procured directly by Governor Clayton for a valuable consideration? Who can doubt that he is directly responsible for the exclusion of those members, ten in number, whose votes were pledged against him, and who, if admitted, would have defeated his election?

Is not the conclusion irresistible that the appointment of those members of the legislature to office by Hadley was the act of Clayton himself? And, going one step further, who does not believe, considering the history of this transaction and the extraordinary fact that nearly one-half of the members who voted for Clayton were, during the session of that legislature and soon after his election, appointed, some to the most honorable and some to the most lucrative offices within the executive patronage, that these appointments were the price of their votes?

Recurring now to the transaction with R. J. T. White, is there any room left for doubt that White sold out and that Clayton bought him? Hadley made the arrangement, Clayton recognized it by a simple word or wink from White, and then Clayton paid the price in the very amount of money and of bonds, and the very class of bonds (first-

mortgage Ouachita and Red River Railroad), which Hadley told White would be paid. And Clayton by the use of this money secured the votes of his own party friends, three or four of whom on this investigation have sworn they would not have voted for him unless he had removed Johnson. Johnson was removed by removing White. If this be true, then it is clear that Clayton obtained his election solely through the power of money. If he had removed Johnson by the *quo warranto* on the judgment of a competent court there would have been nothing corrupt in it, or if the impeachment had resulted in deposing him after a fair trial it might have been considered very sharp but not corrupt practice. But when these failed, and he had no other means left by which to obtain a seat in the United States Senate, except the power and influence of gold, used and applied as it was, I cannot regard that means as other than corrupt. The circumstances of the bargain show that he and White were of the same opinion. Clayton's emissary approached White at a late hour of night after White had gone to bed—made the proposition. The interview was "short, sharp, and decisive." White said he would consider. When he and Clayton met on the street Clayton referred to the subject and passed on. When they met in New York after the election White renewed the subject with a single remark; Clayton signified his obligation, and when Clayton inclosed the money and bonds, instead of sending his own draft (which would have an ear-mark) he sent a certificate, reading that *Jackson E. Sickles* had deposited to White's credit in a New York bank $5,000.

Taking a retrospective glance over the field of this contest, brought on by ambition, made fierce by party strife, and ending in shame, what a sad spectacle do we behold! Clayton's plan of battle was laid while his enemies slept, and long before the day of action. Through executive power he commanded the situation, held it, and won, but with irreparable loss. We see executive power cruelly brought to bear on Storey, party ties subrogated, friend and foe falling without discrimination. We see legislators obeying his beck, and crushing Brooks and others at his nod. We see the representatives of the people seated and unseated at his pleasure. And all these to put him in the Senate! We see registrars appointed and protected by him when charged with fraud. We see overtures to his enemies to join hands and wage war on his friends. We see friends and foes, Democrats and Republicans, following his banner, each confident he was their leader, and each, like the irate knights, seeing a different color on either side the shield. We see an inoffensive citizen, honored by his people with the next highest State office in their gift (and given simultaneously with the highest, which they conferred on Clayton), assailed without cause, by *quo warranto*, to gratify ambition. We see a plain law—so plain that he who runs may read—violated, and a certificate of election issued, under a bargain made for his own promotion, to one not entitled to it. We afterward see this Democratic favorite ejected from his seat in Congress, obtained on that certificate, and his opponent, a Republican, seated by a rebuking majority vote. To furnish an apology for this act we see him raise a packed committee to investigate alleged frauds, and "to report in favor of Edwards." We see the certificate of election withheld for more than two months after it should have been issued, and more than one month after the report of that committee. This ambition still foiled, we see it turn again on Johnson with ferocity increased by disappointment, and attack not only Johnson's position but his honor. Here we see the mercenaries of this leader of two opposing parties discover the reverse side of his banner and desert. A few of their opponents desert and join them and turn upon their former leader. To escape defeat he withdraws his adherents to the headquarters of his first-lieutenant, Bowen, where they are quartered for six days. Strategy meantime is active. One of the opposing leaders, Neal, is captured—joins the enemy—carries a few followers, and the combined forces return, and Neal reports against impeachment. Still ambition is not sated. Still foiled by its foe, Johnson, it curbs passion, abandons the open field, and, encouraged by its success with Neal, again resorts to strategy. An armistice ensues, and Johnson is invited to a counsel. We there see this ambition tender gold to White and office to Johnson, and its hitherto unconquerable foe surrenders. Though the opposing chief surrendered, his followers did not, and victory was not assured. The stragglers, who had sworn they would not advance under Clayton against the opposing forces until their commander, Johnson, had been either killed or captured, hearing of his capture, returned to the ranks. This ambition, still fearing a field engagement, tried again the skill of strategy. Gold and promotion to office were tendered to a few of the enemy; they grounded their arms, joined Clayton, and, thus reenforced, he conquered.

Is it not clear, on a full review of all these facts, that money, or its equivalent, alone gave Clayton his majority of five? Taking the buying of White, by which Johnson was overcome; the votes of the Republicans opposed to his election if Johnson remained lieutenant-governor (three or four of whom testify here that they would not have voted for him except on that condition, and who further swear they did vote for him), and counting those with whom he bargained to give them lucrative offices for their votes, it

is demonstrable by figures that he got more than five votes (his majority) by these two means.

The only remaining question, granting the facts, is, what is the law? On this head I shall be brief. I consider it unnecessary to cite precedents or quote authorities; for the single question is, was using money and lucrative offices in that way fraudulent and corrupt? If so, they make the election void, and the Senate may declare the seat vacant. If, in the judgment of the Senate, such conduct was not corrupt and fraudulent, there is no case made out. This I understand to be the generally accepted rule of law in such cases.

I know there are some who go to the extreme of holding that the Senate has no jurisdiction over a Senator for any offense he may have committed prior to the moment of his election, even though the act was bribery in securing his election. And it is founded on the doctrine of State rights. To my mind this rule is not only unsound but repugnant to State rights. For I can conceive of few higher rights the people of a State, who are the sovereign power of that State, have than to be represented by a Senator who is chosen in conformity to law. The legislature are but the agents of the people. They cannot exceed their delegated power. A part of their delegated power is to elect Senators for their principal, the people—the sovereign. An inseparable incident of that power thus delegated is that it shall be exercised fairly and honestly. The law will never imply that even a private agent is authorized to act fraudulently in transacting the business of his principal. His agency ceases the instant he commits the fraud, and he makes himself individually responsible for the act. He not only cannot act fraudulently, and bind thereby his principal, but he cannot bind his principal by a lawful act done extra the scope of his agency. This being true of a private agent, the rule is even more rigid as to public agents, for reasons I need not stop to enumerate. A legislature is a public agent. And while a court cannot inquire whether a statute was passed by a bribed majority, the people—the principal—to be bound by the statute may. For instance, if a charter for a private corporation should be obtained by a bribed majority, the people, through their legislature, may annul the contract by repealing the charter.

To apply this rule to the election of a Senator. He represents the State. He is in no sense the representative of the legislature. He is elected by the legislature as an agent delegated for that purpose. The agent must act strictly within the limits of his delegated power. Fraud lies outside of that power. And when a candidate bribes a sufficient number of the electors to secure his election, he and they knowingly commit a fraud on the people, and by every rule of law any act done through combination of an agent with a third party to defraud the principal is void. And the man thus elected (to use a solecism) was never elected. The election is void and the seat vacant. And when the fact is judicially ascertained by the Senate, it is only necessary to declare by resolution the seat vacant. I say further, that in such case it is the imperative duty of the Senate so to do, and for the reason that no other power can. The legislature of the State cannot. The people in sovereign character cannot. For the Senate alone, under the Constitution, can judge of the election and qualifications of its members. If the election is void, there has been no election and the State is *pro tanto* unrepresented in the Senate. She is entitled to two members in this body, and it would be the duty of the Senate to say one seat was vacant, that the State might fill it. Here, in my opinion, the power of the Senate to judge of the election of its members necessarily includes the right to go behind the moment and form of an election in order that it may determine whether that election was procured by bribery.

Again, the Senate is expressly clothed with power by the Constitution to judge of the elections, returns, and qualifications of its members. The "qualifications" of a Senator are prescribed in the Constitution. The "returns" spoken of are the formal evidence of his election. But the power to judge is not confined to "qualifications" and "returns." It extends to the election itself, and in terms is unlimited. Is it without limit, or, in other words, may an election be declared void for any cause for which a majority of the Senate in their discretion may see fit to avoid it? Certainly not. It is not a question of discretion, but of parliamentary and constitutional law. A cause which, according to parliamentary law, consistent with the Constitution, avoids an election, is a sufficient cause. But according to parliamentary law, both in England and the United States, an election may be avoided for bribery. The provision in the Constitution is a transcript of the parliamentary law of the English House of Commons, as it existed when, and long before, the Constitution was adopted. And it is to be observed that the same clause that makes the Senate the judge of the election of a Senator makes the House the judge of the elections of its members. The clause is as follows:

"SEC. V, ART. —. Each House shall be the judge of the elections, returns, and qualifications of its own members."

The power of the two Houses is, therefore, the same, and no one has ever doubted that the election of a Representative may be set aside for bribery.

I see no reason for a distinction between the electors who choose a member of the House and those who choose a Senator. The members of a legislature, in choosing a Senator, act as a body of electors, just as the people act as a body of electors in choosing a Representative. Either class may be bribed, and the reasons for holding that bribery avoids the election in the one case apply with equal force to the other.

And hence I say that this right, so far from infringing on State rights, is necessary to their protection. In the case supposed, the State would be defrauded by the election of a corrupt man to the Senate without the power to vacate his seat. For with two members of the Senate admitted as her representatives, and one in a seat obtained by bribing her agent, she could not elect a third to take his place without action by the Senate declaring his seat vacant.

My conclusion on the specifications, which, as before stated, I resolved into three distinct charges, is:

First, that while the evidence satisfies me that a combination did exist between Clayton and Edwards, by which, for the support of Democrats, Clayton agreed to issue the certificate to Edwards, and did accordingly so issue it; yet, that not having obtained his seat by the election held on the 11th of January, at which he received these Democratic votes, the act is one not cognizable by the Senate;

Second, that the charge made of procuring his seat by the corrupt use of money in the transaction with White is sustained by the evidence;

And third, that he obtained 5 other votes, which make his majority, and were necessary to his election, by giving to those electors as a consideration for their votes lucrative offices; and that this was as corrupt as if for the same purpose he had paid them money in kind.

[Special session of Senate, March, 1873.]

TUESDAY, *March* 11, 1873.

Mr. Wright submitted the following resolution for consideration:

"*Resolved*, That the charges made and referred to the select committee for investigation affecting the official character and conduct of the Hon. Powell Clayton are not sustained, and that the committee be discharged from their further consideration."

MONDAY, *March* 24, 1873.

On motion by Mr. Wright that the Senate proceed to the consideration of the resolution submitted by him on the 11th instant, declaring that the charges against the Hon. Powell Clayton are not sustained,

After debate, it was determined in the affirmative—yeas 36, nays 14.

On motion by Mr. Bayard, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Alcorn, Allison, Ames, Bogy, Boreman, Boutwell, Buckingham, Chandler, Cragin, Dorsey, Ferry of Connecticut, Ferry of Michigan, Frelinghuysen, Goldthwaite, Hitchcock, Howe, Ingalls, Lewis, Logan, Mitchell, Morrill of Maine, Morrill of Vermont, Morton, Oglesby, Patterson, Pratt, Ramsey, Robertson, Sargent, Scott, Sherman, Spencer, Stewart, West, Windom, and Wright.

Those who voted in the negative are Messrs. Bayard, Casserly, Davis, Fenton, Gordon, Hamilton of Texas, Kelly, McCreery, Merrimon, Norwood, Saulsbury, Stevenson, Stockton, and Thurman.

So the motion was agreed to.

Whereupon, the Senate proceeded to consider the resolution; and

The resolution having been modified by Mr. Wright, with the consent of the Senate, to read as follows:

"*Resolved*, That the charges made and referred to a select committee of the Senate at the last Congress for investigation affecting the official character and conduct of the Hon. Powell Clayton are not sustained,"

Pending debate,

On motion by Mr. Wright, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 165–173 of the Congressional Record, special session of the Senate, 43d Cong.]

TUESDAY, *March* 25, 1873.

The Senate resumed the consideration of the resolution submitted by Mr. Wright on the 11th instant, viz:

"*Resolved*, That the charges made and referred to a select committee of the Senate at the last Congress for investigation affecting the official character and conduct of the Hon. Powell Clayton are not sustained;"

And, on the question to agree thereto,

After debate, it was determined in the affirmative—yeas 33, nays 6.

On motion by Mr. Davis, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Alcorn, Allison, Ames, Anthony, Boreman, Boutwell, Chandler, Conover, Cragin, Dorsey, Ferry of Connecticut, Ferry of Michigan, Frelinghuysen, Hitchcock, Howe, Ingalls, Jones, Lewis, Logan, Mitchell, Morrill of Maine, Morton, Patterson, Pratt, Ramsey, Robertson, Sargent, Scott, Sherman, Stewart, West, Windom, and Wright.

Those who voted in the negative are Messrs. Cooper, Davis, Goldthwaite, Gordon, Merrimon, and Norwood.

So the resolution was agreed to.

[The debate is found on pages 184–192 of the Congressional Record, special session of the Senate, 43d Cong.]

[Third session Forty-second Congress to third session Forty-sixth Congress.]

RAY vs. McMILLEN; McMILLEN vs. PINCHBACK (MARR AND EUSTIS); AND SPOFFORD vs. KELLOGG (MANNING).

of Louisiana.

William P. Kellogg, whose term expired March 3, 1873, resigned January 13, 1873. January 22, 1873, credentials of John Ray and William L. McMillen, each claiming to have been elected to fill the unexpired term, were presented, and referred to the Committee on Privileges and Elections. Mr. Ray's credentials were signed by William P. Kellogg as governor, and Mr. McMillen's by John McEnery as governor. January 16, a resolution of the Senate directing the committee to inquire and report whether there was an existing legal State government in Louisiana had been referred to the committee. February 20, the committee submitted one report on the credentials and on the resolution. They reported that the State election held in November, 1872, in which Messrs. Kellogg and McEnery each claimed to have been elected governor, was void for fraud; that the Kellogg government, so called, approached more nearly a government *de facto*, and the McEnery government a government *de jure;* that had the election been fairly conducted, Kellogg and a legislature of the same political party would have been elected, but that, while the Kellogg government was in possession of the State-house, there was not a quorum of both houses of the Kellogg legislature who had any pretense of having been elected to their seats; that, under such circumstances, Congress had authority to order a new election. The committee recommended the adoption of resolutions that there was no State government existing at the time in Louisiana, and that neither Ray nor McMillen was entitled to a seat, neither having been elected by the legislature of the State, and recommended the passage of a bill ordering an election in the State. Three members of the committee submitted separate views dissenting from the conclusions of the majority. The bill referred to was rejected February 27, 1873. No further action was taken on the credentials. The expenses incurred by Messrs. Ray and McMillen were reimbursed. The proceedings of the Senate relating to the resolution of January 16 and the bill referred to are not included in the proceedings given below.

The legislature electing Mr. McMillen for the unexpired term ending March 3, 1873, elected him for the succeeding term, and the legislature electing Mr. Ray elected Pinckney B. S. Pinchback for the succeeding term. December 4, 1873, the credentials of both were referred to the Committee on Privileges and Elections. December 15, the committee reported that they were evenly divided upon the question as to whether Mr. Pinchback was upon his credentials entitled to be sworn as a member, and asked to be discharged from the further consideration of the subject and to refer the whole matter to the determination of the Senate. On the same day a resolution was submitted that the credentials of Mr. Pinchback being in due form he was entitled to be sworn as a member, and that any grounds of contest should be made thereafter. January 26, 1874, the resolution was modified so that the credentials of Mr. Pinchback be referred to the Committee on Privileges and Elections, and that the committee be instructed to inquire into the conduct of Mr. Pinchback in connection with his election. January 27, it was ordered that the credentials of Mr. McMillen be referred to the committee. The Senate debated the resolution of January 26, but no further action was taken during the session. December 23, 1874, a resolution was submitted that the Committee on Privileges and Elections be instructed to report if Mr. Pinchback was entitled to be admitted on a *prima facie* case, or if such admission should be postponed until after the investigation of the charges of corruption. January 22, 1875, credentials of a second election of Mr. Pinchback, signed by Mr. Kellogg as governor, were presented. They were referred the same day, together with all the papers in relation to the contested seat, to the committee. (All subsequent action by the Senate was on Mr. Pinchback's first credentials.) February 8, the committee reported that Mr. Pinchback had a *prima facie* title to admission, and recommended the adoption of a resolution that he be admitted. There was a minority report. The Senate debated the resolution for some days, when it was ordered to lie on the table. March 5, the same resolution was submitted and debated. December 15, 1875, the Senate resolved "that the request of W. L. McMillen, heretofore claiming a seat in the Senate, for the return of his credentials be granted." December 20, the credentials of Robert H. Marr, appointed by John McEnery as governor, to fill the vacancy occasioned by the resignation of Mr. McMillen, were presented and ordered to lie on the table. January 18, 1876, the papers purporting to be the credentials of James B. Eustis, elected by the legislature of Louisiana to the contested seat, were presented and ordered to lie on the table. January 24, they were referred to the committee. January 28, the committee reported that Mr. Pinchback having been elected to that seat, there was no vacancy, and recommended that the papers relating to Mr. Eustis be laid on the table. February 3, the Senate resumed the consideration of the resolution of March 5, 1875, and March 8, the resolution having been amended by inserting the word "not" before the word "admitted," the Senate resolved that Mr. Pinchback be not admitted. March 9, 1877, the Senate resolved that the credentials of Mr. Eustis be taken from the files and referred to the committee. December 1, the committee reported that the legislature electing Mr. Eustis, made up according to what was known as the "Wheeler compromise," was the lawful legislature; that a vacancy existed at the time of his election; and that the committee felt bound to regard the vote of the Senate on Mr. Pinchback's claim as final adjudication. They reported a resolution that Mr. Eustis be admitted. December 10, the resolution was agreed to, and Mr. Eustis took the seat which had been vacant since the resignation of Mr. Kellogg, January 13, 1873. Mr. Pinchback was allowed compensation from the beginning of the term to the period of the determination of the contest.

From the existence of two rival bodies, each claiming to be the legislature of Louisiana, arose another contest for the seat for the term beginning March 4, 1877. Mr. Kellogg's credentials were presented January 20, 1877. Objection having been made to the oaths being administered to him March 5, the Senate resolved, March 7, that the credentials lie on the table, to be referred to the Committee on Privileges and Elections when appointed. October 17, the credentials of Henry M. Spofford were presented. October 18, the Senate resolved that the credentials of Mr. Spofford be referred to the committee, and that the committee also report on the credentials of Mr. Kellogg. November 26, the committee reported that Mr. Kellogg's credentials were signed by Stephen B. Packard as governor, and that he had been elected January 10, 1877, by what was known as the Packard legislature; that Mr.

Spofford's credentials were signed by Francis T. Nicholls as governor, and that he had been chosen April 24, 1877, by what was known as the Nicholls legislature; that the committee had gone behind the certificates of the returning officers of the State, and had investigated the elections of individual members of the general assembly; that they found that the returning officers in throwing out certain polls where freedom of election was utterly destroyed, and declaring Republican candidates elected, did what they believed to be legal, and what was really equitable; that a sufficient number of the members by whose votes Mr. Kellogg was elected were lawfully and equitably entitled to their seats; that afterwards the Nicholls legislature by illegal means came to contain an undisputed majority of members lawfully elected to the general assembly, but that until and after the election of Mr. Kellogg the Packard legislature was *de facto* and *de jure* the government of Louisiana; that upon that legislature devolved the duty of electing a Senator; that the duty was performed in the election of Mr. Kellogg; that no subsequent events, especially successful revolution, could undo what had been lawfully done. The committee recommended the adoption of the following resolutions: "*Resolved*, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years, commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath. *Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States." There was a minority report. November 30, the resolutions were agreed to, and Mr. Kellogg took the seat. March 21, 1879, a memorial of Mr. Spofford was presented, praying for an investigation into his claim to a seat, which was referred to a committee. May 7, the Senate resolved that the committee be authorized to make a full investigation into the subject. March 22, 1880, the committee reported that the evidence taken showed that the Packard legislature was, in fact as well as in law, not a legislature, but a body of men assembled by fraud, held together by force, and controlled by bribery, with the aid and in the interest of the sitting member. The committee reported the testimony taken and recommended the adoption of resolutions that Mr. Kellogg was not entitled to the seat in the Senate, and that Mr. Spofford was chosen by the legislature, and that he be admitted to the seat. A minority report claimed that the resolutions of November 30, 1877, were binding as final decisions by the Senate; that a change in the party majority in the Senate was the only change that had taken place since Mr. Kellogg took his seat in pursuance of a resolution of November 30, 1877. The resolutions reported by the committee were debated, but no further action was taken by the Senate. December 7, 1880, credentials of Thomas C. Manning, appointed by the governor in place of Mr. Spofford, who died August 20, 1880, were presented and referred to the committee. No further action was taken on the credentials. Compensation from March 4, 1877, to August 20, 1880, were allowed to the representatives of the estate of Mr. Spofford. The expenses incurred by Messrs. Kellogg and Manning were reimbursed.

The history of the cases here given consists of a transcript of the proceedings of the Senate relating to them from Senate Journals, 3d sess. 42d Cong. to 1st sess. 47th Cong., and the reports of the committee (except the testimony).

Special references to the debates of each day are inserted below, and references to the reports are given in foot-notes.

RAY vs. McMILLEN.

Contest for seat for unexpired term ending March 3, 1873.

WEDNESDAY, *January* 22, 1873.

Mr. West presented the credentials of W. L. McMillen, elected a Senator by the legislature of Louisiana to fill the vacancy occasioned by the resignation of William Pitt Kellogg; which were referred to the Committee on Privileges and Elections. Mr. West presented the credentials of John Ray, elected a Senator by the legislature of Louisiana to fill the vacancy occasioned by the resignation of William Pitt Kellogg; which were referred to the Committee on Privileges and Elections.

THURSDAY, *February* 20, 1873.

Mr. Carpenter, from the Committee on Privileges and Elections, who were directed by a resolution* of the Senate of January 16, 1873, to "inquire and report to the Senate whether there is an existing legal State government in Louisiana, and how and by whom it is constituted," and to whom were referred the credentials of W. L. McMillen and John Ray, claiming seats in the Senate in the place of W. P. Kellogg, resigned, submitted a report (No. 457), accompanied by a bill† (S. 1621) to establish a government in the State of Louisiana, republican in form; which was read and passed to a second reading.

Mr. Morton, Mr. Hill, and Mr. Trumbull, members of the Committee on Privileges and Elections, each submitted views dissenting from the conclusions arrived at by the committee, which were ordered to be printed to accompany the report (No. 457).

REPORT OF COMMITTEE.‡

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 20, 1873.—Ordered to be printed.

Mr. Carpenter submitted the following report to accompany bill S. 1621:

The Committee on Privileges and Elections, to whom was referred Senate resolution of January 16, 1873, as follows:

"*Resolved*, That the Committee on Privileges and Elections be instructed to inquire

*The resolution here given is the one on which this report was made. The one given by an error in the Senate Journal (resolution of January 7, 1873) was reported February 10 (No. 417).

†For copy of bill see Congressional Globe, part 3, 3d sess. 42d Cong., pages 1850, 1851.

‡From Senate Reports, 3d sess. 42d Cong., No. 457. The accompanying testimony is here omitted.

and report to the Senate whether there is any existing State government in Louisiana and how and by whom it is constituted,"

And to which committee were also referred the credentials of John Ray and W. L. McMillen, both claiming the seat supposed to have been made vacant by the resignation of William Pitt Kellogg, a Senator of the United States from the State of Louisiana, respectfully submit the following report:

Your committee have devoted weeks to the investigation of the subjects referred to them, and have taken much record and oral testimony, which accompanies this report.

On the 15th of January, 1873, John McEnery certifies, under what purports to be the great seal of the State of Louisiana, that he is governor of said State; and that on the 14th day of January, 1873, W. L. McMillen was by the legislature of said State duly elected a Senator of the United States to fill the unexpired term of Hon. William Pitt Kellogg. On the same day, January 15, 1873, William Pitt Kellogg certifies, under what purports to be the great seal of said State, that he is the governor of said State, and that John Ray was duly elected by the legislature of said State on the 15th day of January, 1873, to fill said unexpired term of said Kellogg in the Senate of the United States.

The certificate of said John McEnery is countersigned by Y. A. Woodward, assistant secretary of state; and the certificate of said Kellogg is countersigned by P. G. Deslondes, secretary of state.

The Senate must therefore determine whether either McMillen or Ray, and, if either, which, is entitled to said seat.

The extraordinary fact that two men are claiming to be the governor of said State, and that two men are certified under the great seal of the State to have been elected to one and the same seat in the Senate, and the resolution of the Senate requiring your committee to inquire and report whether there is any existing State government in Louisiana and how and by whom it is constituted, have compelled your committee to inquire fully into the condition of things in that State; and the conclusions to which your committee have arrived are now to be stated:

On the 4th day of November last, Henry C. Warmoth was governor of said State, having been elected in 1868. On that day a general election for governor and other State officers, and one-half of the senate and all the members of the house of representatives of said State, ought to have been holden.

The constitution of said State, art. 46, provides as follows:

"Returns of all elections for members of the general assembly shall be made to the secretary of state."

The constitution, Title III, executive department, art. 48, provides as follows:

"The supreme executive power of the State shall be vested in a chief magistrate, who shall be styled the governor of the State of Louisiana. He shall hold his office during the term of four years, and, together with the lieutenant-governor elected for the same term, be elected as follows: The qualified electors for representatives shall vote for governor and lieutenant-governor at the time and place for voting for representatives; the returns of every election shall be sealed up and transmitted by the proper returning officer to the secretary of state, who shall deliver them to the speaker of the house of representatives on the second day of the session of the general assembly then to be holden. The members of the general assembly shall meet in the house of representatives to examine and count the votes. The person having the greatest number of votes for governor shall be declared duly elected; but in case of a tie-vote between two or more candidates, one of them shall be immediately chosen governor by joint vote of the members of the general assembly. The person having the greatest number of votes polled for lieutenant-governor shall be lieutenant-governor; but in case of a tie-vote between two or more candidates one of them shall be immediately chosen lieutenant-governor by joint vote of the members of the general assembly."

Article 60 provides as follows:

"He (the governor) shall nominate and, by and with the advice and consent of the senate, appoint all officers whose offices are established by the constitution, and whose appointments are not herein otherwise provided for: *Provided, however*, That the general assembly shall have a right to prescribe the mode of appointment to all other offices established by law."

These are provisions of the constitution with which the reconstructed State of Louisiana was admitted into the Union.

On the 16th of March, 1870, the legislature of that State pretended to pass a law regulating elections, which among other things provided as follows:

"SEC. 29. *Be it further enacted, &c.*, That in any parish, precinct, ward, city, or town, in which during the time of registration or revision of registration or on any day of election, there shall be any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences at any place within said parish, or at or near any poll

or voting place, or place of registration or revision of registration, which riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences shall prevent, or tend to prevent, a fair, free, peaceable, and full vote of all the qualified electors of said parish, precinct, ward, city, or town, it shall be the duty of the commissioner of election, if such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences occur on the day of election, or of the supervisor of registration, or any assistant supervisor of registration of the parish, if they occur during the time of registration or revision of registration, to make in duplicate and under oath a clear and full statement of all the facts relating thereto, and of the effect produced by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, in preventing a fair, free, peaceable, and full registration or election, and of the number of qualified electors deterred by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, from registering or voting, which statement shall also be corroborated under oath by three respectable citizens, qualified electors of the parish.

"When such statement is made by a commissioner of election or assistant supervisor of registration he shall forward both copies to the supervisor of registration immediately on the close of the election. The supervisor of registration shall forward one copy of all such statements, whether made by himself or a commissioner of election or by an assistant supervisor of registration, to the governor, and shall deposit one copy with the clerk of the district court of the parish.

"SEC. 53. *Be it further enacted, &c.*, That immediately upon the close of the polls on the day of election the commissioners of election at each poll or voting place shall seal the ballot-box by pasting slips of paper over the keyhole and the opening in the top thereof, and fastening the same with sealing-wax, on which they shall impress a seal, and they shall write the names of the commissioners on the said slips of paper; they shall forthwith convey the ballot-box so sealed to the office of, and deliver said ballot-box to, the supervisor of registration for the parish, who shall keep his office open for that purpose from the hour of the close of the election until all the votes from the several polls or voting places of the precinct shall have been received and counted. The supervisor of registration shall immediately upon the receipt of said ballot-box note its condition and the state of the seals and fastenings thereof, and shall then, in the presence of the commissioners of election and three citizens, freeholders of the parish for such poll or voting place, open the ballot-box and count the ballots therein, and make a list of all the names of the persons and offices voted for, the number of votes for each person, the number of ballots in the box, and the number of ballots rejected, and the reason therefor. Said statements shall be made in triplicate, and each copy thereof shall be signed and sworn to by the commissioners of election of the poll and by the supervisor of registration. As soon as the supervisor of registration shall have made the statement above provided for, for each poll in his precinct or parish, and it shall have been sworn to and subscribed as above directed, the supervisor of registration shall inclose in an envelope of strong paper or cloth, securely sealed, one copy of such statement from each poll and one copy of the list of persons voting at each poll, and one copy of any statements as to violence or disturbance, bribery or corruption, or other offenses specified in section 29 of this act, if any there be, together with all memoranda and tally-lists used in making the count and statement of the votes, and shall send such package by mail, properly and plainly addressed, to the governor of the State. The supervisor of registration shall send a second copy of said statement to the governor of the State by the next most safe and speedy mode of conveyance, and shall retain the third copy in his own possession.

"SEC. 54. *Be it further enacted, &c.*, That the governor, the lieutenant-governor, the secretary of state, and John Lynch and T. C. Anderson, or a majority of them, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum and have power to make the returns of all elections. In case of any vacancy by death, resignation, or otherwise by either of the board, then the vacancy shall be filled by the residue of the board of returning officers. The returning officers shall, after each election, before entering upon their duties, take and subscribe to the following oath before a judge of the supreme or any district court:

"'I, A. B., do solemnly swear (or affirm) that I will faithfully and diligently perform the duties of a returning officer as prescribed by law; that I will carefully and honestly canvass and compile the statements of the votes, and make a true and correct return of the election: So help me God.'

"Within ten days after the closing of the election said returning officers shall meet in New Orleans to canvass and compile the statements of votes made by the supervisors of registration, and make returns of the election to the secretary of state. They shall continue in session until such returns have been completed. The governor shall at such meeting open in the presence of the said returning officers the statements of the supervisors of registration, and the said returning officers shall, from said statements, canvass

and compile the returns of the election in duplicate. One copy of such returns they shall file in the office of the secretary of state, and of one copy they shall make public proclamation by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected. The returns of the elections thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers until set aside, after a contest according to law, of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected.

"The governor shall within thirty days thereafter issue commissions to all officers thus declared elected who are required by law to be commissioned.

"SEC. 55. *Be it further enacted, &c.*, That in such canvass and compilation the returning officers shall observe the following order: They shall compile first the statements from all polls or voting places at which there shall have been a fair, free, and peaceable registration and election. Whenever from any poll or voting place there shall be received the statement of any supervisor of registration, assistant supervisor of registration, or commissioner of election, in form as required by section 29 of this act, on affidavit of three or more citizens, of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences which prevented or tended to prevent a fair, free, and peaceable and full vote of all qualified electors entitled to vote at such poll or voting place, such returning officers shall not canvass, count, or compile the statement of votes from such poll or voting place until the statements from all other polls or voting places shall have been canvassed and compiled. The returning officers shall then proceed to investigate the statements of riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences at any such poll or voting place, and if from the evidence of such statements they shall be convinced that such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences did not materially interfere with the purity and freedom of the election at such poll or voting place, or did not prevent a sufficient number of qualified voters thereat from registering or voting to materially change the result of the election, then, and not otherwise, said returning officers shall canvass and compile the vote of such poll or voting place with those previously canvassed and compiled; but if said returning officers shall not be fully satisfied thereof, it shall be their duty to examine further testimony in regard thereto, and to this end they shall have power to send for persons and papers. If, after such examination, the said returning officers shall be convinced that said riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences did materially interfere with the purity and freedom of the election at such poll or voting place, or did prevent a sufficient number of the qualified electors thereat from registering and voting, to materially change the result of the election, then the said returning officers shall not canvass or compile the statement of the votes of such poll or voting place, but shall exclude it from their returns. The returning officers may appoint such clerks as may be necessary, for a length of time not to exceed thirty days, who shall be paid $5 per day each for the time actually served, which time shall be specified in a written account, subscribed and sworn to by such clerk, and approved by the returning officers. The auditor of public accounts shall issue his warrant upon the treasury for the amount of such account so subscribed and sworn to and approved.

"SEC 56. *Be it further enacted, &c.*, That it shall be the duty of the secretary of state to transmit to the clerk of the house of representatives and the secretary of the senate of the last general assembly a list of the names of such persons as, according to the returns, shall have been elected to either branch of the general assembly; and it shall be the duty of said clerk and secretary to place the names of the representatives and senators elect, so furnished, upon the roll of the house and of the senate, respectively; and those representatives and senators whose names are so placed by the clerk and secretary, respectively, in accordance with the foregoing provisions, and none other, shall be competent to organize the house of representatives or senate. Nothing in this act shall be construed to conflict with article 34 of the constitution of the State.

"SEC. 57. *Be it further enacted, &c.*, That should any of the returning officers named in this act be a candidate for any office at any election, he shall be disqualified to act as returning officer for that election, and a majority of the remaining returning officers shall summon some respectable citizen to act as returning officer in place of the one so disqualified."

This act is in conflict with the constitution in several particulars. First, the constitution provides that the return of the election of all members of the legislature shall be made to the secretary of state. (See art. 46.) And article 48 provides that the returns of every election for governor and lieutenant-governor shall be sealed up and transmitted to the secretary of state, who shall deliver them to the speaker of the house of representatives then next to be holden, and that the members of the general assembly—that is,

both houses of the legislature—shall meet in the house of representatives to examine and count the votes for governor and lieutenant-governor.

The act provides that the returns shall be made to the governor, and that the governor, the lieutentant-governor, the secretary of state, and John Lynch and T. C. Anderson, or a majority of them, shall be returning officers for all elections in the State; that they shall examine, canvass, and count the votes, and determine who has been elected governor and to other State offices, and who members of the legislature. The act provides for a totally different machinery from that provided by the constitution for the safe-keeping, examination, and count of the votes for governor and lieutenant-governor. The act, in so far as it provides that Lynch and Anderson shall be members of said canvassing board, is in conflict with the provision of the constitution in relation to appointments to office.

Under these provisions of the constitution and laws of the State, a general election was held in the State on the 4th day of November, 1872, for governor and other State officers, and members of the legislature. At this election McEnery and Kellogg were candidates for governor, and Dibble, who was then judge of the eighth district court of New Orleans, and Elmore were candidates for the office of judge of said court.

The election was in fact conducted, and returns thereof made, in pretended pursuance of the election law above quoted from. Governor Warmoth held in his own hands the entire machinery of the election. He appointed the registrars and they appointed the commissioners of election, and the returns from the parishes were made to him, as the law required, and not to the secretary of state, as required by the constitution.

On the 13th of November, 1872, there was a meeting of the returning or canvassing board. Present: Warmoth, governor; Pinchback, lieutenant-governor; Herron, secretary of state, and Lynch, Anderson being absent. At this meeting Governor Warmoth was elected chairman of the board, Lynch was elected secretary, and the board adjourned to November 14, 12 m.

It seems that Governor Warmoth had become satisfied that the board, as constituted, would not do his bidding or execute his schemes, and he resolved to reconstruct it.

This makes it necessary to consider the imbroglio which then existed in regard to the secretary of state. At the election in 1868, at which Warmoth was elected governor, Bovee was elected secretary of state. In August, 1871, upon pretense of some malfeasance by Bovee, Warmoth issued a so-called "executive order," suspending Bovee as secretary of state, and appointing Herron in his place. This "executive order," so far as your committee can ascertain, had no warrant in the constitution or laws of the State, but was an act of usurpation. But Bovee commenced suit against Herron in the eighth district court of New Orleans, under the "intrusion act," and in that court, Emerson, judge, presiding, it was declared that the governor had authority to suspend Bovee; that such suspension created a vacancy in the office, which the governor could fill by commission, to extend until the close of the next session of the legislature. Bovee attempted to appeal from this decision, but the supreme court dimissed the appeal for the reason that it had not been taken in time. This left the decision of the court below in full force, and it has never been set aside or reversed.

The legislature next met in January, 1872, when Governor Warmoth presented to the house of representatives charges against Bovee, and the house appointed a committee to investigate these charges, with a view to his impeachment. This investigation lasted for some time, and, finally, near the close of the session, on the application of Bovee, was continued to the next session of the legislature, upon the condition that Bovee should remain suspended until the next session.

In March, 1872, after the adjournment of the legislature, Bovee brought a second suit against Herron in the eighth district court of New Orleans, and this court decided, Dibble, J., presiding, that Bovee was entitled to the office, upon the ground that, conceding his original removal and the appointment of Herron in his place to have been legal, yet the commission of Herron expired with the session of the legislature next after the removal of Bovee and appointment of Herron. This decison was appealed from to the supreme court, and affirmed about the 2d day of December, 1872.

In the mean time, on the 14th of November, 1872, at 10 a. m., Governor Warmoth had appointed Wharton in place of Herron, who up to that time had been secretary of state *de facto;* and the governor defends this upon two grounds: first, that Herron's commission expired with the adjournment of the legislature, leaving the office vacant, and that by the constitution the governor is authorized to fill all vacancies happening during the vacation of the legislature; and, second, that Herron was a defaulter in a former office, and by a provision in an amendment to the constitution was ineligible to any office while thus in default. Wharton, under his appointment, obtained possession of the the office and held it, performing its duties down to the time when the supreme court—about December 2, 1872—decided, in Bovee's second suit, that he (Bovee) was entitled to the office.

Governor Warmoth, apparently apprehending that this decision of the supreme court, on being certified to the eighth district court of New Orleans, would be executed by the installation of Bovee in the office of secretary of state, issued a commission to Elmore as judge of said court, upon the ground that Elmore had been elected at the election of November 4, 1872, in place of Dibble, and seated him by force on the bench to the exclusion of Dibble, although no canvass had been made of the votes given at said election for the office of judge of said court; and when the mandate went down from the supreme court in the suit in which that court had decided that Bovee was legally secretary of state, Judge Elmore refused to execute the mandate and issue the proper writ to put Bovee in possession of the office. Thereupon the supreme court adjudged Elmore to be in contempt, and sentenced him to a fine of $50, and imprisonment for ten days, which fine and imprisonment Governor Warmoth remitted by pardon. No writ in favor of Bovee was issued before the troops of the United States took possession of the State-house, as hereinafter stated, about the 6th of December, 1872, when Wharton was excluded from, and Bovee admitted to, the exercise of the office.

Let us now return to the narrative of events following the last November election. We have seen that the first meeting of the board of canvassers, or returning officers, as styled by the law, was held November 13, 1872, and adjourned to November 14, at 12 noon. Before the adjourned meeting of the board, to wit, November 14, 10 a. m., Governor Warmoth removed Herron and appointed Wharton in his place, who qualified both as secretary of state and a member of the canvassing board; and at 12 noon on that day, the hour to which said board stood adjourned, Warmoth, governor, Herron, secretary of state, Pinchback, lieutenant-governor, and Lynch appeared in said board. Pinchback and Anderson, having been candidates at the last November election, were disqualified to serve on said board. Wharton at this time appeared and presented his commission as secretary of state, and claimed a seat in the board in place of Herron. How these two vacancies were filled is disputed in the testimony. Governor Warmoth, Wharton, Cooley, Bragdon, Sheridan, and others swear that Hatch and Da Ponte were elected in the place of Pinchback and Anderson; while on the other hand it is testified by Lynch and Herron that Longstreet and Hawkins were elected to fill these vacancies. This difference gave rise to two boards: First, Warmoth, governor, Wharton as secretary of state, Hatch, and Da Ponte, claiming to be a majority of the board, admitting that Lynch was entitled to a seat, from which, however, he absented himself. Second, Herron, claiming still to be secretary of state, notwithstanding Wharton's appointment; Longstreet and Hawkins, claiming to have been elected to fill the vacancies of Pinchback and Anderson; this board admitting that Governor Warmoth was one of its members, but he absenting himself from its sessions. These boards, for convenience of designation, will hereafter be called the Warmoth board and the Lynch board.

Each of these boards appealed to the court. The Lynch board, about November 18, 1872, commenced suit against the Warmoth board in the eighth district court of New Orleans, Dibble, J., presiding. About the same time the Warmoth board commenced suit against the Lynch board in the same court, and before the same judge. Dibble granted an injunction in both cases, enjoining both boards. In connection with this extraordinary proceeding of injunction against injunction, it should be borne in mind that Dibble was a judge holding over until his successor should be commissioned, and was therefore directly interested in restraining any canvass of votes which must determine that his opponent (Elmore) was duly elected and entitled to his (Dibble's) seat; and that he would continue in office as long as the injunctions granted by him should prevent a legal determination that his opponent (Elmore) had been elected in his place. That Elmore had, in fact, been elected over Dibble, two to one, is admitted by all parties in this controversy.

About the 19th of November Dibble decided the suit commenced by the Lynch board in their favor, and enjoined the Warmoth board, and on the same day dismissed the suit in favor of the Warmoth board against the Lynch board.

Thereupon Governor Warmoth took from his safe a bill which had been passed by the legislature in the previous spring, but never approved by him so as to become a law, and on the 20th of November, 1872, gave it his approval.

This act, approved November 20, 1872, among other things, provides as follows:

"SEC. 2. *Be it further enacted, &c.*, That five persons, to be elected by the senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum, and have power to make the returns of all elections. In case of any vacancy by death, resignation, or otherwise, by either of the board, then the vacancy shall be filled by the residue of the board of returning officers. The returning officers shall, after each election, before entering on their duties, take and subscribe to the following oath before a judge of the supreme or any district court:

"'I, A. B., do solemnly swear (or affirm) that I will faithfully and diligently perform the duties of a returning officer as prescribed by law; that I will carefully and honestly

canvass and compile the statements of the votes, and make a true and correct return of the election: So help me God.'

"Within ten days after the closing of the election said returning officers shall meet in New Orleans to canvass and compile the statement of votes made by the commissioners of election, and make returns of the election to the secretary of state. They shall continue in session until such returns have been compiled. The presiding officer shall, at such meeting, open, in the presence of said returning officers, the statements of the commissioners of election, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate; one copy of such returns they shall file in the office of the secretary of state, and of one copy they shall make public proclamation, by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected. The return of the election thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers, until set aside after contest according to law, of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected. The governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected who are required by law to be commissioned."

And further, as follows:

"SEC. 71. *Be it further enacted, &c.*, That this act shall take effect from and after its passage, and that all others on the subject of election laws be, and the same are hereby, repealed."

Governor Warmoth claimed that the effect of this act was to abolish all previously existing canvassing or returning boards; and that inasmuch as the act took effect during the vacation of the legislature he was authorized to appoint the board under that provision of the constitution before quoted, which authorizes the governor to fill vacancies occurring during such vacation.

On the same day upon which the governor approved the last-named act he issued a proclamation calling a session of the legislature to convene on the 9th day of December, 1872. It is admitted on all hands that the members of the legislature elected November 4, 1872, if any were elected, were authorized to convene under this proclamation.

On the 21st of November motion was made before Judge Dibble for a new trial in the suit of the Lynch board against the Warmoth board, in which the judge had decided in favor of the Lynch board, enjoining the Warmoth board, and in the suit in favor of the Warmoth board against the Lynch board, which that judge had dismissed; and these motions were set down for hearing before Judge Dibble on the 25th of November. Before this day arrived Governor Warmoth pretended to be convinced that Elmore had been elected in place of Dibble; commissioned Elmore, who, supported by the sheriff and a posse comitatus of roughs and thugs, took his place on the bench and excluded Dibble. It should be stated, however, in this connection that although no legal canvass had been made ascertaining the fact that Elmore was elected, nevertheless it is admitted by all parties that he was in fact elected by about 9,000 majority.

On the 3d of December, Elmore, who had been commissioned as aforesaid, and was seated on the bench substantially by force, granted the motion for new trial in both cases upon the ground that the act approved November 20 had abolished all former boards; and he dissolved the injunction granted against the Warmoth board and dismissed both suits.

Governor Warmoth having thus by the judgment of a judge by him prematurely commissioned rid himself of the embarrassment arising from the two boards of canvassers pretending to act, on the evening of the 3d of December proceeded to fill the board provided for by the act of November 20 by appointing De Feriet, Wiltz, Isabel, Austin, and Taylor in pretended pursuance of the authority conferred upon him by article 61 of the constitution, to fill vacancies happening in the vacation of the legislature.

We now come to the saddest chapter in this melancholy business—the interference of Federal authority with the affairs of the State of Louisiana.

The fifteenth amendment of the Constitution provides as follows:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

The subject of suffrage belongs entirely to the States and must be regulated by them exclusively, with the single exception created by this amendment, that no State can deny to a citizen of the United States the right to vote on account of race, color, or previous condition of servitude; and the extent of the power of Congress over the subject is to see to it that the States do not violate this provision. Congress has the undoubted

power to enact such laws as are necessary and proper to secure to the colored citizen his right to vote upon the same terms and conditions and with the same effect as the right is enjoyed and exercised by white citizens; and, speaking of the case before us, this is the extent of jurisdiction possessed by the National Government in regard to State elections.

The act of Congress of May 31, 1870 (16 Stat. at Large, 140), provides as follows:

"SECTION 1. That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude, any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

The second section provides for registration under the laws of the State without distinction of race, color, or previous condition of servitude; and section 3 provides that where any act is required by any State law—as registration, for instance—"the offer of any such citizen to perform the act required to be done, as aforesaid, shall, if it fail to be carried into execution by the wrongful act" of the State officer, be deemed and held a performance in law of the act required; and that the person so offering and failing, as aforesaid, shall be entitled to vote in the same manner as if he had in fact performed such act.

Section 23 is as follows:

"That when any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States and secured by this act."

This act was amended by the act of February 28, 1871, 16 Stat. L., 433, section 15, providing as follows:

"That the jurisdiction of the circuit court of the United States shall extend to all cases in law or equity arising under the provisions of this act or the act hereby amended; and if any person shall receive any injury to his person or property, for or on account of any act by him done under any of the provisions of this act or the act hereby amended, he shall be entitled to maintain suit for damages therefor in the circuit court of the United States in the district wherein the party doing the injury may reside or shall be found."

These acts were passed to give effect to the provisions of the fifteenth amendment and regulate elections for members of Congress; and, so far as they apply to the election of State officers and members of State legislatures, they are confined to the single purpose of securing to all citizens the right to vote without distinction of race, color, or previous condition of servitude; and an act of Congress attempting to go beyond this would be void for want of authority in Congress to enact it. Therefore, a contest between two citizens of the same State in relation to the office of governor, or other State office, cannot be waged in a Federal court, except upon the ground that the contestant has been defeated or deprived of his election by reason of the denial to any citizen or citizens of the right to vote on account of race, color, or previous condition of servitude. If the contestant has been defeated in consequence of a denial to citizens of the right to vote on account of their belonging to a particular political party, or a particular church, or for any reason, except race, color, or previous condition of servitude, no Federal court has power to hear and determine it.

Keeping this in mind, we come to consider the proceedings in the circuit court of the United States for the district of Louisiana.

On the 16th of November, 1872, Kellogg filed his bill on the equity side of said circuit court against the Warmoth board—Warmoth, Wharton, Hatch, and Da Ponte—and against McEnery, and the New Orleans Republican Printing Company, publishers of the New Orleans Republican, being the official journal of the State, stating that a general election was held on the 4th day of November, 1872, for governor and other State officers; that Kellogg and McEnery were candidates for governor at said election; that

Governor Warmoth had the power by law to appoint registrars; and that prior to the election Warmoth had repeatedly avowed his intention to unlawfully defeat the election of Kellogg, and to that end had appointed persons who would aid him in his purpose; and made it a condition of their appointment that they should so aid him, and that one of his plans was to deprive a large number of citizens of the right to vote, by refusing them registration on account of their race, color, and previous condition; that this plan was carried into execution, so that at least 10,000 voters were on that account deprived of registration; that persons so refused registration applied to vote at the election and were denied; that he (Kellogg) was in possession of evidence of this fact; and that he is informed and believes that from three to five thousand persons who had offered to be registered had been denied the right to vote on account of race and color.

That Warmoth, combining with the officers appointed by him, had caused a dishonest and false count of votes cast at said election, and had falsified and caused false returns of the election to be made; that a number of ballots of citizens of color, sufficient to have elected him, had not been counted.

That when the canvassing board met, November 14, 1872, Longstreet and Hawkins were elected by the board to fill the vacancies of Pinchback and Anderson; that Warmoth, being in possession of returns, refused to open and present the same to said board; that Warmoth, without authority, had pretended to eject Herron from the office of secretary of state, and had attempted with force and arms to take possession of the records and archives of that office, and had unlawfully pretended to appoint Wharton secretary of state; and that Wharton pretended to be a member of the board, and that Warmoth and Wharton had pretended to elect Hatch and Da Ponte to fill the vacancies of Pinchback and Anderson, and that Warmoth had unlawfully opened and submitted the returns to this illegal board, and that it was the intention of the board to make a false canvass and declare McEnery elected; that although the canvass by such unlawful board would be void, yet their determination would embarrass him in legal proceedings to obtain said office; and that it was the intention of Warmoth and his board to destroy the returns; and the intention of McEnery and the Warmoth board to have it declared and published in the official paper that he (McEnery) was elected.

That Warmoth had totally disregarded the law in regard to said election; that he had done everything in his power to defeat the will of the people; that he intended to destroy the returns and all evidences of the election, so as to render it impossible for him (Kellogg) ever to establish his right to the office.

The bill prayed an injunction against Warmoth, restraining him from canvassing the returns except in presence of the Lynch board, and commanding him not to deliver the returns to the Warmoth board, and restraining the Warmoth board from acting or making any return or certificate in regard to said election; and restraining McEnery from pretending to act as governor, or asserting any claim to the office, by virtue of any certificate or canvass then made, or thereafter to be made, by the Warmoth board; and restraining the publishers of the official newspaper from publishing any canvass made by the Warmoth board.

The prayer for the relief is as follows:

"And it may also please your honors to order and adjudge that the said defendant, H. C. Warmoth, within a period of time to be fixed by your honors, do make and deposit in this honorable court, in the office of the clerk thereof, full, true, and exact sworn copies of each and every paper, document, affidavit, tally-sheet, list, sworn statement, or certificate or letter which he may have received or may have come into his possession from any commissioner or commissioners, or any officer concerned in the control or management of said election, or who had any duties to perform in connection therewith, and from all supervisors or assistant supervisors of election, in any manner relating to said election, in order that the same may be beyond the power of destruction by the said defendant Warmoth and his said confederates, and in order that the same may be saved to your orator as evidence to enable him to establish his right to the office of governor as aforesaid in any judicial proceedings which he may be compelled to institute in this court to establish and vindicate the same.

"And that the same may be also preserved for use or proof in support of your orator's bill in this behalf, and to establish his right to the relief by him herein and hereby prayed for, and that the said evidence, documents, &c., to be produced remain on file in this court in order that the same may be preserved as evidence in any action which your orator may be required to institute in this court to establish his said right to said office."

The bill also contained prayer for process and for general relief.

It is at least questionable whether this bill on its face presented a case within the jurisdiction of the Federal court. Although it is alleged in the former part of the bill that about ten thousand persons had been denied registration on account of race and color, and that from three to five thousand of those thus deprived of registration were denied the right to vote, yet this wrong was completed at the time the bill was filed, and

it was not in the power of the court to undo it. In the subsequent part of the bill the pleader appears to ignore the fact of race, color, or previous condition of servitude as an element of jurisdiction.

Again, it can hardly be claimed that Kellogg had been deprived of his office of governor at the time the bill was filed. The bill states, indeed, Kellogg's apprehension that this board would declare McEnery elected, and that such declaration would embarrass him in the enforcement of his legal right to the office.

On the other hand, it may reasonably be claimed that if Warmoth should destroy the returns it would be out of Kellogg's power to establish the fact that he had been defeated because citizens had not been allowed to vote on account of race and color.

Conceding, however, that the bill did present a case within the jurisdiction of the court, that jurisdiction was limited by the scope of the bill, and gave no warrant to the extraordinary proceedings which were subsequently had in the case. The only legitimate purpose of this bill was to preserve testimony, and the subsequent attempt of the court, on a bill in equity, to determine the title of Warmoth, Wharton, and others to act as State canvassers was a matter wholly beyond the jurisdiction of Federal courts. The bill shows that Warmoth, Wharton, Hatch, and Da Ponte claimed to be members of the board, and were acting as such; and alleges that they were not members of the board, but that Lynch, Herron, Longstreet, Hawkins, and Warmoth were the legal members of said board. What jurisdiction had the Federal court to determine the right between these contending boards? They were State officers, and it is not alleged in the bill that any colored man was deprived of any right which had resulted in the election of Hatch and Da Ponte. Besides, the question of right to this office was entirely collateral in the proceedings. Wharton and Longstreet might have contested their respective rights in the State courts under the "intrusion act" of that State, which corresponds to proceedings by *quo warranto* at the common law. But it was never before pretended that such a question could be settled by suit in equity.

The utmost which the court had authority to do upon this bill was to restrain the destruction of the returns and documents, to preserve which the bill was filed. They were State records, and the Federal court had no right to take possession of them. The bill did not ask the court to do so, but only to require copies to be filed. But the court issued the following restraining order:

"United States of America, circuit court of the United States, fifth circuit and district of Louisiana, November term, A. D. 1872.

"NEW ORLEANS, *Saturday, November* 16, 1872.

"Court met pursuant to adjournment. Present, the Hon. E. H. Durell, district judge.

"WILLIAM P. KELLOGG *vs.* "H. C. WARMOTH ET AL. } No. 6830.

"On motion of J. R. Beckwith, counsel and solicitor for complainant, it is ordered that H. C. Warmoth, Jack Wharton, Frank H. Hatch, Durant Da Ponte, John McEnery, and the New Orleans Republican Printing Company, publishers of the New Orleans Republican, a newspaper, being the official journal of the State of Louisiana, be enjoined and restrained from in any manner, either directly or indirectly, pretending to consider or canvass any certificate, statement, or return of any supervisor of registration, except in the presence of the legal returning officers named in the bill of complaint filed this day, to wit, John Lynch, Jacob Hawkins, James Longstreet, and Francis J. Herron; and it is further ordered that the said H. C. Warmoth desist and refrain from submitting to the defendants, Jack Wharton, Frank H. Hatch, and Durant Da Ponte, or any or either of them, either as pretended members of any board of returning officers of elections of the State of Louisiana, or as individuals, any statements, certificates of returns, or pretended statements, certificates, or returns of election, and to desist from assisting, aiding, abetting, or permitting any other person or persons whatsoever other than John Lynch, Jacob Hawkins, James Longstreet, and Francis J. Herron, or their duly qualified successors, as returning officers, to inspect, consider, or have custody of or access to said statements, certificates, or returns of said supervisors of registration, or any other paper, document, affidavit, or proof that may have come into the hands of said Warmoth, or shall hereafter come into his hand, relating to said election, or to the fairness or correctness thereof, and which by law it is his duty to submit to the said John Lynch, Jacob Hawkins, James Longstreet, and Francis J. Herron, the said legal board of returning officers of elections, and which should be properly considered by them.

"And it is further ordered that the said H. C. Warmoth, Jack Wharton, Frank H.

Hatch, and Durant Da Ponte, and each of them, be commanded and enjoined to refrain and desist from pretending to act together as a board of returning officers, or as returning officers of elections, from canvassing or attempting to canvass or consider any certificate, document, affidavit, return, statement of votes, or any paper whatsoever properly relating to said election mentioned in the said bill of complaint, and from attempting to make a canvass, to make, declare, or publish any pretended deduction, calculation, statement, or proclamation based thereon, or pretended to be derived therefrom, in any way relating or pertaining to said election mentioned in the said bill of complaint, held on the 4th day of November, 1872, or certifying to any candidate for office at said election any certificate of election, or any statement of the result of said election tending to show any right to office in any person growing out of ballots cast at said election, and from meddling with, altering, suppressing, falsifying, obliterating, or destroying any document, paper, voucher, proof, statement of votes, or certificate relating to said election. And it is further ordered that the said John McEnery be commanded, enjoined, restrained, and inhibited from in any manner acting or pretending to act as governor of the State of Louisiana, and from making any pretensions or asserting any claim to the office of governor of said State by virtue of any pretended evidence of election thereto under or by virtue of any certificate, document, or count, canvass, or adjudication now or hereafter made by the said defendant, H. C. Warmoth, and the said defendants, Jack Wharton, Frank H. Hatch, Durant Da Ponte, in this bill charged to be unlawfully combined and conspired as returning officers. And it is further ordered that the said New Orleans Republican Printing Company, under whose control and direction the newspaper called the New Orleans Republican, the official journal of the State of Louisiana, is published, whereof W. R. Fish is president, be enjoined and restrained from in any manner publishing any official notice, document, or statement relating to any canvass or statement of votes made, or pretended to be made, or in any manner emanating from the said H. C. Warmoth, and said Jack Wharton, Frank H. Hatch, Durant Da Ponte, or either of them, as a pretended board of returning officers of elections, in any manner relating to the said election held on the 4th day of November, A. D. 1872.

"And it is further ordered that the said defendants, H. C. Warmoth, Jack Wharton, Frank H. Hatch, Durant Da Ponte, John McEnery, and the New Orleans Republican Printing Company, named in the bill of complaint this day filed, be so commanded, enjoined, and restrained until the further order of this honorable court."

And this order was duly served by the marshal on the 17th of November, 1872.

On the 19th of November, 1872, Kellogg filed an affidavit, as follows:

"William P. Kellogg, being first duly sworn, deposeth and saith that he is advised and informed, and thereby believes, that the said defendants, H. C. Warmoth, Durant Da Ponte, Jack Wharton, and Frank H. Hatch, are now, and at all times since the making and service of the restraining order, issued in this cause, have been acting in disregard and in disobedience thereof, in contempt of the lawful orders of this court, and have aided, abetted, and countenanced the continued possession, custody, and canvass of the returns, certificates of officers connected with said elections, by persons other than the said Lynch, Longstreet, Herron, and Hawkins, and have in other material respects disobeyed the orders of this honorable court.

"WM. P. KELLOGG.

"Sworn to and subscribed before me this 19th November, 1872.

"J. W. GURLEY,
"*United States Commissioner.*"

A rule was granted against Warmoth and others to show cause, upon which interrogatories and answers were filed, and this matter was slowly progressing when Governor Warmoth, to escape the clutches of Judge Durell, approved the act of November 20, 1872, which act repealed all the laws before then in force in regard to canvassing boards, and of course legislated both the Warmoth and Lynch boards out of existence. After this it is difficult to see what was left of the case made by Kellogg's bill in the United States court. Warmoth exercised the legislative power of the State, took the whole subject away from the United States court, and, on the evening of December 3, appointed De Feriet, Wiltz, Isabelle, Austin, and Taylor a canvassing board under the act of November 20, and at the same time, as governor, commenced suit in the eighth district court before Judge Elmore, and obtained an injunction restraining the Lynch board, upon the ground that the act of November 20 had abolished that board. The Lynch board applied to the Federal court for a certiorari to remove this suit of Warmoth against the Lynch board into the Federal court. The State court treated the writ with contempt and made no return to it. No proceedings were had in the Federal court on the certiorari, nor was any motion made in that court to dissolve the injunction which had been granted against the Lynch board. Conceding the right of the Federal court to issue this writ of certi-

orari, its effect, when served upon the State court, was to transfer the cause to the Federal court; and the Lynch board might have applied to the Federal court to compel a return, and for a dissolution of the injunction granted by the State court. But as no such application was made to the Federal court, the injunction granted by the State court remains in full force against the Lynch board.

Warmoth having thus become master of the situation, having by the act approved November 20 legislated all former boards out of existence, and obtained an injunction against the Lynch board, restraining them upon the ground that their offices had been abolished, ordered the De Feriet board to the front; and that board, on the 4th day of December, made their canvass, declaring McEnery elected governor, Penn lieutenant-governor, Graham auditor, Armistead secretary of state, Ogden attorney-general, and Lusher superintendent of education; and declaring, also, who had been elected members of the legislature; and on the same day Governor Warmoth issued his proclamation promulgating this result, and therewith published the certificate of Wharton, secretary of state, containing the list of members of the legislature, to the secretary of the senate and clerk of the house of representatives, as required by law; being those declared by the De Feriet board to have been elected at said November election. (See pages 303, 304 of testimony attached to this report.)

The governor undoubtedly congratulated himself at this point that he had secured a complete victory over Judge Durell; but, unfortunately for the governor's joy, Judge Durell took a very different view of the situation; and, out of court, at his house, late at night, December 5, without application by any party, made the following order, which is without parallel, and it is hoped will remain so, in judicial proceedings.

"Circuit court of the United States, fifth circuit and district of Louisiana, in equity.

"WILLIAM P. KELLOGG *vs.* "H. C. WARMOTH ET AL. } No. 6830.

"Whereas Henry C. Warmoth, one of the respondents herein, has, in violation of the restraining order herein, issued the following proclamation and returns of certain persons claiming to be a board of returning officers, all in violation and contempt of the said restraining order, as follows, viz:

"'*Proclamation.*

"'STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
"'*New Orleans, December* 4, 1872.

"'Whereas P. S. Wiltz, Gabriel De Feriet, Thomas Isabelle, J. A. Taylor, and J. E. Austin, returning officers appointed by the governor to fill vacancies existing, in accordance with the constitution and laws of the State of Louisiana, have made declaration of the result of an election held November 4, 1872, and have declared certain persons elected to the senate and house of representatives of the State of Louisiana, as will appear from the returns herewith attached and made a part of this proclamation; and

"'Whereas such returns are compiled from the official returns of commissioners of election and supervisors of registration, on file in this office, and are in fact and in form accurate and correct, and made in accordance with law:

"'Now, therefore, I, Henry Clay Warmoth, governor of the State of Louisiana, do issue this my proclamation, making known the result of said election aforesaid, and command all officers and persons within the State of Louisiana to take notice of and respect the same.

"'Given under my hand and the seal of the State this 4th day of December, A. D. 1872, and of the independence of the United States the ninety-seventh.

"'H. C. WARMOTH.

"'By the governor:

"'Y. A. WOODWARD,
"'*Assistant Secretary of State.*'

"Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and, further, to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana shall forthwith take possession of the building known as the Mechanics' Institute, and occupied as the State-house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court, and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns

made by said pretended returning officers in contempt and violation of said restraining order; but the marshal is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

"E. H. DURELL."

It is impossible to conceive of a more irregular, illegal, and in every way inexcusable act on the part of a judge. Conceding the power of the court to make such an order, the judge, out of court, had no more authority to make it than had the marshal. It has not even the form of judicial process. It was not sealed, nor was it signed by the clerk, and had no more legal effect than an order issued by any private citizen.

There had been no amendment of the bill of complaint. The law of November 20 had been promulgated. The De Feriet board had been appointed in pretended pursuance thereof. Whether under the constitution the governor had the power, in the vacation of the legislature, to appoint that board, upon the ground that the act of November 20 created offices, and therefore vacancies in office, your committee do not inquire. But it is understood that the constitution has been so construed in that State, and that Judge Dibble was appointed by the governor under similar circumstances.

The De Feriet board, therefore, had color of official existence. Their canvass was completed, and the result promulgated under color of the State law, and it is clear that this gave the Federal court no more right to seize the State-house than to seize this Capitol.

The marshal, on receiving this pretended order, called for a detachment of United States troops to act as a posse comitatus, seized the State-house at 2 a. m. of December 6, and held it for weeks.

Afterward, on the same day, Judge Durell delivered an opinion in the Kellogg case on the application for injunctions *pendente lite*, and made an order granting the injunction as prayed for by the bill. As matter of justice to Judge Durell, we give his opinion, order, and injunction in full:

"United States circuit court, in equity.

"WILLIAM PITT KELLOGG
vs.
"HENRY C. WARMOTH ET AL. } No. 6830.

"Filed December 6, 1872.

"*Opinion of the court.*

"This application comes before me under a bill to preserve evidence to enable the complainant to prosecute a suit at law. This bill is well known to courts of chancery, and is founded upon the statute, being chapter 104 of the second session of the Forty-first Congress, sixteenth Statutes at Large, page 140, entitled 'An act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes,' and upon the amendment to the same, being chapter 99 of the third session of the same Congress, sixteenth Statutes at Large, page 433. Section 1 of the first act cited provides as follows:

"'That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude, any constitution, law, custom, usage, or regulation of any State or Territory by or under its authority to the contrary notwithstanding.'

"Section 3 of the same act provides:

"'That whenever, by or under the authority of laws of any State, or the laws of any Territory, any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting therein, be deemed and held as a performance in law of such act. And the person so offering and failing, as aforesaid, being otherwise qualified, shall be entitled to vote in the same manner and in the same extent as if he had in fact performed such act.'

"Section 23 provides as follows:

"'That whenever any person shall be defeated or deprived of his election to any office except elector or President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servi-

tude, his right to hold and enjoy any such office and the emoluments thereof shall not be impaired by such denial.'

"And section 15 of the amending act provides as follows:

"'That the jurisdiction of the circuit court of the United States shall extend to all cases in law or equity arising under the provisions of this act, or the act hereby amended, and if any person shall receive any injury to his person or property for or on account of any act by him done, under any of the provisions of this act or the act hereby amended, he shall be entitled to maintain a suit for damages thereof in the circuit court of the United States in the district wherein the party doing the injury may reside or shall be found.'

"These two acts were passed by Congress to enforce the provision of the Constitution of the United States known as the fifteenth amendment (16 Statutes at Large, pages 140 and 433), which reads as follows:

"'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

"'SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.'

"The whole matter involved in the discussion, which has occupied more than a week before me, has been presented on both sides with such ability, research, and fullness that I feel greatly indebted to the solicitors of both the complainant and the respondents for the aid which they have rendered in enabling me to come to an early decision.

"The first question to be solved is, are the acts referred to constitutional? Do they fall within the appropriate legislation authorized and imposed as a duty upon Congress by the second section of the amendment? To solve this question we must look to the object proposed to be attained by the amendment. It was to protect all citizens of the United States, including the recently emancipated and enfranchised colored citizens, in the full and free exercise of the right to vote. Nine years previous to the adoption of the amendment, and the enactment of the statutes passed to enforce the same, four millions of those who now constitute the great body of the citizens of the United States were slaves. It is not necessary here to repeat the history of slavery in this country; how it was and continued to be from the very foundation of our Government a source of internal disquiet, increasing year by year until it culminated in a most bitter and devastating civil war. The result of that war was the emancipation and enfranchisement of four millions of people, who thus passed rapidly from a state of bondage to the possession of all the civil and political rights of citizens of the United States. It was impossible that so large a body of people should be suffered to remain exposed to the assaults of the prejudice naturally growing out of their former condition without securing to them through Congressional legislation a free and perfect use of the vote which the fifteenth amendment gave to them as a shield and a sword of protection for their persons, their liberties, and their property.

"Congress has legislated and given us the acts referred to as the means most appropriate for effecting the object proposed. These acts have been highly eulogized by the solicitors on both sides, and they seem to me to be most wise and in the highest sense appropriate. It is to be remarked that the fifteenth amendment is most broad in its comprehensiveness. Though called into existence in order to protect the freedman, it protects as well all other citizens, both native and foreign. It would protect the foreigner who had become a citizen should another Know-Nothing excitement agitate the nation, and it would protect the native-born should the foreign-born citizen ever gain in any State or locality an ascendency and attempt to use that ascendency oppressively. The same may be said of the acts of Congress to give practical effect to the amendment. The provision of the Constitution that no State shall pass a law impairing the obligations of contracts needed no legislation to enforce it beyond giving the right of review in the Supreme Court of the United States to the party feeling himself aggrieved; but in the case of the fifteenth amendment the helplessness of the party to be protected rendered a larger and peculiar jurisdiction necessary.

"Congress, then, in the acts under consideration, threw around all classes of citizens these effective laws and secured obedience thereto—first, by criminal punishment; second, by clothing the candidate of the voter with the right to prevent or redress the wrong attempted or perpetrated upon the vote by an appropriate civil action. Now, what are the grievances set forth in this case? What are the allegations made in the bill? They are that 10,000 citizens of this State have been on account of race, color, and previous condition deprived of registration, and after due proffer of the right to vote; and that that 10,000 votes which were in fact cast for the complainant for the office of governor have been or are about to be suppressed by an illegally constituted board of returning officers; and that without the interference of this court these votes, both those refused and those cast, which ought to be counted for the complainant, will be lost to him, and that thereby he will be defeated for said office.

"The allegations are supported by upward of four thousand affidavits of the actual voters. The chief defendant, namely, H. C. Warmoth, meets this weight of testimony solely by his answer and affidavit; and certain acts done by him since the canvass commenced force upon my mind the belief that his defense rests upon no solid foundation. The further allegation is made that the board of canvassers legally constituted are deprived by this respondent of the proper returns with the view to deprive the citizens of the right to vote. In other words, that the respondent has prevented a fair canvass of the votes by impeding the legal board and setting up an illegal board. This leads me to consider the facts with reference to these two boards.

"By an act of the State legislature of March 16, 1870, the board of returning officers was made to consist of the governor, lieutenant-governor, secretary of state, Mr. Lynch, and Mr. Anderson. The lieutenant-governor and Mr. Anderson being disqualified on account of having been candidates, the governor, Lynch, and Herron, as a majority of the board, met to fill vacancies. The governor attempted to remove Herron, who was certainly *de facto* secretary of state, who seems to have some sort of judgment in his favor against Bovee, the elected secretary of state, who has for a long period attested all the statutes of the State, and who, without going into his title to the office as against Bovee, was the *de facto* officer clothed with sufficient authority to act as one of the board. The attempt to remove Herron I dismiss with the remark that if all the governor alleges against him had been true, it could have been established only by judicial inquiry, and gave the governor no right to displace him. Herron and Lynch by a majority vote filled the vacancies by electing Hawkins and General Longstreet, and these four, together with the governor, are clearly the legal board of returning officers. Wharton's vote goes for nothing, as he never had any legal status in the board, and with him necessarily fall out Da Ponte and Hatch. Thus it appears that the board which we will call the Herron board, in contradistinction to the Wharton board, is the board which this court feels bound to recognize as having been the legal board at the time this suit was commenced. And this brings me to inquire as to the effect of the approval by the governor of the act of November 20, 1872. The only question before me at this stage of the case connected with the effect of that approval is, did it change in any way the legal status of the Herron board? The act contained a repealing clause, and since it covered the whole subject of the election, and the election cannot be said to be complete until the final counting is concluded, I was at first startled by what seemed to me to be the logical inference of some of the authorities cited by the learned solicitors of the respondents, that if the act of 1870 was at that time repealed it might vitiate the whole election. But it is not necessary for me to pass upon the question, for giving the act of November 20 all the force of law, still the Herron returning board must continue to discharge their duties until their successors are inducted into office. Article 122 of the State constitution of 1868 reads thus:

"'ART. 122. All officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office, except in cases of impeachment or suspension.'

"Indeed, the Herron board must finish the canvass of the votes, or a new legislature cannot be legally organized so as to create a board of canvassers in accordance with sections 2 and 44 of the law of the 20th of November, 1872.

"'SEC. 2. *Be it further enacted, &c.*, That five persons, to be elected by the senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum, and have power to make the returns of all elections. In case of any vacancy by death, resignation, or otherwise, by either of the board, then the vacancy shall be filled by the residue of the board of returning officers. The returning officers shall, after each election, before entering on their duties, take and subscribe to the following oath before a judge of the supreme or any district court:

"'I, A. B., do solemnly swear (or affirm) that I will faithfully and diligently perform the duties of a returning officer as prescribed by law; that I will carefully and honestly canvass and compile the statements of the votes, and make a true and correct return of the election: So help me God.'

"'Within ten days after the closing of the election said returning officers shall meet in New Orleans to canvass and compile the statement of votes made by the commissioners of election, and make returns of the election to the secretary of state. They shall continue in session until such returns have been compiled. The presiding officer shall at such meeting open, in the presence of the said returning officers, the statement of the commissioners of election, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate; one copy of such returns they shall file in the office of the secretary of state, and of one copy they shall make public proclamation by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected. The return of the election thus made and promulgated shall be *prima facie*

evidence in all courts of justice and before all civil officers until set aside after a contest, according to law, of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected. The governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected, who are required by law to be commissioned.

"'SEC. 44. *Be it further enacted, &c.*, That it shall be the duty of the secretary of state to transmit to the clerk of the house of representatives and the secretary of the senate of the last general assembly a list of the names of such persons as, according to the returns, shall have been elected to either branch of the general assembly; and it shall be the duty of the said clerk and secretary to place the names of the representatives and senators elect so furnished upon the roll of the house and of the senate, respectively; and those representatives and senators whose names are so placed by the clerk and secretary, respectively in accordance with the foregoing provisions, and none other, shall be competent to organize the house of representatives or senate. Nothing in this act shall be construed to conflict with article 34 of the constitution of the State.'

"I see, therefore, no way of avoiding the conclusion that, in any view of the case, the Herron board of returning officers are still authorized to continue their duties, and are still entitled to the protection of the court.

"The court keeps within the acts of Congress and the fifteenth amendment. It does not pretend in any way to make a governor of the State, or in any degree to interfere with the voice of the people expressed through the ballot-box. What it does is to aid in making known the voice of the people, in accordance with sections 3 and 23 of the act of Congress, and with section 15 of the amendment thereto, and in its action is only a clearly needed adjunct of the legal returning board. Many propositions were discussed during the argument which it is not necessary for me to now pass upon. It is enough that I find the statute constitution; that the court has jurisdiction, and that the board of returning officers, composed of H. C. Warmoth and Messrs. Hawkins, Lynch, Longstreet, and Herron, are the legal board, and as such entitled to the protection of this court.

"As to the question of the ineligibility of the complainant in the bill to the office of governor, this question cannot arise under the bill, and could only come before this court in a direct action at law to test the title to the office. It is not, therefore, necessary or proper for me to decide it now; but were it otherwise, I would say that the reason of the thing seems to favor his eligibility, the object of the provision of the constitution being to prevent a man serving two masters and having a divided allegiance. And the fact that, contemporaneously with the adoption of the constitution which first contained this provision, the then Territorial governor was by the then constitutional convention made governor of the State provisionally, and at the ensuing election made by the people the first governor of the State, would seem to indicate that the meaning of the inhibition was understood to be as I above stated.

"It only remains for me now to make the following order:

"Circuit court of the United States, district of Louisiana, in equity.

"WILLIAM PITT KELLOGG, COMPLAINANT,
vs.
"HENRY C. WARMOTH, JACK WHARTON, FRANK H. Hatch, Durant Da Ponte, and John McEnery, and the New Orleans Republican Printing Company, defendants.

No. 6830.—Order entered December 6, 1872.

"This cause having come on for hearing on the complainant's motion for writs of injunction *pendente lite*, and for other interlocutory orders prayed for in complainant's bill and amended bill of complaint, and the court having considered the pleadings, affidavits, and exhibits filed in the cause, and having heard counsel as well for the complainant as for said defendants, and the court having considered the premises,

"It is ordered—

"That the said defendant, Henry C. Warmoth, during the pendency of this cause, be, and he hereby is, until the further order of this court, enjoined, inhibited, and restrained from in any manner, either directly or indirectly, considering, or pretending to consider or canvass, any statement, certificate, or return of any supervisor or assistant supervisor of registration, or any office, having any duties to perform about or concerning an election held on the 4th day of November, A. D. 1872, in the State of Louisiana, or relating to any votes or ballots cast at said election, except in the presence of John Lynch, Jacob Hawkins, James Longstreet, and George E. Bovee, a board of returning officers for said election; and that he do further desist and refrain from submitting, or allowing to be submitted, or from aiding or assisting in the submission to the defendants, Frank Hatch, Jack Wharton, Durant Da Ponte, or any other person or persons whatsoever, other than the said Hawkins, Bovee, Lynch, and Longstreet, any paper, document, affidavit, statement of votes, return of officers of election, or other proof in any manner

relating to said election, and from allowing any other person or persons whatsoever, other than those in this order excepted, whether pretending to act as returning officers, or in any other capacity, to inspect, consider, have access to, canvass, or tamper with any paper, document, affidavit, statement of votes, returns or written proof relating to said election or to the fairness and correctness thereof, that may have heretofore or may hereafter come into his hands or possession, and which, by law, should properly be laid before, submitted to, or considered by such returning officers of election in making a canvass thereof. And that the said defendant, H. C. Warmoth, be further enjoined and inhibited from altering, suppressing, mutilating, destroying, or secreting any such document, proof, or paper. And that he further desist and be enjoined from in any manner interfering with, obstructing, or hindering the said Lynch, Longstreet, Bovee, and Hawkins, or either of them, from full and complete access to, as well as custody of, all such documents, papers, and proofs relating to said election, as he may or shall have in his possession, custody, or control, or as they shall or may demand, either by refusing to deliver such documents or proofs to them, or either of them, or by any suit or proceeding instituted with the intent to hinder, delay, or obstruct them in the performance of their duty as returning officers. And that he be further restrained and enjoined from issuing commissions to any persons based upon any calculation, deduction, or pretended canvass of ballots cast at said election, or make, publish, sign, or deposit in the office of the secretary of state, or in any other public office, or cause to be so deposited, any document, statement of persons elected to any offices or positions of trust at said election, and from giving any effect to the same if already filed and deposited, unless the same be with the concurrent action and lawfully given consent of the said Lynch, Hawkins, Bovee, and Longstreet, or a majority thereof, or of a sufficient number of them to constitute a majority of a board of returning officers, acting as such returning officers.

"And it is further ordered that the said defendants, Jack Wharton, Frank H. Hatch, Durant Da Ponte, and the New Orleans Republican Printing Company, until the final hearing of this cause, or until the further order of the court, be severally and respectively enjoined and restrained to the same extent, effect, and manner as said complainant has in his said bill of complaint prayed they may severally and respectively be restrained. And that writs of injunction in due form of law issue against the said defendants, in accordance with the terms of this order. And that the returning order heretofore issued and allowed in this cause continue in full force and effect until the court shall otherwise order.

"And in order that the evidence relating to said election may be perpetuated and preserved, that it may be of avail upon the hearing of this cause, and in any cause which the said complainant may hereafter be compelled to institute and prosecute to test or determine his right to the office of governor of said State, and in order that public inconvenience may not result therefrom, it is further ordered that the said Henry C. Warmoth do forthwith and without delay deliver unto the said returning officers, John Lynch, George E. Bovee, Jacob Hawkins, and James Longstreet, each and every paper, document, affidavit, tally-sheet, list, sworn statement, certificate, letter, communication, or proof which he has or may have in his possession, or which may hereafter come into his possession from any supervisor or assistant supervisor of registration or election, or any officer or person, commissioner or commissioners, in any manner concerned in the conduct, control, management, or direction of said election, held on the 4th day of November, A. D. 1872, in any manner relating to said election, or any voting or ballots cast at said election or in any manner relating thereto, in order that they may consider, canvass, and make due return thereof, as required by law; and when the same are no longer required for the purpose of said canvass, it is ordered that the said defendant, H. C. Warmoth, do thereafter immediately file and deposit the same with the clerk of this court, there to remain until true, accurate, and complete attested copies thereof be made by the clerk, subject to the direction of the court.

"*Injunction.—Issued December* 6, 1872.

"WILLIAM PITT KELLOGG
vs.
"HENRY C. WARMOTH, JACK WHARTON, FRANK H. Hatch, Durant Da Ponte, John McEnery, and the New Orleans Republican Printing Company. } No. 6830.

"Circuit court of the United States, fifth circuit and district of Louisiana.

"*The President of the United States, greeting:*

"Whereas it has been represented to us in our said circuit court on the part of William P. Kellogg, by his bill of complaint lately exhibited against you and each of you, touching certain matters and things therein set forth:

"Now, therefore, in consideration of the premises and of the allegations in said bill

contained, you, the said above-named defendants, your attorneys and each of you, are hereby commanded and strictly enjoined under the penalty of the law that you absolutely refrain and desist during the pendency of this cause, until the further order of this court, from in any manner, either directly or indirectly, considering or pretending to consider or canvass any statement, certificate, or return of any supervisor or assistant supervisor of registration, or any officer having any duties to perform about or concerning an election held on the 4th day of November, 1872, in the State of Louisiana, or relating to any votes or ballots cast at said election, except in the presence of John Lynch, Jacob Hawkins, James Longstreet, and George E. Bovee, a board of returning officers for said election, or from submitting or allowing to be submitted, or from aiding or assisting in the submission to the said defendants, Frank H. Hatch, Jack Wharton, Durant Da Ponte, or any other person or persons whatsoever other than the said Hawkins, Bovee, Lynch, and Longstreet, any paper, document, affidavit, statement of votes, return of officers of election, or other proof in any manner relating to said election, and from allowing any other person or persons whatsoever other than those in this order excepted, whether pretending to act as returning officers, or in any other capacity, to inspect, consider, have access to, canvass, or tamper with any paper, document, affidavit, statement of votes, return, or written proof relating to said election, or to the fairness and correctness thereof, that may have heretofore or may hereafter come into his hands or possession, and which by law should properly be laid before, submitted to, or considered by such returning officers of election in making a canvass thereof; and that the said defendant, H. C. Warmoth, be further enjoined and inhibited from altering, suppressing, mutilating, destroying, or secreting any such document, proof, or paper.

"And that he further desist and be enjoined from in any manner interfering with, obstructing, or hindering the said Lynch, Longstreet, Bovee, and Hawkins, or either of them, from full and complete access to, as well as custody of, such documents, proof, or paper.

"And that he further desist and be enjoined from in any manner interfering with, obstructing, or hindering the said Lynch, Longstreet, Bovee, and Hawkins, or either of them, from full and complete access to, as well as custody of, such documents, papers, and proofs relating to said election as he may or shall have in his possession, custody, or control, or as they shall or may demand, either by refusing to deliver such documents or proofs to them, or either of them, or by any suit or proceeding instituted with the intent to hinder, delay, or obstruct them in the performance of their duty as returning officers; and that he be further restrained and enjoined from issuing any commissions to any persons based upon any calculation, deduction, or pretended canvass of ballots cast at said election, or make, publish, sign, or deposit in the office of the secretary of state or in any other public office, or cause to be so deposited, any document, statement of persons elected to any offices or positions of trust at said election, and from giving any effect to the same, if already filed and deposited, unless the same be with the concurrent action and lawfully-given consent of the said Lynch, Hawkins, Bovee, and Longstreet, or a majority thereof, or of a sufficient number of them to constitute a majority of a board of returning officers.

"And it is further ordered that the said defendants, Jack Wharton, Frank H. Hatch, Durant Da Ponte, and the New Orleans Republican Printing Company, until the final hearing of this cause, or until the further order of the court, be severally and respectively enjoined and restrained to the same extent, effect, and manner as said complainant has in his bill of complaint prayed they may severally and respectively be restrained.

"And that writs of injunction in due form of law issue against the said defendants in accordance with the terms of this order.

"And that the restraining order heretofore issued and allowed in this cause continue in full force and effect until the court shall otherwise order.

"Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this 6th day of December, in the year of our Lord 1872.

"[SEAL.] F. A. WOOLFLEY, *Clerk.*

"Marshal's return.

"Received December 7, 1872, by the United States marshal, and on the same day, month, and year served the within-named persons with a copy of this injunction, as follows: On H. C. Warmoth, by handing the same to him in person at the Saint Charles Hotel, in this city; Jack Wharton, same day, month, and year, served the within injunction by handing the same to him in person at the Saint Charles Hotel, in this city; on Durant Da Ponte, same day, month, and year, by handing the same to him in person in this city; on Frank H. Hatch, same day, month, and year, by handing the same to him in person in this city; on the New Orleans Republican, December 9, 1872, by handing the same to W. R. Fish, president of said paper.

"C. R. STEELE,
"Deputy United States Marshal."

It is somewhat remarkable that in this opinion the judge makes no allusion to the fact that the State-house was then in possession of Federal troops, under an order issued by him, out of court, the night before. The opinion materially misstates the allegations of the bill, and wholly ignores the fact that, under the act of November 20, the governor had appointed a new canvassing board which had in fact canvassed the votes; of all which he was aware, because the proclamation of the governor officially promulgating these facts was embodied in the order for seizing the State-house, made by the judge the night before. The judge also declares that about four thousand affidavits sustain the averments of the bill.

Your committee have examined many of these affidavits, and it is admitted that none of them contain the statement that right of registration or right of voting was denied on account of race, color, or previous condition of servitude.

But in this opinion he disposes of the act of November 20 in a remarkable way. He seems to admit its validity, but seems also determined that it shall not take effect at an inconveniently early date. He admits that it repealed all former election laws, and covered the whole subject of elections; but from this he draws two singular conclusions: First, that inasmuch as the act of November 20 repealed all former election laws, all that had been done under such repealed laws was void; and second, to avoid this difficulty, which he says at first startled him, that it was his duty to continue the old laws in force until the old boards could have a reasonable opportunity to complete all the business before them.

One of two things is certain: The governor's approval of the new election law on the 20th of November gave it effect on that day, or it did not. Assuming that the approval on that day was regular, the new law absolutely repealed all the laws under which the Warmoth board and the Lynch board were pretending to act, and, of course, abolished both boards without regard to the question which was the legal one. All that had been done in the election of November, 1872, in pursuance of the old laws—that is, the registration, voting, and returns—was as valid after the act of November 20 as before. If the canvass had been made by the proper board under the old law, and in all things completed, the rights of parties based upon that canvass would not have been affected by the repeal of the laws. But the act of November 20, taking effect after the returns were made, and before they were canvassed, transferred the duty of canvassing to the new board created by the act.

Congress, a year or two ago, passed an act creating a new judicial district in the State of Wisconsin, carved out of the territory of the then existing district. When the President signed the bill, the circuit court for the old district was in session, and in the midst of a jury-trial, in that part of the State which the act erected into a new district. What would have been said if the court had determined not to regard the act of Congress until that trial could be completed? The court stopped, and the trial fell. Acts have frequently been passed abolishing courts. It never was pretended that the abolished court could proceed and dispose of pending causes. If the act abolishing a court transfers its jurisdiction to another court, or creates a new court in its stead, the new court assumes jurisdiction and proceeds with the causes, and orders and injunctions granted by the old court are valid in the new.

A few years since, on admitting one of the new States, by which the Territorial courts were abolished, Congress, by inadvertence, omitted to provide for pending causes in those courts; and, after a suspension of jurisdiction for a year or more, Congress passed an act transferring those causes which were of Federal cognizance to the courts of the Union, and the Supreme Court held it valid.

In the opinion of your committee there can be no doubt—conceding the validity of the act of November 20—that it transferred the duty of canvassing the returns of the last election to the board to be elected under the provisions of the act. The act provided for such election by the senate, and, taking effect in the vacation of the legislature, created offices to be filled thereafter by the senate. This is what is styled in that State an original vacancy, which, happening in the vacation of the legislature, the governor is authorized to fill by appointment; and it is said that the courts of that State have repeatedly recognized the right of the governor to make such appointments.

Viewed in any light in which your committee can consider them, the orders and injunctions made and granted by Judge Durell in this cause are most reprehensible, erroneous in point of law, and are wholly void for want of jurisdiction; and your committee must express their sorrow and humiliation that a judge of the United States should have proceeded in such flagrant disregard of his duty, and have so far overstepped the limits of Federal jurisdiction.

After the foregoing decision was made by Judge Durell, Armstead filed a bill in the eighth district court against the members of the Lynch board, and obtained an injunction commanding them to make no canvass of the November election, except upon the returns made in pursuance of law. This injunction in no way conflicted with the decision

of Judge Durell; for, conceding Lynch that the board was, notwithstanding the repeal of the law creating it, a valid board, it cannot be doubted that the courts of the State might restrain that board from canvassing any but the legal returns of the election.

A writ of *certiorari* was issued by the Federal court in this case, which was disregarded by the State court. No subsequent proceedings were had in the Federal court upon said writ, and the injunction remains in full force.

On the 6th of December, 1872, the Lynch board—Bovee (who was then acting as secretary of state in place of Herron), Lynch, Longstreet, and Hawkins—pretended to have canvassed the returns of the election, and certified to the secretary of state that Kellogg had been elected governor; Antoine, lieutenant-governor; Clinton, auditor; Field, attorney-general; Brown, superintendent of education, and Deslondes, secretary of state; and also certified a list of persons whom they had determined to be elected to the legislature.

There is nothing in all the comedy of blunders and frauds under consideration more indefensible than the pretended canvass of this board.

The following are some of the objections to the validity of their proceedings:

1. The board had been abolished by the act of November 20.

2. The board was under valid and existing injunctions restraining it from acting at all, and an injunction in the Armstead case restraining it from making any canvass not based upon the official returns of the election.

3. Conceding the board was in existence, and had full authority to canvass the returns, it had no returns to canvass.

The returns from the parishes had been made, under the law of 1870, to the governor, and not one of them was before the Lynch board.

It was testified before your committee by Mr. Bovee himself, who participated in this canvass by the Lynch board, that they were determined to have a republican legislature, and made their canvass to that end. The testimony abundantly establishes the fraudulent character of their canvass. In some cases they had what were supposed to be copies of the original returns, in other cases they had nothing but newspaper statements, and in other cases, where they had nothing whatever to act upon, they made an estimate based upon their knowledge of the political complexion of the parish, of what the vote ought to have been. They also counted a large number of affidavits purporting to be sworn to by voters who had been wrongfully denied registration or the right to vote, many of which affidavits they must have known to be forgeries. It was testified by one witness that he forged over a thousand affidavits, and delivered them to the Lynch board while it was in session. It is quite unnecessary to waste time in considering this part of the case, for no person can examine the testimony ever so cursorily without seeing that this pretended canvass had no semblance of integrity.

But it has been claimed before your committee that a decision of the supreme court of Louisiana, rendered since this investigation commenced, has determined that the Lynch board was the legal returning board at the time it pretended to canvass the votes; and it is urged that a wholesome regard for the rights of the State precludes the Senate from investigating this subject back of that decision; that the canvassers were a board of officers created by the State law, and that the decision of the supreme court having determined that the Lynch board was the legal board the United States is esstopped by that decision, and the canvass made by the board. To this there are three answers:

First. The supreme court, in the case referred to, is understood not to have had any testimony before it showing the character of the proceedings by the Lynch board, which testimony is before your committee very fully. Fraud vitiates everything, and it is certain that no court, upon the testimony before your committee, could hold the canvass by that board to be valid.

Second. In the opinion of your committee the supreme court had no jurisdiction of the case in which they made the decision. The judgments of every court, the most exalted in character, are absolutely void if rendered without jurisdiction. But this point will be considered more fully hereafter.

Third. But for the interference of Judge Durell in the matter of this State election, a matter wholly beyond his jurisdiction, the McEnery government would to-day have been the *de facto* government of the State. Judge Durell interposed the Army of the United States between the people of Louisiana and the only government which has the semblance of regularity, and the result of this has been to establish the Kellogg government, so far as that State now has any government. For the United States to interfere in a State election, and, by the employment of troops, set up a governor and legislature without a shadow of right, and then to refuse redress of the wrong, upon the ground that to grant relief would be interfering with the rights of the State, is a proposition difficult to utter with a grave countenance. Besides, it is impossible to determine to what extent the supreme court may have been influenced in rendering this decision by the fact that the Kellogg government, the creation of the Lynch board, had already been established, and the expectation that it would be sustained by Federal authority.

But so much stress is laid upon this decision of the supreme court that it merits a more particular notice, and we shall examine it with a view to determine whether the court had jurisdiction. It is said that the supreme court of a State is the sole judge of its jurisdiction under State laws, and that the supreme court here expressly decided that it had jurisdiction of this cause. Every judgment implies an assertion of jurisdiction, but it is well settled that no judgment of any court has validity when it is shown that it was rendered without jurisdiction. The Constitution of the United States declares that in each State full faith and credit shall be given to the records and judicial proceedings of every other State. And yet it is well settled that when the record of a judgment rendered by the court of another State is produced, inquiry may be made as to the jurisdiction of the court to render such judgment, and that, too, although the court rendering the judgment may have expressly asserted its jurisdiction. Whoever presents the record of any judicial proceeding, and claims for it conclusive effect, asserts that the court had jurisdiction, and if it can be shown that such jurisdiction did not exist the paper is no record.

Now, to examine the decision in question with reference to jurisdiction:

The suit was commenced in the eighth district court of New Orleans, by the Lynch board against the Warmoth board, on the 14th of November, 1872, under the "intrusion act," for the purpose of determining which was the legal board. This suit was analogous to a proceeding by *quo warranto* at the common law. The only question involved—the entire subject-matter of the suit—was whether Lynch and the other members of that board, or Warmoth and the other members of his board, were authorized to act as State canvassers. The plaintiffs averred themselves to be the legal members of the board, and that the defendants had intruded into their offices. This was the only question that could be settled by that proceeding.

On the 19th November the court decided in favor of the plaintiffs, the Lynch board. On the 21st November motion for new trial was made, and was set for hearing on the 25th November. The hearing of the motion was on that day postponed, and was finally had, and the motion granted on the 3d of December; and the suit was dismissed upon the ground that the act of November 20 repealed all former election laws, and abolished the office.

By the constitution, article 74, the appellate power of the supreme court extends only to cases "where the matter in dispute shall exceed $500."

It is well settled by adjudications that where an office is in dispute the amount involved is determined by the amount of salary attached to the office. In this case the board had no salary. Therefore the Lynch board could not appeal from the judgment dismissing the suit.

On the 19th day of December, A. P. Field, a stranger to the cause, presented his petition for intervention and appeal.

His petition states that he was elected attorney-general at the November election, 1872, and that it had been so declared by the Lynch board, and that he had been duly commissioned; that he was interested in this case, for that the plaintiffs were legal returning officers, and had returned that he had been duly elected; and that the judgment in said case, against the plaintiffs therein, "jeopardizes the position of your petitioner in his said office, whereby your petitioner has an interest in having such judgment reversed and set aside;" and that he had an interest in this case exceeding $500, the salary of attorney-general being $5,000 per annum. The petitioner prayed an appeal to the supreme court, which was granted.

In the opinion of the majority of the supreme court it is attempted to be shown that the Lynch board might have appealed from the judgment dismissing their suit, upon the ground that, although it did not involve the amount of $500, pecuniary interest, it was very important to the people of the State. The theory that, although a case involves no pecuniary amount, it may, from its magnificence or public importance, be cognizable by a court whose jurisdiction is, by the constitution, limited to cases involving $500, is new to your committee; but, conceding its correctness, its materiality is not perceived, because the Lynch board did not appeal.

We have carefully examined the opinions of the majority of the court, and the cases cited, and also the dissenting opinions of Judge Wyly and Judge Kennard, with the cases referred to by them. We are of opinion that the dissenting opinions of Wyly and Kennard declare the true principles of law applicable to this subject, and we adopt the opinion of Judge Wyly as a part of this report:

Opinion of Judge Wyly.

"State *ex rel.* Attorney-General *et al. vs.* Jack Wharton *et al.* Wyly, judge, dissenting.

"The judgment of a court without jurisdiction *ratione materiæ* is a nullity so absolute

it need not be pronounced. The court will notice the want of jurisdiction *ex proprio motu*.

"It is well settled that an intervention is not allowable where the party seeking to intervene would have no separate cause of action against either or both of the litigants, or where he has no claim to the immediate object of the litigation.

"The immediate object of the litigation in the case before us is to determine the title to the offices of the returning board of election, under act No. 100 of the acts of 1870.

"The controversy is between the relators and the defendants for these offices.

"A. P. Field, who intervenes and brings up this appeal, does not claim the offices in dispute. He holds the office of attorney-general, and as neither the relators nor the defendants set up a claim to his office, or attempt in any manner to impede the administration thereof, he has no cause of action against either of them.

"He, therefore, has no right to intervene, because the law will not allow a party to thrust himself into a litigation he would be prohibited from instituting for himself. The object of interpleading is to abridge litigation, and avoid the multiplicity of suits. Having no cause of action against either of the litigants, and not claiming the offices in dispute, how can A. P. Field interplead, and, by appealing, protract a vexatious litigation dropped by the original parties?

"Such pleading is not allowable in ordinary suits; but this is a proceeding under the intrusion act to determine whether the relators or the defendants are entitled to the offices of the returning board of election under the act of 1870.

"The law provides that suits of this character must be brought in the name of the State, on the relation of the district attorney or the attorney-general, against the party accused of intruding into or unlawfully holding an office; that the name of the person claiming to be rightfully entitled to said office may be joined as plaintiff with the State; and that when the intrusion is made apparent the court may decide the defendant to be an intruder, eject him from office, and order that the person joined with the State as plaintiff may be inducted into office. (Acts of 1868, pages 71 and 199.)

"No provision is made for an intervention in a suit of this kind, and in my opinion it is not allowable. If a controversy for a certain office be settled improperly under a proceeding of this character, and the person inducted into office is not entitled to it, as against a third party, who was not joined as plaintiff with the State, the rights of such party are in no manner impaired. He can by mandamus if necessary compel the district attorney or the attorney-general to institute in his behalf a proceeding in the name of the State, under the intrusion act, and have his title to the office established and the previously successful litigant ejected therefrom. After the time for contesting the election has passed, the only suit to establish title to office that can be brought is a suit under the intrusion act, and that, as before remarked, must be brought in the name of the State. The State, as before remarked by this court, must take the initiative; no one can litigate for office under that statute in his own name. And if a person cannot in his own name bring an action for the office he claims, how can he accomplish the same object by filing a petition of intervention in his own name, setting up his separate demand?

"As I understand the intrusion law, no one will be allowed to demand an office in this State in a proceeding in his own name, whether he pleads directly in a separate action or whether he interpleads in an action between other parties. Whenever he sees fit to set up his demand for an office the statutes to which I have referred prescribe the precise form or mode of procedure in which he must bring that demand in order that the court may decide the title to the office.

"If the State under the intrusion law must be the prominent litigant, and no demand for office can be set up except in the name of the State, how can there be an intervention? Can this State intervene in her own suit? Can the State, suing for A, set up a separate demand in her own suit in behalf of B? Can the same party be both plaintiff and intervenor in the same suit? Such a proposition to a legal mind is utterly absurd. But then, how are the rights of several persons claiming a particular office to be determined without numerous suits, which the law abhors? The answer is plain and simple.

"It is found in section 9 of the intrusion law, being act No. 58 of the acts of 1868. It is in these words: 'That where several persons claim to be entitled to the same office or franchise one action may be brought against all such persons in the same action, in order to try their respective rights to such office or franchise.'

"Here, then, to simplify pleading and to settle conflicting titles to office, the State has enacted a law by which she can in her own name in one action sue all the claimants to the office in dispute, and in the same action 'try their respective rights to such office or franchise.'

"From the very language of the law it is apparent that no interpleading was contemplated by the lawgiver. And, indeed, under the statute it could not be done, because, as before observed, the State alone can bring the suit, and she cannot in the same action occupy two contradictory positions, that of plaintiff, the prominent litigant, and that of

intervenor, a third party, a stranger to the suit. Is it doubted that the State is the real litigant in suits under the intrusion law? I point to the State *vs.* Krieder, 21 An., 482, and numerous other decisions wherein this court has so often affirmed it, and I refer to the statute itself.

"It is well settled that in a contest for office the pecuniary interest involved is the amount of the salary.

"In the suit before us there is no salary at all. Consequently, as between the original parties, the matter in dispute does not exceed $500, and this court is without jurisdiction *ratione materiæ*. To ascertain the jurisdiction of the court it is idle to discuss general principles or to cite the adjudications of the Supreme Court of the United States, because it does not spring from such sources. The jurisdiction of this court is limited and defined in precise terms in the constitution of this State, the instrument creating it, and beyond these limitations we cannot go without usurpation.

"This court has only appellate jurisdiction, 'which shall extend to all cases when the matter in dispute shall exceed $500.' * * * (Article 74, constitution of 1868.)

"But the intervenor and appellant contends that as his salary of attorney-general is $5,000 he has a pecuniary interest in this litigation exceeding $500, and therefore the court as to him has jurisdiction. For argument let us assume that it is so. We then have no anomaly of a jurisdiction as to one litigant, and no jurisdiction as to the others, and positively no jurisdiction as to the offices in controversy, the immediate object in dispute, and of the litigation.

"The matter in dispute between A and B, the very object of their litigation, has a pecuniary value less than $500; neither can appeal to this court for want of jurisdiction; the difficulty can be obviated; the judgment below can be reversed; all that is necessary is for a third party to aver that as he owns some other object worth $500 he has a pecuniary interest in the controversy exceeding $500 and therefore can intervene and appeal. If the doctrine contended for be true, all the inferior courts of this State, including justices of the peace, may in the same manner be brought before this court for revision. Such a proposition is unreasonable and absurd. In my judgment the title to an office the salary of which is less than $500 cannot be determined by this court, for want of jurisdiction *ratione materiæ*, it matters not who is the appellant, and it matters not how many affidavits are filed setting up a pecuniary interest exceeding the amount of the salary. A third party appealing from a judgment must show a direct pecuniary interest in the subject-matter of the suit. (Attorney-general *vs.* Markey, Kaiser, 21 Ann., 743; 1 N. S., 308; 4 N. S., 342; 2 R., 391.) The subject-matter of this suit is the title to the offices of the returning boards of election under act No. 100 of the acts of 1870, to which offices there is no salary. Therefore neither the original litigants nor the intervenor has a direct pecuniary interest in the subject-matter of this suit and therefore cannot appeal, because this court is without jurisdiction *ratione materiæ*. It is therefore my judgment that if an intervention in a case like this were allowable, and if a third party could intervene and appeal from a judgment not appealable by the original litigants, because the matter in dispute is less than $500, the intervenor, A. P. Field, has not shown a direct pecuniary interest in this suit sufficient to entitle him to the appeal or sufficient to give this court jurisdiction.

"If he had been joined as plaintiff with the State in this suit, he could not appeal, because the subject-matter of the suit is less than $500. The argument, however, is urged that Field has a direct pecuniary interest in this case, because, as the time for contesting elections has passed (more than ten days after the election having elapsed), he has no other way to vindicate his title to the office of attorney-general. That if the board by whom he was returned as elected was not the lawful returning board, then his title to the office has no basis upon which to rest. Consequently, his entire salary as attorney-general is involved in this controversy between the two returning boards.

"The answer to this is twofold: First, the controversy between these returning boards in no way prevented him from instituting, within proper time, the usual proceedings to contest the election. Second, his title to the office of attorney-general cannot now be determined as against H. N. Ogden, his opponent at the election, because the latter is not a party to these proceedings. Besides, in a controversy for one office the title to another office (separate and distinct) cannot be determined. A proceeding under the "intrusion act" can only determine the title to the office in dispute, and no one can become a party to that proceeding who does not claim the immediate object of the litigation. If A. P. Field, who was returned as elected attorney-general, can intervene in this controversy, every candidate for office at the late election, every person expecting an office if his party prevails, and every person incidentally or remotely interested in the settlement of the issue may intervene, and the rights of everybody, the titles to all the offices in the State, may at once be determined, notwithstanding the opponents of these various intervenors were not cited, and were not parties to the suit between these returning boards. An argument that leads to such monstrous absurdities ought not to be accepted by this court as correct. In

State *vs.* Mason *et al.*, 149, 506, A., where parties not claiming the offices of mayor and councilmen of Carrollton contested the election of the defendants to said offices, this court said: 'It appears reasonable that no one but a person pretending to have a right to an office should be permitted to test the right of the incumbent to that office.' In Voisin and others *vs.* Leche *et al.*, 23 A., 25, a similar case, this doctrine was affirmed by this court, the identical language being adopted by Chief-Justice Ludeling, the organ of the court. In State *ex rel.* Sullivan *et al. vs.* Mount *et al.*, 21 A., 755, where the controversy was between two boards of school directors, and where Kendall, the secretary of one of the boards, appealed, claiming that as his salary was $1,800 he had a pecuniary interest in the controversy exceeding $500, this court held that 'in a controversy for office under the intrusion act' a third party, not holding or claiming the office in dispute, cannot appeal from the judgment of the court *a qua*. There the board that appointed Kendall secretary was unsuccessful in the controversy with the other board of school directors, and could not appeal because of the want of pecuniary interest (there being no salary allowed the school directors of the parish of Orleans). Kendall, the secretary, appealed, and contended that, unless his right to appeal was maintained, he would lose his office, affording him a salary of $1,800 per annum; that the very basis of his office rested upon the reversal of the judgment in the controversy between these two boards of school directors. The court held that as he did not claim the offices in dispute (the immediate object of the litigation), Kendall could not 'appeal from the judgment of the court *a qua*.' Here neither of the returning boards of election has appealed from the judgment in the controversy between them, because, having no salary, there is no pecuniary interest involved as between them. A. P. Field, claiming to be returned as attorney-general by one of these boards, whose suit under the 'intrusion act' was dismissed, has appealed, and he contends that unless that judgment is reversed and the board which returned him as elected attorney-general is recognized by this court and declared the lawful board, his title to that office has no basis upon which to rest. The case presented by him is identical in principle with that presented by Kendall, and should have the same solution. He is a third party, not claiming the offices in controversy, and cannot appeal from the judgment of the court *a qua*, 21 A., 735. The appellant cites the case of Byerly *vs.* Judge of the Eighth District Court, 23 A., 768, to show that a third party having an appealable interest may appeal. That case is not like the one before the court. Byerly showed a direct pecuniary interest in the matter in dispute.

"I deem it proper to remark, however, that there is a feature of that case that I do not approve of. I was not present at the hearing, and took no part in its decision. Whatever comfort it may give the appellant, however, is utterly annihilated in the subsequent final decision of that same case reported in 24 A., 115.

"The case in 12 A., 48, cited to show that a third party may appeal, is wholly unlike the case before the court. There the property of a third party had been seized, and the appeal was from the judgment dissolving his injunction. It being a separate demand, C. P., 398, and the value of the property being sufficient to give this court jurisdiction, there was no error in maintaining the appeal.

"There are other grounds for dismissing the appeal, which I deem it unnecessary to notice, because, to my mind, the argument which I have endeavored to make fully maintains the exception of the defendants that A. P. Field has no right to take this appeal.

"Believing that the case is not within the jurisdiction of the court and that the decree of a court without jurisdiction, *ratione materiæ*, is an absolute nullity, I hardly think it necessary to enter upon an elaborate discussion of the issues presented for adjudication upon the merits. I will state, however, some of the conclusions forced upon my mind from a careful consideration of these questions.

"I believe the governor had the right to sign the new election law on the 20th of November, 1872; that it became operative from the moment of the signing, and that it entirely repealed the law creating the offices in controversy, to wit, act No. 100 of the acts of 1870.

"That the governor has the right in this State to sign and approve laws after the session of the legislature has ended has often been decided by this court; indeed, I regard the jurisprudence settled on this point. But the appellant contends with some show of plausibility that when this act was signed (the 20th of November, 1872) the legislature that enacted the law had passed out of existence (the terms of most all the members of the general assembly having expired); that with the cessation of their terms ended all of their unfinished business, so that the governor could not complete by his approval and signature a statute after its authors had ceased to exist.

"This argument is ingenious but unsound. The fallacy lies in supposing that the law-making power had ceased to exist. While our structure of government remains neither of the co-ordinate branches thereof can cease to exist, although the persons intrusted by the people to administer them often discontinue to do so because of death, resignation, or the lapse of the terms for which these public functions were chosen.

"In this State the effect of a repealing law is not always a question of construction. When a repealing law like any other law 'is clear and free from ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit' (C. C., 13);

"It is only when the law is dubious in its language that its meaning must be sought by construction (C. C., 16);

"In my opinion the election law approved 20th November, 1872, entirely repealed the law of 1870. It devised a new and different way of canvassing the votes and making the returns, and it entirely abolished the offices involved in this controversy. How the incumbents of offices that have been abolished can pretend to hold over under article 122 of the constitution till their successors are inducted into office I cannot imagine.

"How can there be an inducting of successors into offices that do not exist?

"But great stress is laid on the case of Kreider, 21 A., 482, and it is insisted that the ruling in that case covers this one. I do not think so. The statute interpreted in that case differed very materially from the one now under examination. There the court held that the thirteenth section of the act of September 14, 1868, repealing the charter of Jefferson, approved March 8, 1867, did not abolish the office of the corporation. This clause only repealed the old charter in so far as its provisions were not incorporated in the new charter.

"The title of that act was 'An act for revising and amending the charter of the city of Jefferson.'

"The title of the act only proposed to 'revise and amend' the charter.

"Under cover of such a title the old act could not be abolished, and any clause to that effect would be repugnant to article 114 of the constitution requiring the objects of every statute to be expressed in the title thereof. In the Kreider case it was held that the 'clause only repealed the old charter in so far as its provisions were not incorporated in the new charter.'

"The provisions of that act did not abolish the offices of the corporation, but continued them.

"In the statute before us the officers of returning boards in the old law are not carried over and incorporated in it. Therefore these offices are abolished under the authority of Kreider's case, which has been produced to show the reverse.

"In my judgment the act approved 20th November, 1872, is not mere revisory legislation; but whether it is or not is of no consequence, because the offices claimed by the relators under the old law are abolished, if not directly at least by implication, because the continuing of said offices is not provided for in the new law, and it is inconsistent therewith.

"The provision of act No. 100 of the acts of 1870, creating these offices and designating the duties to be performed therein, is in conflict with the provisions of the act of 20th November, 1872, and is therefore repealed.

"This was the view taken by this court in the analogous case of the State *ex rel.* Martien *vs.* Lavigne (23 A., 111);

"Here, to my mind, another difficulty arises. What judicial effect can the decision have? What legal right shall we order to be executed? A. P. Field cannot be put into the offices in controversy, because he don't claim them.

"We cannot eject the defendants and induct into these offices the relators, because the plaintiffs have not appealed from the judgment dismissing their suit. (1 N. S., 308.) Besides, the defendants are not claiming the offices, but contend that they, as well as the plaintiffs, are not out of office by reason of the approval of the election law of 1872.

"Furthermore, if the approval of said law is not valid the relators have nothing to contend for, having canvassed and made their returns. Notwithstanding the suit, they have exhausted the powers confided to them, and they are now *functus officio*—they are no longer excluded from office. There are other questiods which I deem it unnecessary to discuss.

"With all due respect for the views of my learned associates, who compose the quorum deciding this case, I feel constrained to differ with them in the conclusion to which they have arrived, because I believe their decision is not in harmony with the analogies of our law, and the numerous adjudications of ourselves and our predecessors. I believe that it practically overrules many important principles and points of practice heretofore deemed settled, and that it is a new departure in the jurisprudence of our State.

"For the reason stated, I feel constrained to dissent in this case."

No man can be said to be aggrieved by a judgment unless he has some direct interest in it. A man may be aggrieved in the sense of being distressed or afflicted at the defeat of his neighbor or friend, or because he thinks the judgment will have injurious effects upon public interests. But before he can intervene and appeal he must show that some right of his is injuriously affected by the judgment. In a suit by *quo warranto* against a person who had been for years acting as a judge of a court it would hardly be maintained that every person who had recovered a judgment while the defendant had been

acting as judge could intervene and appeal from a judgment determining that the judge had wrongfully exercised the office. One reason is that a judgment rendered by a *de facto* judge is as valid between the parties as if rendered by a judge *de jure*. And in this suit the supreme court, although they declare that Field was entitled to an appeal, make no decision in his favor; do not declare that he is entitled to the office of attorney-general, and could not, for his opponent was not before the court; but reverse the judgment below solely upon the ground that it was erroneous as to the Lynch board, who had not appealed. We therefore dismiss the further consideration of this decision of the supreme court of the State with the further remark that if the jurisdiction of the supreme court were conceded their decision would not be conclusive against the United States in an inquiry like this, to ascertain if the State has a government.

We now proceed to consider another case pending before Judge Durell, in which, if possible, he has still more flagrantly transcended his jurisdiction.

The act of Congress of May 31, 1870, 16 Stat. L., 146 sec 23, provides:

"That whenever any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, Representative, or Delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote of the right to vote on account of race, color, or previous condition of servitude," such person may have his action in the Federal court, &c.

On the 7th day of December, 1872, C. C. Antoine, claiming that he had been elected lieutenant-governor at the election in November, 1872, filed his bill of complaint on the equity side of the circuit court of the United States for the district of Louisiana, against the Warmoth board—Warmoth, Wharton, Hatch, and Da Ponte—against the holding-over clerk of the house of representatives, and the holding-over secretary of the senate; and against Y. A. Woodward, assistant secretary of state; against Penn, claiming to be lieutenant-governor; and against Armstead, claiming to be secretary of state; against Blanchard, state registrar of voters; against the metropolitan police of the city of New Orleans; against all the persons determined by the board composed of De Feriet and others, appointed under the act of November 20, to have been elected senators and members of the house of representatives: and against the De Feriet board.

This bill contained, in substance, the allegations contained in the Kellogg bill, though more in detail; and set forth that secret and confidential instructions were issued to the State supervisors of registration to exclude the supervisors appointed by the United States from the canvass of State and parish officers; and to permit no person to vote who had been denied registration, unless they knew that he had been so denied; and that Warmoth manipulated the election so as to defeat the complainant; excluding the votes given by colored citizens from the count, &c.; the approval by the governor of the act of November 20; the appointment of De Feriet and others, canvassers under the said act; that said De Feriet board pretended to make a canvass, and that proclamation thereof was made, &c.; that by law it was the duty of the secretary of state to transmit to Vigers, clerk of the house, and Merritt, secretary of the senate, a list of the persons elected to the legislature; they being the only persons competent to organize the legislature; that Wharton, as secretary of state, had furnished to the secretary of the senate the list of persons declared by the De Feriet board to be elected, and that it was the intention of Merritt to organize the senate accordingly; and the same as to the house of representatives; and that the legislature, if so organized, would deprive the complainant of his rights, &c.; that Bovee is the lawful secretary of state, and Wharton has no right to said office; that the metropolitan police are acting in collusion and will aid the fraudulent purpose, &c.

The bill prays injunction against Warmoth, restraining him from interfering with the organization of the legislature on the 9th day of January, 1873, or on any future day, &c.; and from aiding any person to a seat not certified by Bovee; and an injunction against the police from interfering, &c.; and against the members of the legislature certified by the De Feriet board; and against Merritt, secretary of the senate, restraining him from placing on the roll any name not certified by Bovee; same as to the house of representatives against Bovee, restraining the clerk from receiving any returns except from the Lynch board.

The prayer for relief is as follows:

"And may it also please your honors to order and adjudge that the said defendant, H. C. Warmoth, within a period of time to be fixed by your honors, do make and deposit in this honorable court, in the office of the clerk thereof, full, true, and exact sworn copies of each and every paper, document, affidavit, tally-sheet, list, sworn statement or certificate, or letter which he may have received, or may have come into his possession from any commissioner or commissioners, or any officer concerned in the control or management of said election, or who had any duties to perform in connection therewith, and from all supervisors or assistant supervisors of election, in any manner relating to said election, in order that the same may be beyond the power of destruction by the said

defendant, Warmoth, and his said confederates, and in order that the same may be saved to your orator as evidence to enable him to establish his right to the office as aforesaid in any judicial proceedings which he may be compelled to institute in this court to establish and vindicate the same, and that the same may be also preserved for use or proof in support of your orator's bill in this behalf, and to establish his right to the relief by him herein and hereby prayed for; and that the said evidence, documents, &c., to be produced remain on file in this court, in order that the same may be preserved as evidence in any action which your orator may be required to institute in this court to establish his right to said office."

The bill also contained prayer for process and for general relief.

The court granted a rule to show cause, returnable on the 11th December, 1872, why injunctions *pendente lite* should not be allowed as prayed for, and granted restraining order in the mean time to the extent and effect prayed for in the bill; and for the purpose of explaining the extent and scope of the order directed the clerk to attach thereto a copy of the prayer for injunction, which order and copy attached are as follows:

"Circuit court of the United States in and for the district of Louisiana, in equity.

"C. C. ANTOINE
vs.
"H. C. WARMOTH ET AL. } No. 6861.

"*Restraining order.—Issued December* 7, 1872.

"Whereas the plaintiff herein has this day filed and exhibited his bill of complaint against the said defendant, H. C. Warmoth, and the other defendants named in said bill of complaint, and has therein prayed that injunctions, *pendente lite*, issue against the defendants therein, and that a restraining order be also issued restraining the said defendants as prayed for in said bill from doing or permitting to be done the acts in said bill complained of:

"Now, therefore, on motion of J. R. Beckwith and E. C. Billings, solicitors for complainant, it is ordered that the defendants named in said bill do show cause on the 11th day of December, 1872, why injunctions, *pendente lite*, should not be allowed as prayed for. It is further ordered that said defendants, each and every one of them, be, and are hereby, commanded and restrained to the extent and effect as in said bill of complaint prayed [the clerk will attach to this order a copy of the prayer for injunction as set forth in said bill of complaint] until the hearing and determination of said rule for injunction and until the further order of the court in the premises.

"E. H. DURELL, *Judge.*

"A true and correct copy of the original order on file in this cause.

"F. A. WOOLFLEY, *Clerk.*

"Wherefore your orator humbly prays that your honor will grant unto him all just and proper relief in the premises; that you will allow and grant unto him the most gracious writ of injunction issued under the seal of this honorable court, directed to the said defendant, Henry C. Warmoth, enjoining and restraining him from in any manner, directly or indirectly, by himself or through any other officer of the State, city, or parish, or through any other person, from controlling or attempting to control, interfering with, or attempting to interfere with, the organization of either branch of this general assembly of the State of Louisiana, called to assemble on the 9th day of December, A. D. 1872, or that may be called to assemble at any future day, and from directly or indirectly, either by himself or through any other person, preventing any person claiming to be a member of said general assembly from having full and free ingress and egress to and from the place, building, and room of that branch of said general assembly of which he may claim to be a member, or from issuing any written or oral order or instruction, request, or direction, calculated or designed to directly or indirectly control or interfere with the organization of either of the branches of said general assembly, or calculated or designed to prevent any person from having free access thereto, who claims to be a member thereof, and from doing any act, or from giving any order, direction, or making any request which may directly or indirectly prevent or hinder any person from being present and taking part in the organization of said senate, called to convene on the said 9th day of December, or at any future day, who may be returned as a member thereof by the board of returning officers, composed of the said Henry C. Warmoth, George E. Bovee, James Longstreet, Jacob Hawkins, and John Lynch, and whose name shall also be transmitted by the said George E. Bovee, secretary of state, to Charles H. Merritt,

the secretary of the senate of the last general assembly, and placed by the said Merritt upon the roll of said senate, so to be convened, and from in any manner, directly or indirectly, aiding or abetting any person who is not so returned by said returning board as a member of said senate, so to be convened, and whose name is not so transmitted as a member elected to said senate, and is not so placed upon the roll of said senate, from participating in the organization of said senate, and from doing any act, or from giving any order, direction, or making any request which may directly or indirectly prevent or hinder any person from being present and taking part in the organization of said house, called to convene on the said 9th day of December, or that may be called to convene at any future day, who may be returned as a member thereof by the board of returning officers, composed of the said Henry C. Warmoth, George E. Bovee, James Longstreet, Jacob Hawkins, and John Lynch, and whose name shall also be transmitted by the said George E. Bovee, secretary of state, to William Vigers, the secretary of the house of the last general assembly, and placed by the said William Vigers upon the roll of said house so to be convened, and from in any manner directly or indirectly aiding or abetting any person who is not so returned by said returning board as a member of said house, so to be convened, and whose name is not so transmitted as a member elected to said house, and is not so placed upon the roll of said house, from participating in the organization of said house.

"Except that the said Henry C. Warmoth is not hereby prohibited from participating in the canvass and return of the members elected to the said branches of said general assembly, so to be convened, provided he do the same in conjunction with and in the presence of said George E. Bovee, James Longstreet, Jacob Hawkins, and John Lynch, but not otherwise. And that he further be enjoined and restrained from in any manner obstructing or hindering the said William Vigers, clerk of the house of representatives, or the said secretary of the senate, Charles H. Merritt, in the free and unobstructed discharge of their duties, or in full and complete obedience to the orders of this court, and from suspending, removing them, or either of them, from office, or appointing or ordering, or abetting any other person or persons to perform any act which by law or the orders of this court devolves on either the said Vigers, Merritt, or upon George E. Bovee, secretary of state, and from recognizing any validity in any act done or performed by any other person or persons pretending to act in the office or capacity of either of said officers.

"And that a writ of injunction may also issue, directed to A. S. Badger, chief of metropolitan police, and to each member of the board of the metropolitan police, and to the board of metropolitan police, enjoining and restraining them and each of them from interfering in any manner with the organization of either branch of the general assembly to be convened on the 9th of December, A. D. 1872, or at any time thereafter, except to preserve the peace, and to prevent no person from having access to either of the halls of said houses who is certified by George E. Bovee as being a member-elect of the same.

"And that writs of injunction also issue, directed to the said E. Booth, A. Voorhies, A. J. Lewis, B. F. Jonas, T. B. Stamps, D. S. Cage, R. C. White, T. C. Anderson, J. M. Thompson, E. S. Weber, A. S. Herron, Robert Worrall, O. H. Brewster, E. M. Graham, J. W. McDonald, A. H. Leonard, C. J. C. Puckett, James G. White, J. F. Kelly, enjoining and restraining them and each of them from participating in any manner in the organization of the senate to be convened on the 9th day of December, A. D. 1872, or at any time thereafter, or from doing any act or thing toward, in, or about the organization of said senate, either by casting a vote or otherwise, unless his name shall be and appear on the list of names of members of said senate transmitted to the secretary of the same by George E. Bovee, secretary of state, as having been elected thereto.

"And that a writ of injunction also issue to the said J. J. Mellon and James Timony, J. A. Shakespeare, J. A. Rice, J. J. Finney, E. H. McCaleb, Charles Montaldo, W. B. Barrett, W. L. Stanford, T. B. Blanchard, jr., F. C. Zacharie, F. Fusillier, V. O. King, A. Garidel, L. S. Roderiguez, John Barrow, John Delaney, William Stevens, W. C. Kinsella, C. Kummell, J. B. Eustis, J. McConnell, A. J. Dumont, E. L. Bowers, E. Riviere, P. Landry, C. N. Lewis, E. B. Cox, Numa Vives, T. J. Edwards, W. K. Johnston, T. L. Mills, T. Bynum, J. S. Gardere, J. L. Lobdell, W. S. Cockernam, W. H. Scanlan, L. P. Sandidge, J. C. Moncure, George L. Smith, J. Sella Martin, W. H. Kirkman, Thomas J. Humble, Paul Jones, George C. Bonham, Cain Sartain, Allen J. Davis, W. F. Moreland, Thomas Price, David Young, George Washington, J. P. Elam, A. F. Stephenson, John Goir, James Laws, James W. Armstead, F. W. Norris, J. H. Hadnot, L. A. Snaer, J. K. Cavannaugh, E. A. Hubin, William Kern, C. W. Lowell, J. D. Trahan, John S. Billim, O. Harang, T. G. Davidson, James R. McDowell, C. C. Davenport, E. L. Pierson, W. A. Ponder, W. F. Southard, D. Hill, H. Mahoney, J. P. Harris, L. B. Claiborne, L. Texada, John J. Swan, J. G. P. Hooe, E. W. Dewees, H. F. Vickers, J. F. Smith, R. V. Ducros, M. Hahn, D. K. Gorman, Henry Demas, Benjamin R. Gantt, J. F. Little, E. D. Estilette, L. D. Prescott, V. Bochon, L. A. Martinet, James Costello, M. J. Foster, J. G. Tate, J. R. Stewart, J. S. Mathews, J. J. Booles, P. Fonteliu, J. R. Smart, A. C. Bickham, J. P. Schultz, William

A. Strong, enjoining and restraining them and each of them from participating in any manner in the organization of the house of representatives, to be convened on the 9th day of December, A. D. 1872, or at any time thereafter, or from doing any act or thing toward, in, or about the organization of the same, either by casting a vote or otherwise, unless his name shall be and appear on the list of names of members of said house transmitted to the clerk of the same by George E. Bovee, secretary of state, as having been elected to the same.

"And that a writ of injunction may also issue, directed to Charles H. Merritt, secretary of the senate of the last general assembly, enjoining and restraining him from placing, causing, or suffering to be placed upon the roll of the senate to be convened on the 9th December, A. D. 1872, or at any time thereafter, or from placing, causing, or suffering to be placed upon any list of members-elect to said last mentioned senate, or from announcing, causing, or suffering to be announced, as a member elected to said last mentioned senate, or from recognizing, or causing or suffering to be recognized, as a member elected to said last mentioned senate, or from in any manner designating, or causing, or suffering to be designated, as a member to the said last mentioned senate, prior or during the organization thereof, any person whose name shall not be transmitted to him by George E. Bovee, the secretary of state, upon a list of the names of such persons as have been elected to the said last mentioned senate, and from in any manner acting upon any other list except the one so transmitted by the said George E. Bovee, in the organization of the last mentioned senate, and to disregard in said organization all other lists.

"And that a writ of injunction may also issue directed to William Vigers, clerk of the house of representatives of the last general assembly, enjoining and restraining him from placing, causing or suffering to be placed, upon the roll of the house of representatives, to be convened on the 9th of December, A. D. 1872, or at any time thereafter, or from placing, causing or suffering to be placed, upon any list of members elected to said last mentioned house, or from announcing, causing or suffering to be announced, as a member elected to said last mentioned house of representatives, or from recognizing, or causing or suffering to be recognized, as a member elected to said last mentioned house of representatives, or from in any manner designating, or causing or suffering to be designated, as a member to the said last mentioned house, prior or during the organization thereof, any person whose name shall not be transmitted to him by George E. Bovee, the secretary of state, upon a list of the names of such persons as have been elected to the said last mentioned house of representatives, and from in any manner acting upon any other list except the one so transmitted by the said George E. Bovee in the organization of the last mentioned house of representatives, and to disregard in said organization all other lists.

"And that a writ of injunction also issue directed to saidGeorge E. Bovee, enjoining and restraining him from receiving any return or returns of the election of any State officers or of the members of either branch of the general assembly of the State of Louisiana, excepting such returns as may be received by or filed in the office of him as secretary of state from the board of returning officers, and a majority of the same, composed of Henry C. Warmoth, James Longstreet, and Jacob Hawkins, and John Lynch, and himself, and from delivering, causing, or suffering to be delivered to any speaker of the house of representatives any return except received and filed as above stated of any election whatever, or from making, or causing or suffering to be made, any list of names of the members elected to either branch of the general assembly, except from and according to returns so received or filed, as above stated.

"That a writ of injunction also issue directed to the said Jack Wharton and Samuel Armstead, and each of them, enjoining and restraining them and each of them from receiving any returns of the elections held in the State of Louisiana on the first Monday of November last past, for members of the general assembly, or from transmitting to William Vigers, the clerk of the house of representatives, or to Charles H. Merritt, the secretary of the senate of the last general assembly, or to any other person, any list of names which is or purports to be a list of names of such persons as, or the name of any person who, according to any returns, shall have been, or shall be stated, or claimed, or assumed to have been, elected to either branch of the general assembly called to convene on the 9th day of December, A. D. 1872, or that may be called to convene at any future time, and from making any statement or doing anything calculated or designed to furnish a basis for the organization of either of said branches of the said general assembly, or from delivering or interfering, conniving at, or aiding, or suffering any other person to deliver to the speaker of the house of representatives, or any other person, any returns of any election whatever.

"And that writs of injunction may also issue directed to the said Thomas Isabelle, P. S. Wiltz, J. S. Taylor, J. E. Austin, and G. de Feriet; also issue against the said H. C. Warmoth, Jack Wharton, Frank H. Hatch, and Durant Da Ponte, commanding them and each of them to refrain and desist from pretending to act together as a board of re-

turning officers or as returning officers of elections, from canvassing or attempting to canvass or consider any certificate, document, affidavit, return, statement of votes, or any paper whatsoever properly relating to said election, and from attempting to make a canvass, declare, or publish any pretended deduction, calculation, statement, or proclamation based thereon, or pretended to be derived therefrom, in any way relating or pertaining to said election, held on the 4th day of November, 1872, or certifying to any candidate for office at said election, any certificate of election, or any statement of the result of said election tending to show any right to office in any person growing out of ballots cast at said election, and from meddling with, altering, suppressing, falsifying, obliterating, or destroying any document, paper, voucher, proof, statement of votes, or certificates relating to said election.

"I hereby certify that the foregoing is a true and correct copy of the complainant's prayer for injunction in his bill of complaint in the cause of Cæsar C. Antoine *vs.* Henry C. Warmoth *et al.*, No. 6851 of the docket of the circuit court of the United States for the district of Louisiana, referred to and made a part of the subjoined restraining order.

"[SEAL.] F. A. WOOLFLEY, *Clerk.*

"JANUARY 3, 1873."

"United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

"CLERK'S OFFICE.

"I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, except entries from minutes of continuances, &c., in the case of C. C. Antoine *vs.* H. C. Warmoth *et al.*, No. 6851 of the docket, so far as the same now remains of record or on file in said court.

"Witness my hand and the seal of said court, at the city of New Orleans, this 3d day of January, A. D. 1873.

"[SEAL.] F. A. WOOLFLEY, *Clerk.*"

Here was a restraining order, having the force of an injunction, issued for no purpose under heaven except to control the organization of the legislature and compel the seating of those members who had been returned and certified to by the Lynch board, and exclude those who had been certified by the De Feriet board.

When we consider that the act of Congress under which this proceeding was instituted by express words excludes members of the State legislature from the right to maintain any proceedings in a Federal court to obtain their seats, even when they have been defeated and deprived of their rights, because citizens have been denied the right to vote on account of race, color, or previous condition of servitude; and that the State-house was held by Federal troops under the unlawful and void order of Judge Durell, hereinbefore set forth, which order commanded the marshal to prevent "all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said De Feriet board," we can comprehend the full force and effect of the additional restraining order in the Antoine case.

It was claimed that section 15 of the act of Congress approved February 28, 1871, which provides "that the jurisdiction of the circuit courts of the United States shall extend to all cases in law or equity arising under the provisions of this act, or the act hereby amended," had the effect to repeal the exception in regard to "members of a State legislature" in section 23 of the act of May 31, 1870.

But we think this proposition cannot be maintained. The case of a member of a State legislature claiming his seat was not a case arising under the former act, because it was expressly excluded by that act. It was not a case arising under the latter act, because there is no provision of that act applicable to such a case, or recognizing any purpose of Congress to extend the jurisdiction of circuit courts to the cases excepted in the twenty-third section of the original act. It must be borne in mind that if the fifteenth section of the latter act extended the jurisdiction of the circuit court over the election of members of a State legislature, it did so as to members of Congress, which would be clearly unconstitutional, because the Constitution makes each House of Congress the exclusive judge of the election, returns, and qualification of its own members. The constitution of every State of the Union contains similar provisions in regard to the houses of the legislature of the State. The intention of Congress to pass a law in violation of the express provisions of the Constitution of the United States cannot be maintained unless that intention be expressed in words so plain as to admit of no other construction. There is no provision of the latter act compelling or justifying such a construction. On the contrary, remedies are given by the latter act which fully explain the purpose of that por-

tion of section 15 above quoted, without holding it to be a repeal of the exceptions in section 23 of the former act.

And if a member of a State legislature cannot maintain a suit in the Federal courts to secure his right to sit in the legislature, it can require no argument to show that the lieutenant-governor cannot maintain a suit in the Federal courts on behalf of a hundred such members.

Indeed, it is impossible not to see that this bill was filed, and the restraining order thereon was issued, for the sole purpose of accomplishing, what no Federal court has the jurisdiction to do, the organization of a State legislature.

And your committee cannot refrain from expressing their astonishment that any judge of the United States should thus unwarrantably have interfered with a State government, and know no language too strong to express their condemnation of such a proceeding.

It is the opinion of your committee that but for the unjustifiable interference of Judge Durell, whose orders were executed by United States troops, the canvass made by the De Feriet board, and promulgated by the governor, declaring McEnery to have been elected governor, &c., and also declaring who had been elected to the legislature, would have been acquiesced in by the people, and that government would have entered quietly upon the exercise of the sovereign power of the State. But the proceedings of Judge Durell, and the support given to him by United States troops, resulted in establishing the authority *de facto* of Kellogg and his associates in State offices, and of the persons declared by the Lynch board to be elected to the legislature. We have already seen that the proceedings of that board cannot be sustained without disregarding all the principles of law applicable to the subject, and ignoring the distinction between good faith and fraud.

Your committee are, therefore, led to the conclusion that if the election held in November, 1872, be not absolutely void for frauds committed therein, McEnery and his associates in State offices, and the persons certified as members of the legislature by the De Feriet board, ought to be recognized as the legal government of the State. Considering all the facts established before your committee, there seems no escape from the alternative that the McEnery government must be recognized by Congress, or Congress must provide for a re-election. And this brings us to consider—

1. Whether the election of November last is void for fraud; and
2. If void, has Congress the authority to order a re-election?

First. A careful consideration of the testimony convinces us that, had the election of November last been fairly conducted and returned, Kellogg and his associates, and a legislature composed of the same political party, would have been elected. The colored population of that State outnumbers the white, and in the last election the colored voters were almost unanimous in their support of the Republican ticket. Governor Warmoth, who was elected by the Republicans of the State in 1868, had passed into opposition, and held in his hands the entire machinery of the election. He appointed the supervisors of registration, and they appointed the commissioners of election. The testimony shows a systematic purpose on the part of those conducting the election to throw every possible difficulty in the way of the colored voters in the matter of registration. The polling places are not fixed by law, and at the last election they were purposely established by those conducting the election at places inconvenient of access, in those parishes which were known to be largely Republican; so that, in some instances, voters had to travel over twenty miles to reach the polls. The election was generally conducted in quiet, and was, perhaps, unusually free from disturbance or riot. Governor Warmoth, who was the master spirit in the whole proceeding, seems to have relied upon craft rather than violence to carry the State for McEnery. In the canvass of votes which determined the McEnery government to be elected the votes of several Republican parishes were rejected.

The testimony shows that leading and sagacious politicians of the State, who were acting with Warmoth, entertained the opinion before the election that Warmoth's control of the election machinery was equivalent to 20,000 votes; and we are satisfied by the testimony that this opinion was well founded. We believe that had registration been accessible to all, and polling places been properly established, the result of the election would have been entirely different. And although we cannot approve of such a canvass as that made by the Lynch board, who seem to have acted upon the principle of "fighting the devil with fire," and circumventing fraud by fraud, and cannot say that Kellogg's government was elected, nevertheless we believe that Kellogg's government was defeated, and the popular voice reversed, by the fraudulent manipulation of the election.

If the Senate should be inclined not to go behind the official returns of the election, then the McEnery government and legislature must be recognized as the lawful government of the State, and McMillen, if regularly elected by that legislature, should be seated in the Senate in place of Kellogg. But your committee believe that this would be recognizing a government based upon fraud, in defiance of the wishes and intention of the voters of that State.

Second. If the Senate shall concur with us in the opinion that the frauds committed in the election are sufficient to annul it, then it will be necessary for the Senate to consider whether Congress has the power to order a re-election.

This is one of the most important and delicate questions that can arise under the Constitution of the United States. The Constitution, article 4, section 4, provides:

"The United States shall guarantee to every State in this Union a republican form of government," &c.

This provision of the Constitution requires that the United States shall guarantee to every State two things: First, a government; and second, a government which is republican in form.

What is meant by the term "government" in this part of the Constitution? That man or body of men, in any community, who exercise sovereign power constitute the government of that community; and the best definition of a republican government ever given in the English tongue is that given by President Lincoln: "A government of the people, by the people, for the people." A standard author thus defines sovereignty:

"In every society, not being in a state of nature or a state of anarchy, some person or persons must possess the supreme or sovereign power.

"The marks by which the possession of the sovereign power may be distinguished are mainly two, the one positive and the other negative, viz:

"1. A habit of obedience to some determinate person or persons by the community which he or they assume to govern.

"2. The absence of a habit of obedience, on the part of the same person or persons, to any person or government."

This definition furnishes us a criterion for determining whether there is at present any government in the State of Louisiana. And, judging the condition of things by this rule, it is impossible to say that the State has any government whatever. The McEnery government, so called, approaches more nearly a government *de jure*, and the Kellogg government a government *de facto*.

The Kellogg government is in possession of the State-house, the seal, archives, and records of the State, and its empty treasury. There are two bodies of men in that State, one claiming to be the senate and the other the house of representatives, who recognize Kellogg and his associates as the officers of the State. But there is not, and never has been, a quorum of both houses who have any pretense of having been elected to their seats. This pretended legislature is daily passing laws, and Kellogg is approving or vetoing them. This is the legislature which pretended to elect Ray to fill the unexpired portion of Kellogg's term in the Senate. McEnery and his associates claim to be the rightful officers of the State, and two other bodies of men claim to be the senate and house of representatives of the State. And this is the legislature which pretended to elect McMillen to fill Kellogg's unexpired term in the Senate.

But it is claimed that the validity of the Kellogg government has been established by a decision of the supreme court of that State, and that this question is therefore precluded. Before proceeding to consider the case relied upon, it may be well to recall some general principles applicable to this subject.

In Luther *vs.* Borden, 7 Howard, 1, the Supreme Court had occasion to examine a case growing out of the Dorr rebellion in Rhode Island. The action was a trespass for certain acts done by the defendant under authority of the charter government, after the declaration of martial law by that government. The plaintiff set forth the facts constituting the injury complained of, and the defendant pleaded the existence of a rebellion, the declaration of martial law, and that the acts complained of were done under orders of a military superior while martial law was in force. The plaintiff replied that the act declaring martial law was invalid, because the government which adopted it was not the legal government of Rhode Island. That the people of the State had previously adopted a new constitution, under which the legal government of the State was organized, and therefore the pretended declaration of martial law was the act of a defunct government and absolutely void. The issue thus formed raised the question: Which was the legal government of Rhode Island at the time the alleged trespass was committed?

After stating this to be the question presented by the case, the court, by C. J. Taney, say:

"Indeed, we do not see how the question could be tried and judicially decided in the State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is assailed and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and it should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of

pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

Much reliance is placed upon some detached expressions in this opinion, which, unless considered with reference to the facts, might seem to conflict with the paragraph above quoted.

The Dorr government only pretended to exist for about one year, and in that year the acts were committed of which the plaintiff complained. In 1843 the people of that State adopted a constitution under which the government of the State was organized, which was universally admitted to be the legitimate government, supplanting all former government of the State; and after the new government was established, a government which was altogether free from question, Dorr was brought to trial for acts done by him—not under the government of the State existing when the indictment was found, but during the year when the question of legitimacy was in dispute between the Dorr government and the charter government. In this cause, under the new and unquestioned government, Dorr, in his defense, set up, as a fact, that the Dorr government was the real government, when, &c., and that he did the things charged to be treason in the capacity of governor, as he lawfully might.

The court, that is, the court of the new government, under the constitution of 1843, decided that the Dorr government, so called, was a fraud, and not a government. And it was of the decisions of this court that Chief-Justice Taney was speaking when he employed the language now relied upon to show that the supreme court of Louisiana, by recognizing one of the rival governments, now contending for supremacy in that State, can settle the question so as to preclude the United States from entering upon that field of inquiry.

The Chief-Justice, to guard against the use of his language now sought to be made, says:

"It is worthy of remark, however, when we are referring to the authority of the State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution," &c.

Bearing these principles in mind, we come to consider the case decided by the supreme court of Louisiana, which is The State *ex rel.* P. H. Morgan *vs.* J. H. Kennard. Your committee know nothing of this case except from the opinions delivered by the judges therein, the record not being before us.

In November, 1872, Judge Howe, of the supreme court, resigned, and Governor Warmoth commissioned J. H. Kennard to fill the vacancy. After the Kellogg legislature was organized under Judge Durell's injunctions, enforced by United States troops, the house of representatives of that legislature pretended to impeach and suspend Governor Warmoth, whereupon Pinchback, who had been elected president of the senate in place of Lieutenant-Governor Dunn, deceased, which under the constitution made him lieutenant-governor, proclaimed himself acting governor in place of Warmoth, impeached and suspended. Pinchback afterward nominated Morgan, who was confirmed by the senate, to fill the same vacancy.

On the 15th of January, 1873, the Kellogg legislature passed an act entitled "An act to regulate proceedings in contestation between persons claiming a judicial office." This act provides that, if the incumbent shall refuse to vacate the office, the person "so commissioned shall have the right to proceed by rule. * * * Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately, without jury, and by preference over all other matters or causes depending in such court, and the judgment thereon shall be signed the same day of rendition.

"That either party to such rule may take an appeal from the judgment thereon, but such an appeal shall be applied for within one legal day from the rendition of the judgment on such rule, and shall be made returnable to the supreme court within two days.

"The appeal shall be taken up in the supreme court by preference over all other cases, immediately on the application of either party, and the judgment thereon shall become final after the expiration of one legal day, whether judicial or not."

Whatever else may be said of this law, it cannot be said that it was intended to delay the administration of justice. A decision rendered at 11.55 Saturday night, as it might be, would have to be appealed from within five minutes after its rendition, or the right of appeal would be gone forever.

But your committee, for the purpose of this report, will concede the constitutionality and validity of this act.

This act was approved on the 15th day of January, 1873, and on the next day the plaintiff in some subordinate court filed the following motion or rule:

"On motion of A. P. Field, attorney-general of the State of Louisiana, herein appear-

ing upon the relation of Philip Hickey Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand, and be informed as follows, to wit:

"That said P. H. Morgan was nominated by the acting governor of the State to the senate thereof, to fill the vacancy of associate justice of the supreme court of Louisiana; that his said nomination was confirmed; that he was commissioned thereto on the 4th of January, 1873; that he has taken and subscribed the oath required by law; that he is entitled and empowered to execute and fill the duties of said office according to law, and to have and to hold said office, with all the powers, privileges, and emoluments thereof;

"And on further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office and executes the duties thereof, and claims the right to the said office, and to the powers, privileges, and emoluments thereof,

"*It is ordered*, That said John H. Kennard show cause, on Saturday, January 18, 1873, at 11 o'clock a. m., why it should not be forthwith adjudged and decreed that he is unlawfully holding and exercising the duties of said office of associate justice of the supreme court of the State of Louisiana, and the said P. H. Morgan be decreed and adjudged entitled thereto."

On the 18th of January, 1873, the defendant filed the following exception, to wit:

"And now comes John H. Kennard, and excepts that there has been no citation issued herein, or served on him in this case, and prays to be hence dismissed with costs."

On the same day the following exception and answer was also filed, to wit:

"Now comes John H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, attorney-general, on the relation of P. H. Morgan, on the ground that said proceeding by rule, in manner and form as set forth in said rule, is not authorized by law; and further, that the act of the 15th January, 1873, entitled 'An act to regulate proceedings in contestations between persons claiming a judicial office,' as to its first section is unconstitutional and void, not being in conformity to the title of said act; and further that said act is prospective, and does not apply to pending litigation. And further, that said act in relation to sections 2 and 3 is unconstitutional, as it authorizes proceedings which amount to a denial of justice. And further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void, because in violation of article 110 of the constitution. In case these exceptions be overruled, and not otherwise, for answer to said rule this respondent avers that he was duly appointed by the governor of the State to the office of associate justice of the supreme court of the State of Louisiana, on the 3d day of December, 1872, vice W. W. Howe, resigned during the recess of the senate, and that on the same day he was duly qualified and took possession of said office, having complied with all legal requirements, and his term of office has not yet expired."

On the same day (Saturday, January 18, 1873), these exceptions were overruled by the court, and the case was continued for trial till Monday, the 20th January, 1873, on which day the defendant filed the following supplemental answer, to wit:

"Now comes in J. H. Kennard, and for further answer prays for a trial by jury, and pleads that the said act of the legislature under which the relator, P. H. Morgan, claims to proceed is null and void, as violative of section 1, article 14, of the Constitution of the United States, which forbids any State from making any law which shall abridge the privileges and immunities of its citizens, and prohibits any State from depriving any person of life, liberty, or property without due process of law, or to deny to any person, within its jurisdiction, the legal protection of its laws; and if said act is void, this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule."

On the same day the prayer for trial by jury was refused, the case was tried, and judgment entered for the plaintiff. The defendant immediately took an appeal.

The only question to be settled by this suit was whether Morgan, the relator, or Kennard, the defendant, was entitled to hold the office of associate justice of the supreme court in place of Howe, resigned; and the idea that in disposing of this single question the court had any authority or jurisdiction to determine as between Warmoth and Pinchback, neither of whom was a party to the cause, which of them was entitled to exercise the office of governor, and between two or three hundred persons, the Kellogg legislature, and as many more, the McEnery legislature, not one of whom was a party to the suit, which of the rival bodies was authorized to exercise the legislative power of that State, is too preposterous a proposition to require serious refutation.

The utmost that can be claimed for this decision is that the court recognizes the Kellogg government as a government *de facto*, which may be conceded without touching the question whether it has been established by a regular election or set up and established by the usurpation of the individuals composing it, sustained by the military forces of the United States.

The question we are considering is not a judicial question and no judicial court can determine it. The question is political in its character, and, so far as the United States

have to deal with it, must be determined by the political department of this Government. We must therefore investigate the facts, and no decision of any branch of a pretended State government can estop us in this inquiry.

The people of the State are about equally divided in sentiment in regard to these two pretended governments. The people of New Orleans, which is the seat of government, support the McEnery government, two to one; and it is believed that if Federal support were withdrawn from the Kellogg government it would be immediately supplanted by the McEnery government. The people of the State, as a body, neither support nor submit to either government. Neither government can collect taxes, for the people have no assurance that payment to one will prevent collection by the other government. Business is interrupted, and public confidence destroyed; and should Congress adjourn without making provision for the case, one of two things must result: Either collision and bloodshed between the adherents of the two governments, or the President must continue the support of Federal authority to the Kellogg government. The alternative of civil war or the maintenance by military power of a State government not elected is exceedingly embarrassing; and in the opinion of your committee the best solution of this difficulty is for Congress to order a re-election, and provide for holding it under authority of the United States; to the end that a government may be elected by the people, to which they will submit, or which, in case of disturbance, the United States can honestly maintain.

Your committee have prepared a bill which they believe will insure an honest election, and result in the establishment of a republican form of government in that State, and your committee recommend its passage.

We are aware that ordering an election in a State upon the ground that an election which has been held is void for fraud is an exercise of power which ought never to be undertaken by Congress without stern necessity. It will be said that if such power resides in Congress it may be exercised improperly. This is true. But the same may be said of every power conferred upon a government. The people, in adopting the Constitution of the United States, saw fit to confer upon the General Government authority to guarantee to each of the States a government republican in form. This undoubtedly confers the power to determine whether a particular State has a government, and, if so, whether it be republican in form. There is no doubt Congress might to-morrow, as a question of mere power, declare that the government of Massachusetts is not republican in form, and set up in its place a government which it might determine to be so. This would, of course, be a great abuse of this power. When a judge has jurisdiction to decide a cause, he has as much power to decide it wrong as right; and an erroneous judgment is as valid as any other, until vacated or reversed by competent authority. In exercising this power Congress should act with great caution and prudence. The clamor usually raised by those who are defeated in an election should not, and would not, induce Congress to interfere. Ordinarily, even a government elected by fraud, but going quietly into the exercise of power, and submitted to by the people, may better be left to fill its brief term than be interfered with by Congress. But when the frauds committed are so glaring and widespread as to create public discontent in the State, and the organization of two rival governments threatening civil war, and it is manifest that neither government has been fairly elected, this power of the National Government must be regarded as wise and salutary. It cannot be maintained that its prudent exercise violates the rights of the States, because the States, for their own protection and security, have conferred the power upon the National Government; and this Government cannot refuse or neglect to exercise it, in a proper case, without disregarding the obligation which the Constitution has devolved upon it. We think the melancholy condition of the people of Louisiana, who are substantially in a state of anarchy, makes it the duty of Congress to act in the premises.

Therefore your committee recommend the adoption of the following resolutions:

1. *Resolved*, That there is no State government at present existing in the State of Louisiana.

2. *Resolved*, That neither John Ray nor W. L. McMillen is entitled to a seat in the Senate, neither having been elected by the legislature of the State of Louisiana.

And your committee recommend the passage of the bill herewith reported.

MATT. H. CARPENTER.
JOHN A. LOGAN.
J. L. ALCORN.
H. B. ANTHONY.

VIEWS OF MR. TRUMBULL.

The undersigned, unable to agree to the recommendations and some of the conclusions of the majority of the committee, asks leave to present the following views:

He agrees with the majority that portions of the Louisiana election law are in conflict

with the constitution of the State; that Wharton was *de facto* secretary of state, and, as such, *ex officio* a member of the returning board; that under the statute the Warmoth-Wharton board was the legal and rightful board to canvass the official returns; that it was illegally restrained by United States District Judge Durell from making such canvass; that by the election law approved November 20, 1872, all previous returning boards were abolished; that the De Feriet-Wiltz board was authorized under that act to complete the canvass which had been begun under the Wharton board; that said De Feriet board did canvass the official returns, and the result was duly proclaimed by the governor December 4; that Herron ceased to be the secretary of state when Wharton was appointed and took possession of the office; that the Lynch returning board never had authority to examine the official returns, and never had any to examine; that neither Kellogg nor any of the persons returned as elected to State offices by the Lynch board were elected according to the official returns; that neither the Pinchback nor the Kellogg State government could have been set up, nor the persons returned by the Lynch board as elected to the legislature have assembled and organized as a legislature, but for the unauthorized and usurped authority exercised by Judge Durell, supported by United States troops.

On the contrary, that but for such illegal and unwarranted interference, the McEnery State government and legislature would have been peacefully inaugurated, and that there has been no decision of the supreme court of Louisiana declaring the Kellogg State government and legislature legal in any case over which said court had jurisdiction to make such decision. The undersigned cannot, however, agree, because a United States district judge, supported by United States troops, has, by usurpation, caused a governor and a legislature not elected by the people to be installed in power in a State, that such usurpation authorizes Congress to intervene and order a new election in the State when there is in existence in such State a governor, other State officers, and members of the legislature duly elected by the people. All that is necessary in such a case is for the Senate to recognize the legitimate legislature by admitting to his seat in the Senate the person they have chosen to represent the State, and to forbid the use of United States troops to carry into effect the void orders of a usurping judge. The whole trouble in Louisiana has grown out of the illegal interference of the United States authorities, civil and military, with the internal affairs of the State.

According to the official returns, the fusion State ticket, headed by McEnery for governor, received an average majority of about 10,000 votes, and a large majority of the persons elected to the legislature were of the same party; and but for the illegal interference of the United States authorities, as is stated in the report of the majority, the McEnery government would have been peacefully inaugurated.

How skillfully the plan was laid to overthrow the legitimate State government, set aside an election, and inaugurate the Pinchback and Kellogg administrations and legislatures, and how well Judge Durell was supported in all these revolutionary and illegal proceedings by other United States officials, will appear by reference to a few facts disclosed in the evidence. The legislature had been called by Governor Warmoth to assemble December 9; December 3 the following dispatch was sent from Washington:

DEPARTMENT OF JUSTICE, *December* 3, 1872.

S. B. PACKARD, Esq.,
United States Marshal, New Orleans, Louisiana:

You are to enforce the decrees and mandates of the United States courts, no matter by whom resisted, and General Emory will furnish you with all necessary troops for that purpose.

GEO. H. WILLIAMS,
Attorney-General.

This dispatch, so far as the evidence shows, was not responsive to any call for troops; there had been no resistance to any process of the United States courts, nor does it appear that any was threatened. R. H. Jackson, a captain in the First Artillery, United States Army, testified that he went to New Orleans on the night of December 5 with two batteries of his regiment and eighty-six men.

The same night, December 5, between 9 and 11 o'clock, Judge Durell, at his private lodgings, issued his order, which, for want of jurisdiction, was void, and entitled to no respect from anybody, directing the United States marshal forthwith to take possession of the State-house, to hold the same until the further order of the court, and prevent all unlawful assemblage of persons therein, having reference to the persons returned as elected to the legislature according to the official returns. Captain Jackson testifies that he took possession of the State-house at about 2 o'clock on the morning of the 6th, with instructions to take and hold it under the direction of the United States marshal, and to act in obedience to his orders. He further testified that he was not stationed in the State-house to prevent riots, but to hold the building, and that if a riot had occurred in

front of the building he would not have interfered. He posted two soldiers at the entrance door, who guarded it with crossed bayonets, and suffered no one to enter the building except by permission of the United States marshal, one of whose deputies was at all times present. These troops continued to occupy the State-house for more than six weeks, until January 21, and it is manifest, from the whole testimony, that they were not there to preserve the peace, but to carry out the illegal orders of Judge Durell, and prevent the legally elected members of the legislature from assembling and organizing.

Can it be that the Attorney-General sent his telegram, and that Captain Jackson was ordered to New Orleans with his batteries, in anticipation of the unauthorized orders of United States District Judge Durell to seize the State-house and prevent the legislature from organizing except with such persons as he should declare legally elected; or that the Attorney-General supposed it the duty of the Executive to support with the military power the decrees and mandates of United States courts issued without jurisdiction, and consequently void? In no conceivable case could a United States court or judge have jurisdiction to issue orders such as were promulgated by Judge Durell. As well might a United States district judge make an order to seize the Federal Capitol and prevent all members of Congress from entering the building except such as he should declare elected. Would the President direct General Emory to furnish the troops to execute such an order? He has no more right to aid the execution of an order of court, void for want of jurisdiction, than the judge has to make it. It is his duty to discriminate between the orders of courts which may be lawful and those which must necessarily be void for want of jurisdiction. Had the troops been withdrawn when the character of the orders they were enforcing was made known, it might be inferred that the Attorney-General did not intend they should be used for such a purpose; but they held possession of the State-house for more than six weeks.

The next telegram was from Casey, United States collector of the port of New Orleans, as follows:

NEW ORLEANS, *December* 6, 1872.

President GRANT:

Marshal Packard took possession of State-house this morning, at an early hour, with military posse, in obedience to a mandate of circuit court, to prevent illegal assemblage of persons under guise of authority of Warmoth's returning board, in violation of injunction of circuit court. Decree of court just rendered declares Warmoth's returning board illegal, and orders the returns of the election to be forthwith placed before the legal board. This board will probably soon declare the result of the election of officers of State and legislature, which will meet in State-house with protection of court. The decree was sweeping in its provisions, and if enforced will save the Republican majority and give Louisiana Republican legislature and State government, and check Warmoth in his usurpations. Warmoth's Democratic supporters are becoming disgusted with him, and charging that his usurpations are ruining their cause.

JAS. F. CASEY.

What a spectacle is this, to see a State legislature set up and made Republican by the usurped authority of a United States district judge.

The next dispatches are as follows:

NEW ORLEANS, *December* 6, 1872.

Attorney-General WILLIAMS, *Washington, D. C.:*

Returning board provided by election of '70, under which election was held, and which United States court sustains, promulgated in official journal this morning result of election of legislature: House stands 77 Republicans, 32 Democratic; senate 28 Republicans, 8 Democratic. Board counted ballots attached to affidavits of colored persons wrongfully prevented from voting, filed with chief supervisor.

S. B. PACKARD,
United States Marshal.

[Telegram.]

NEW ORLEANS, *December* 9, 1872.

Hon. GEO. H. WILLIAMS,
Attorney-General, Washington, D. C.:

Returning board has officially promulgated in official journal this morning the result of the election for State officers. Kellogg's majority, 18,861.

S. B. PACKARD,
United States Marshal.

The returning board here referred to is the illegal Lynch board, which never had an official return before it. Lynch, in testifying before the committee, said:

"We took all the evidence we had before us, and our knowledge of the parishes and their political complexion, and we then decided.

"By Mr. CARPENTER:

"Q. You estimated it, then, upon the basis of what you thought the vote ought to have been?

"A. Yes, sir. That was just the fact, and I think on the whole we were pretty correct."

Much of what Lynch called evidence was shown to be newspaper reports, letters, and forged affidavits. Then followed in quick succession the following dispatches:

[Telegram.]

NEW ORLEANS, *December* 9, 1872.

Hon. GEO. H. WILLIAMS, *Attorney-General:*

Governor Warmoth has been impeached by vote of 58 to 6. Warmoth's legislature returned by his board has made no pretense of a session.

S. B. PACKARD,
United States Marshal.

[Telegram.]

NEW ORLEANS, LA., *December* 9, 1872

Hon. GEO. H. WILLIAMS, *Attorney-General:*

Senate, by vote of 17 to 5, have resolved into high court of impeachment. Senator Harris elected president of the senate, Lieutenant-Governor Pinchback being now governor.

S. B. PACKARD,
United States Marshal.

[Telegram.]

NEW ORLEANS, *December* 9, 1872.

Hon. GEO. H. WILLIAMS,
Attorney-General, Washington, D. C.:

Lieutenant-Governor Pinchback qualified and took possession of the governor's office to-night. Senate organized as high court of impeachment, Chief-Justice Ludeling presiding, and adjourned to meet Monday next. It is believed that all the Democrats, members of general assembly, will qualify and take seats to-morrow.

S. B. PACKARD,
United States Marshal.

[Telegram.]

NEW ORLEANS, *December* 9, 1872.

We have the honor to transmit to your excellency the following concurrent resolution of both houses of the general assembly and to request an early reply:

"Whereas the general assembly is now convened, in compliance with the call of the governor, and certain evil-disposed persons are reported to be forming combinations to disturb the public peace, defy the lawful authority, and the State is threatened with violence: Therefore,

"*Be it resolved by the senate and house of representatives of the State of Louisiana in general assembly convened*, That the President of the United States be requested to afford the protection guaranteed each State by the Constitution of the United States when threatened with domestic violence, and that the presiding officers of the general assembly transmit this resolution immediately by telegraph or otherwise to the President of the United States."

Adopted in general assembly convened this 9th day of December, A. D. 1872.

P. B. S. PINCHBACK,
Lieutenant-Governor, and President of the Senate.
CHAS. W. LOWELL,
Speaker of the House of Representatives.

[Telegram.]

NEW ORLEANS, *December* 9, 1872.

President GRANT:

Having taken the oath of office and being in the possession of the gubernatorial office, it devolves upon me to urge the necessity of a favorable consideration of the request of the general assembly as conveyed in the concurrent resolution of this day telegraphed to you requesting the protection of the United States Government. Be pleased to send the necessary orders to General Emory. This seems to me a necessary measure of precaution, although all is quiet here.

P. B. S. PINCHBACK,
Lieutenant-Governor, Acting Governor of Louisiana.

This pretended legislature, made up of persons returned as members by the Lynch board, perfected its organization, impeached the governor, suspended him from office, and installed Pinchback in his place. All this was done on the same day and within a few hours, and that, too, in disregard of a statute of the State, which, as stated to the committee, provides that the officer sought to be impeached shall be summoned before a committee of the house of representatives; shall have permission to cross-examine witnesses that are brought against him; shall have citation of the witnesses he may desire to summon; that the house of representatives shall act only in case the committee report in favor of the impeachment; that if the committee report adversely to it, that is itself an acquittal, and the officer cannot ever be arraigned on the charges then reported on. No such proceedings were had in this case.

It may not be amiss to remark in this connection that each of the members of the Lynch board was immediately rewarded by Pinchback with a lucrative office, except Lynch, and his son was given an appointment.

While these revolutionary proceedings were being enacted, Judge Durell was busy fulminating new injunctions and restraining orders, and calling Governor Warmoth and his associates of the legal returning board before him to answer for alleged contempts of his void orders.

The Pinchback administration and legislature thus set up was so entirely without the moral support and respect of the people that it was in great danger of falling to pieces unless it could get the further support of the Federal administration backed by a larger military force. So well was this understood that Pinchback and United States officials at New Orleans kept the telegraph busy calling on the President for help and additional forces. The two batteries and eighty-six men under Captain Jackson were not deemed sufficient to protect Pinchback and his legislature from the just indignation of an outraged people. Hence the cries for help which were continually being sent to Washington. The following are specimens of some of these cries:

[Telegram.]

NEW ORLEANS, LA., *December* 11, 1872.

Hon. GEO. H. WILLIAMS, *Attorney-General:*

I have the honor to acknowledge the receipt of your dispatch. May I suggest that the commanding general be authorized to furnish troops upon my requisition upon him for the protection of the legislature and the gubernatorial office? The moral effect would be great, and in my judgment tend greatly to allay any trouble likely to grow out of the recent inflammatory proclamation of Warmoth. I beg you to believe that I will act in all things with discretion.

P. B. S. PINCHBACK,
Lieutenant-Governor, Acting Governor.

[Telegram.]

NEW ORLEANS, *December* 11, 1872.

President GRANT:

Parties interested in the success of the Democratic party, particularly the New Orleans Times, are making desperate efforts to array the people against us. Old citizens are dragooned into an opposition they do not feel, and pressure is hourly growing; our members are poor and adversaries are rich, and offers are made that are difficult for them to withstand. There is danger that they will break our quorum. The delay in placing troops at disposal of Governor Pinchback, in accordance with joint resolution of

Monday, is disheartening our friends and cheering our enemies. If requisition of legislature is complied with all difficulty will be dissipated, the party saved, and everything go on smoothly. If this is done the tide will be turned at once in our favor. The real underlying sentiment is with us if it can but be encouraged, Governor Pinchback acting with great discretion, as is the legislature, and they will so continue.

JAS. F. CASEY,
Collector.

[Telegram.]

NEW ORLEANS, 11, 1872.

Hon. GEO. WILLIAMS:

If President in some way indicate recognition, Governor Pinchback and legislature would settle everything. Our friends here acting discreetly.

W. P. KELLOGG.

[Telegram.]

NEW ORLEANS, 11, 1872.

President GRANT:

Democratic members of the legislature taking their seats. Most, if not all, will so in next few days. Important that you immediately recognize Governor Pinchback's legislature in some manner, either by instructing General Emory to comply with any requisition by Governor Pinchback, under joint resolution of legislature of Monday, or otherwise. This would quiet matters much. I earnestly urge this and ask a reply.

JAMES F. CASEY.

[Telegram.]

NEW ORLEANS, *December* 12, 1872.

President GRANT:

The condition of affairs is this: The United States circuit court has decided which is the legal board of canvassers. Upon the basis of that decision a legislature has been organized in strict conformity with the laws of the State, Warmoth impeached, and thus Pinchback, as provided by the constitution, became acting governor. The chief-justice of the supreme court organized the senate into a court of impeachment, and Associate Justice Tallifeiro administered oath to Governor Pinchback. The legislature, fully organized, has proceeded in regular routine of business since Monday. Notwithstanding this, Warmoth has organized a pretended legislature, and it is proceeding with pretended legislation. A conflict between these two organizations may at any time occur. A conflict may occur at any hour, and in my opinion there is no safety for the legal government, without the Federal troops are given in compliance with the requisition of the legislature. The supreme court is known to be in sympathy with the Republican State government. If a decided recognition of Governor Pinchback and the legal legislature were made, in my judgment it would settle the whole matter. General Longstreet has been appointed by Governor Pinchback as adjutant-general of State militia.

JAMES F. CASEY.

In reply to these appeals for help the Attorney-General answered as follows:

[Telegram.]

DEPARTMENT OF JUSTICE, *December* 12, 1872.

Acting Governor PINCHBACK,
New Orleans, Louisiana:

Let it be understood that you are recognized by the President as the lawful executive of Louisiana, and that the body assembled at Mechanics' Institute is the lawful legislature of the State, and it is suggested that you make proclamation to that effect, and also that all necessary assistance will be given to you and the legislature herein recognized to protect the State from disorder and violence.

GEO. H. WILLIAMS.
Attorney-General.

The following telegrams were sent to the President by the friends of the State government which was being subverted:

[Telegram.]

NEW ORLEANS, *December* 11, 1872.

The PRESIDENT OF THE UNITED STATES:

Under an order from the judge of the United States district court, investing James Longstreet, Jacob Hawkins, and others with the powers and duties of returning officers under the State election law, and charging them with the duty of completing the legal returns and declaring the result in accordance therewith, those persons have promulgated results based upon no returns whatever, and no evidence except *ex parte* statements. They have constructed a pretended general assembly, composed mainly of candidates defeated at the election, and those candidates, protected by United States military forces, have taken possession of the State-house and have organized a pretended legislature, which to-day has passed pretended articles of impeachment against the governor; in pursuance of which, the person claiming to be a lieutenant-governor, but whose term had expired, proclaimed himself acting governor, broke into the executive office under the protection of United States soldiers, and took possession of the archives. In the mean time the general assembly has met at the city hall, and organized for business with sixty members in the house and twenty-one in the senate, being more than a quorum of both bodies. I ask and believe that no violent action be taken, and no force used by the Government, at least until the supreme court shall have passed final judgment on the case. A full statement of the facts will be laid before you and the Congress in a few days.

H. C. WARMOTH,
Governor of Louisiana.

[Telegram.]

NEW ORLEANS, 12*th*, 1872.

His Excellency U. S. GRANT,
President United States:

Claiming to be governor-elect of this State, I beg you, in the name of all justice, to suspend recognition of either of the dual governments now in operation here until there can be laid before you all facts, and both sides, touching legitimacy of either government. The people denying the legitimacy of Pinchback government and its legislature simply ask to be heard, through committee of many of our best citizens on eve of departure for Washington, before you recognize the one or the other of said governments. I do not believe we will be condemned before we are fully heard.

JNO. McENERY.

[Telegram.]

NEW ORLEANS, *December* 12, 1872.

His Excellency U. S. GRANT,
President of the United States:

SIR: As chairman of a committee of citizens appointed under authority of a mass-meeting recently held in this city, I am instructed to inform you that said committee is about leaving here for Washington to lay before you and the Congress of the United States the facts of the political difficulties at present existing in this State, and further earnestly to request you to delay executive action in the premises until after the arrival and hearing of said committee, which is composed of business and professional men without regard to past political affiliations.

THOMAS A. ADAMS,
Chairman.

To these respectful appeals on behalf of the legitimate governor and people of Louisiana, asking to be heard before a usurping executive and legislature should be forced upon them, the President, through the Attorney-General and War Department, returned the following replies:

[Telegram.]

DEPARTMENT OF JUSTICE, *December* 13, 1872.

Hon. JOHN MCENERY,
New Orleans, Louisiana:

Your visit with a hundred citizens will be unavailing so far as the President is concerned. His decision is made and will not be changed, and the sooner it is acquiesced in the sooner good order and peace will be restored.

GEO. H. WILLIAMS,
Attorney-General.

[Telegram.]

WASHINGTON, *December* 14, 1872.

General W. H. EMORY, U. S. A.,
Commanding New Orleans, Louisiana:

You may use all necessary force to preserve the peace, and will recognize the authority of Governor Pinchback.

By order of the President:

E. D. TOWNSEND,
Adjutant-General.

The history of the world does not furnish a more palpable instance of usurpation than that by which Pinchback was made governor and the persons returned by the Lynch board the legislature of Louisiana; nor can a parallel be found for the unfeeling and despotic answers sent by order of the President to the respectful appeals of the people of Louisiana. This pretended legislature, installed in power by the aid of the United States Army, in pursuance of a void order of a United States district judge, proceeded to elect John Ray to represent the State of Louisiana in the Senate of the United States; and it is said the Senate must receive him because the supreme court of Louisiana has decided the Pinchback legislature to be the rightful legislature of the State, and that the Senate is bound to follow the decision of the State court as to what constitutes its legislature.

It is true, as a rule, that the Federal courts follow the decisions of the State courts in regard to the construction of their own constitution and laws; but it is not true that the legislative department of the Government follows the decisions of the courts upon political questions. The inquiry, what is the established government in a State, belongs to the political, and not the judicial power. The Senate, by the Constitution, is made the sole and only judge of the election of its members, who can only be chosen by the legislatures of the respective States. Ordinarily the body recognized in a State as its legislature would be held by the Senate to be the body authorized to elect a Senator; but when, as in the case of Louisiana, there are two bodies in a State, each claiming to be its legislature, and each of which has chosen a person to represent the State in the Senate, in deciding between the claimants the Senate must necessarily determine which body was the rightful legislature and had authority to make the election.

In view of the facts as shown to exist in Louisiana, the decisions of its courts in favor of the validity of the Pinchback legislature are entitled to no respect whatever. As has been already shown, that legislature was not elected nor brought into being by the people of the State, but owes its existence to the void proceedings of the United States court supported by military force. It was the creature of force and fraud. Its first act was to impeach and suspend the governor (Warmoth) and install Pinchback in his place. It then abolished one court and set up another in its place, and Pinchback appointed Hawkins, one of the Lynch returning board, judge of the newly established court. To give any consideration to the decisions of the court thus set up would be to aid the usurpation. Hawkins counts in spurious members of the legislature; that legislature makes a governor, who makes Hawkins judge, and Hawkins then decides the legislature to be legal.

The Morgan case, in which a majority of the supreme court judges went out of the record to express opinions upon the legal status of Pinchback as acting governor, and the persons acting with him claiming to be a State senate, was commenced before this same Judge Hawkins under laws passed by this pretended legislature. As to the invalidity and extraordinary character of those laws, and the shameful proceedings of a majority of the members of the supreme court in Morgan's case, I concur with what is said by the majority of the committee in their report. Could anything be more preposterous than to give validity to such proceedings? Had the supreme court of the State stood in

the way of this pretended legislature its judges would no doubt have been summarily impeached and suspended, as Governor Warmoth was. That a wholesome fear of such proceedings operated upon a majority of the members of that court to make them obsequious to the demands of the pretended legislature is inferable from the fact that they make haste, in advance of any case coming before them involving the validity of the legislature, to make known their sympathy with it, as appears from the following extract from the dispatch sent by United States Collector Casey to the President December 12: "The supreme court is known to be in sympathy with the Republican State government."

The proper tribunal to decide between the contending legislatures in Louisiana is the Senate of the United States in passing upon the admission of the Senators by them respectively chosen.

The Supreme Court of the United States, in the case of Luther *vs.* Borden, say:

"When Senators and Representatives of a State are admitted into the councils of the Union, the authority of the Government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal."

The credentials of William L. McMillen are signed by Mr. McEnery as governor of the State, with the seal of the State attached. He was elected by what is known as the McEnery legislature, which, including Senators holding over, consisted of a quorum in each branch of the persons elected according to the official returns as canvassed by the De Feriet board. The result of that canvass was duly proclaimed by Governor Warmoth, together with the list of the names of the persons elected to the senate and house of representatives, certified by Jack Wharton, who was at the time the acting secretary of state. The official returns also show that McEnery was elected governor by some 10,000 majority. These returns were before the committee, and their tabulation, showing the results above stated, were proven to be correct. It is true the members of the McEnery legislature did not meet at the time and place fixed in the governor's proclamation, and the facts show that it was out of their power to do so, for the reason that the Mechanics' Institute, in which they were called to assemble, was then occupied by United States troops, acting under the orders of a United States marshal in the execution of a void order of a United States court, which prohibited their assembling and organizing as a legislature in said building. The fact that when thus prevented from assembling in the Mechanics' Institute the members got together as soon as practicable in another building in the same city and proceeded to organize cannot vitiate their proceedings any more than if the Mechanics' Institute had burned down before the time for assembling had arrived. It is difficult to conceive upon what principle McMillen is to be refused his seat, unless the election in Louisiana in November last be declared void, and Louisiana to be without a State government, propositions to which the undersigned cannot give his assent. He believes the De Feriet board had color of authority at least to make the canvass of the returns for the legislature; that Wharton was *de facto* secretary of state at the time, and the proper person to make out the list of members on which the legislature is organized according to the laws of the State; but whether this were so or not is not perhaps material, because the official returns from the parishes were before us, and we know that the results at which the De Feriet board arrived were substantially correct. It is the fact that certain persons received a majority of the votes cast; that is of the substance of the election. The canvass of the returns is but machinery, and whoever receives a majority of the votes polled at an election for an office ought not to be deprived of the benefit of it unless in obedience to some positive statute.

It is, however, said by a majority of the committee that the election of November 4 was so tainted with fraud as to render it wholly void, and they recommend the passage of a law for holding a new election under the authority of Congress.

If it were admitted, as it is not, that Congress has authority to inquire into the fairness and regularity of a State election, it is denied that there was any such fraud in the late Louisiana election as would justify setting it aside. It was confessedly one of the most quiet and peaceful elections ever held in the State, and the evidence shows that it was substantially free and fair.

The vote polled was 20,000 larger than ever before cast in the State, and against more than two-thirds of it no complaint of unfairness is even alleged.

S. B. Packard, United States marshal for the district of Louisiana, was chairman of the Republican State executive committee, and his office in the custom-house was the headquarters of the organization of which he was one, if not the leading spirit. He appointed from one to four special deputy marshals in every parish, and upward of six hundred in New Orleans, who were to be at the polls. Some of them served for seventy days; and he made requisitions on the Attorney-General, previous to the election, for the money to pay deputy marshals and United States supervisors. Under the law, one of the two United

States supervisors appointed by the court is selected from each party, but in appointing his special deputies United States Marshal Packard confined himself exclusively to his own party, so far as the testimony shows. This United States marshal and chairman of the Republican executive committee issued instructions to the Republican United States supervisor in each parish in regard to the supervision of the vote for State and local officers, but gave no such instructions to the supervisor appointed on the fusion side. With all the sources of information which the hundreds of his subordinates scattered through the State, and his position as United States marshal and chairman of the State Republican executive committee, afforded him, Packard testified before the committee that "in a majority of the parishes, in my judgment, the election was as fair as you usually have it in any State election.

"Rapides and Natchitoches, I should say, were the two worst. Then I would add Madison, Caddo, and Bossier, and East Baton Rouge; a portion of the returns for West Baton Rouge.

"A. These parishes I have named were the worst cases.

"Q. Seven of these cases?

"A. Yes, sir. There is also the parish of Assumption, which I believe to be a Republican parish, which went about 700 Republican in 1870, is returned differently.

"Q. I want to know about how many there were in which there were notorious charges of fraud, such as are not usually made in elections?

"A. That is the number, or about the number. It would increase the number, perhaps, ten or fifteen, if I were to add those in which I believed the returns were not in accordance with the facts."

The State is divided into fifty-six parishes, from only about twenty of which, containing less than one-third of the population of the State, frauds were even reported, and these reports were not supported by the direct testimony of a single witness before the committee, unless proof that the places of registration and of voting were established at inconvenient places in two or three parishes should be regarded as evidence of fraud. The only evidence to sustain the charges of fraud made by the Republicans were the opinions of witnesses who took an active part in the election on the Republican side, and were disappointed in the result, or *ex parte* "affidavits, the statements of supervisors of election, appointed under the act of Congress, letters, and verbal statements," which were laid before and made to the Lynch returning board, and upon which the committee have already reported that the Lynch returning board, "with the sort of evidence which was before them, had no power under the law of the State to investigate these charges of fraud and injury, or act upon their convictions of wrongs that had been suffered."

It was also in evidence before the committee that many of the affidavits before the Lynch board for the purpose of proving unfairness in the election, and upon which that board acted, were forged, and that others were triplicated.

No returns were made to the governor, as required by law, from two parishes, and the returns were irregular from two others. Informalities also existed in some few other parishes or parts of parishes, but not so as to affect the general result, which for State officers, according to the official returns, showed an average majority of over 10,000 for the fusion ticket. These returns were produced before the committee, and the tabulation as contained in the evidence, page 81, proved to be correct.

It has been said that the colored voters were all Republicans, that the colored population of the State outnumbers the whites, and that therefore if the election had been fair the Republican ticket must have succeeded; but the census of 1870 shows that there were in the State one hundred and fifty-three more white than colored males over twenty one years of age; and it is also in evidence that from eight to ten thousand colored persons voted the fusion ticket, while the number of whites who voted the Republican ticket is not believed to have exceeded half that number.

That fraud was practiced in some of the parishes, that irregularities existed in others, may be admitted; and still, in the absence of any legitimate evidence to establish those frauds, or of any sort of complaint even against the fairness of the election in more than two-thirds of the State, the undersigned cannot admit that such a case exists as would authorize the interference of Congress with the election in any form, and his conclusion is, that by the admission of McMillen to his seat in the Senate, and the recognition thereby of the McEnery legislature as the legitimate legislature of the State, the peace of Louisiana will be speedily restored, and effect given to the fairly expressed will of her people.

LYMAN TRUMBULL.

VIEWS OF MR. MORTON.

Article 46 of the constitution of Louisiana is in the following words: "Returns of all elections for members of the general assembly shall be made to the secretary of state." This leaves it to the legislature to provide the necessary machinery for the conduct of elections and the organization of the new legislature after each election.

In March, 1870, the necessary machinery was provided in the registration and election law; and the latter law requires all returns to be made to the governor, and to be by him laid before the returning board, of which the secretary of state is *ex officio* a member, which shall count the votes, and that the board shall then deposit the returns with the secretary of state, as also a copy of their count or finding.

Article 48 of the constitution provides, in regard to the election of governor and lieutenant-governor, that "the returns of every election shall be sealed up and transmitted by the proper returning officers to the secretary of state, who shall deliver them to the speaker of the house of representatives on the second day of the session of the general assembly then to be holden. The members of the general assembly shall meet in the house of representatives to examine and count the votes."

In this regard also the law provides a somewhat circuitous route by which the returns of the election shall reach the secretary of state, yet apparently with as little objection, in a constitutional point of view, as in the case of the members of the general assembly. The returns in both cases reach the secretary of state through the governor and the returning board. The constitution provides that the legislature shall count the votes for governor and lieutenant-governor, but makes no provision for counting them as to other State officers or members of the legislature, and leaving all that machinery to be provided by statute.

The act of 1870 provides for supervisors of registration in the parishes, and commissioners of election to be appointed by the supervisors, and the returns of the election in the several parishes to be sent to the governor, to be by him laid before the returning board, and by the returning board, together with the result of their finding, deposited with the secretary of state. These provisions are held by the courts in Louisiana to be a compliance with the constitutional provisions, and I see no objection to them on that score. The law makes the governor, with other members of the returning board, "returning officers" under the constitution, to which I can see no objection.

For a statement of the facts attending the election on the 4th of November, and the counting of the votes, I refer to the preliminary report already made by the Committee on Privileges and Elections in regard to the election of Presidential electors. By the law of 1870 the governor, lieutenant-governor, secretary of state, and John Lynch and T. C. Anderson by name, were constituted a board to count the votes. Lieutenant-Governor Pinchback and Mr. Anderson, having been candidates for Congress, were, by a provision of the law, prevented from acting on the board, and a struggle arose between Governor Warmoth on the one side, and Mr. Lynch, and Herron, the acting secretary of state, on the other, to fill the vacancies. The governor attempted to depose Herron by appointing Jack Wharton in his place, and claimed that by his vote and Wharton's they had elected F. H. Hatch and Durant Da Ponte to fill the vacancies, while Lynch and Herron claimed that by their votes they had elected James Longstreet and Jacob Hawkins. On the next day, the 15th of November, a suit was commenced in the eighth district court, before Judge Dibble, in the name of the State, on the relation of Lynch and others, to restrain Wharton, Hatch, and Da Ponte from acting as members of the returning board, upon which a preliminary restraining order was granted. On the next day, the 16th, a suit was commenced in the same court by Governor Warmoth to restrain Herron, Hawkins, and Longstreet from acting as members of the board, upon which a like restraining order was granted. Both cases came on for hearing upon the 19th of November, when the court decided that Lynch, Herron, Hawkins, Longstreet, and Governor Warmoth constituted the legal returning board, dismissed the Warmoth suit, and enjoined Wharton, Hatch, and Da Ponte from assuming to act as members of the board. Two days afterward Judge Dibble, the clerk, and the sheriff were forcibly ejected from the court-room, and Judge Elmore took possession of the bench, having been commissioned that morning as judge by Governor Warmoth, but the votes for whom had never been counted by any person having authority. Upon the 3d of December following Judge Elmore annulled the judgment rendered by Judge Dibble and dismissed the suit. This case was finally appealed to the supreme court of the State, in which it was decided, on the 23d day of January, that the legal returning board, on the day when the case was decided in the lower court, was composed of Governor Warmoth, John Lynch, F. J. Herron (acting secretary of state when the suit was commenced), James Longstreet, and Jacob Hawkins; that Governor Warmoth had no power to remove Herron and appoint Wharton secretary of state; and that Wharton, Hatch, and Da Ponte had no authority whatever.

On the 16th of November, Kellogg, who claimed to have been elected governor, commenced a suit in the circuit court of the United States before Judge Durell, for the ostensible purpose of perpetuating testimony, in which he alleged that he had been a candidate for governor before the election, and had been deprived of the office by the wrongful denial of the right to vote of 10,000 persons on account of their race, color, and previous condition of servitude. Upon the filing of the bill Judge Durell granted an order restraining

Wharton, Hatch, and Da Ponte from acting as members of the returning board, opening and counting the votes, or in any way meddling with the election returns. On the 6th of December he decided the case, holding that Lynch, Hawkins, Longstreet, and Bovee, secretary of state, together with Governor Warmoth, constituted the legal returning board, and enjoining Wharton, Hatch, and Da Ponte from assuming to act as members thereof. On the day previous he had issued an order to the United States marshal to take possession of the State-house, and prevent any illegal assemblage, which the marshal executed by summoning as a posse comitatus a detachment of United States troops. On the 6th of December, Armstead, who claimed to have been elected secretary of state, commenced a suit before Judge Elmore to restrain the members of the Lynch board from counting the votes and making returns in the absence of the official returns of the election. The restraining order was granted, but the case was removed the next day to the circuit court of the United States by certiorari. On the 7th of December, Antoine, who claimed to have been elected lieutenant-governor on the same ticket with Kellogg, commenced suit in the circuit court of the United States, upon which Judge Durell granted an order restraining all persons from taking part in organizing the legislature whose names were not on the lists issued by the secretary of state, and returned as elected by the Lynch board.

In the month of March, 1872, the legislature passed a new election act, which assumed to abolish the returning board, as created by the law of 1870, and authorized the State senate to elect a board of five from outside of its own members, which act Governor Warmoth kept in his possession without signing until the 20th of November, and then signed and published it as a law; but the supreme court of the State, in the case before referred to, decided that this law did not have the effect to abolish the returning board, as created by the law of 1870, until after the returns for the election of 1872, which had been held before the bill was signed, had been counted and the new legislature organized. On the 21st of November, Governor Warmoth, assuming that the act he had signed the day before had abolished the returning board as created by the law of 1870, and that he had power under the constitution to fill vacancies, appointed Mr. De Feriet and four other persons to act as a returning board, to count the votes for State officers and members of the legislature. He placed in their hands for that purpose what purported to be the official returns of the election, upon which they proceeded to count the votes and make proclamation of their finding as to members of the legislature.

Mr. Bovee was elected secretary of state in 1868, to hold his office for the same term as the governor, and until the meeting of the regular session of the legislature in 1873. On the 21st day of August, 1871, Governor Warmoth assumed the power to suspend Mr. Bovee from office and appoint in his stead F. J. Herron as acting secretary of state during the suspension of Mr. Bovee. In March, 1872, Mr. Bovee commenced a suit to assert his title to the office, which was appealed to the supreme court, and decided in his favor on the 2d December, 1872; but he was not restored to the actual possession of the office until the 6th December.

On the 20th day of November, in the exercise of the power reposed in him by the constitution, Governor Warmoth issued a proclamation convening the legislature in extra session on the 9th of December, at the Mechanics' Institute, in the city of New Orleans, then used and known as the State-house. By the law the house consisted of one hundred and eight members and the senate of thirty-six members, and, under the construction of the clause in the constitution in regard to a quorum, it was held that it required a majority of the whole number of which each house should properly consist to constitute a quorum; that is, 55 in the house, and 19 in the senate.

The members of the house held their office for two years, and of the senate for four years; one-half of the senate to be elected every two years. Owing to several causes there were but fifteen senators left of those holding over from the election in 1870, and twenty-one were to have been elected at the late election. Mr. Pinchback, who had been elected a senator in 1868, and whose time would expire on the 4th November, 1872, had, on the death of Lieutenant-Governor Dunn, in December, 1871, been elected president of the senate and lieutenant-governor of the State in accordance with the law.

The act to provide for filling a vacancy in the office of lieutenant-governor is in these words: "In case of vacancy in the office of governor the lieutenant-governor shall be governor; in case of vacancy in the office of lieutenant-governor the senate shall elect a president, who shall be lieutenant-governor."—(Sec. 1580 rev. stat., act of 1865.)

There was a dispute in regard to the character of his office, it being held by one party that he was only acting lieutenant-governor by his election as president of the senate, and by the other that he actually became lieutenant-governor, and would continue to hold that office after his term as senator had expired. It is not necessary to go into this question, as it has since been decided by the supreme court of the State that, by such election, Mr. Pinchback became lieutenant-governor, and his office as such did not expire with his term of senator; that he continued legally to perform the duties of lieuten-

ant-governor up to the period when the term of Lieutenant-Governor Dunn would have expired had he lived.

By the law of the State the legislature was to be organized by the secretary of the senate and the clerk of the house of representatives of the last legislature. The secretary of state is directed to furnish to those officers a list of the members of the senate and of the house returned as elected by the legal returning board, and no person is entitled to take a seat in either house whose name is not found upon such list.

On the day fixed for the meeting of the legislature in extra session, Governor Pinchback appeared in the senate, took the chair and proceeded to the organization of that body. The secretary of the last senate produced a list from the secretary of state of the newly elected senators, and fourteen appeared and were sworn in; two others appeared the next day, and were admitted to their seats upon taking the oath; and these with fourteen of the senators holding over made thirty present on the second day. Of the sixteen new senators, seven were returned by both the Lynch and De Feriet boards, and about their election there was no dispute. Four others were returned by the Lynch board from strong Republican districts, in which the regular official returns had been thrown out by the De Feriet board, in whole or in part, and about whose actual election by the votes cast there can hardly be any dispute.

The house of representatives was organized by the clerk of the last house, who had a list of the members from the secretary of state returned as elected by the Lynch board; and representatives thus returned as elected appeared and were sworn in to the number of seventy-six. Of this number, forty-five were returned as elected by both the Lynch and De Feriet boards, and about their election there is no dispute, leaving thirty-one who were returned by the Lynch board only, whose election was disputed by the De Feriet board.

The house then proceeded to the election of a speaker and other officers, and the two bodies were declared to be duly organized according to law.

Within three days after this eleven members seceded from the house, and six members from the senate, who proceeded to Lyceum Hall, and there, in connection with a number of persons who had been returned by the De Feriet board, attempted to organize a new legislature, which we will disignate as the "McEnery legislature." This pretended legislature was organized by the admission of persons who were not returned as elected by any person having authority, and in the absence of those lists of elected members to be issued by the secretary of state as expressly required by the law. It did not meet until three days after the time fixed in the governor's proclamation for the assembling of the legislature, nor at the place fixed in that proclamation; and it has no semblance of legal authority in any respect, but rests entirely upon the unauthorized and unofficial declarations that the persons composing it were elected at the election on the 4th of November last.

But I do not think it necessary to pursue its history any further, as in my opinion it could not under any circumstances come to be regarded as the legal legislature of the State. If, after the legal organization of the Senate and House of Representatives of the United States at the beginning of a new Congress, even a majority of the lawfully elected members of each body should secede from it and go to the city hall and there attempt to organize a new Congress, it will not be pretended that such new organization could legally become the Congress of the United States. By such act they might disable either House from doing business; but it would be absurd to say that the new one could be received as the legal Congress. The proposition that, after a legislature has been completely organized, it is in the power of seceding members to form a new one which, in contemplation of law, can take the place of the first, is so manifestly unreasonable that I dismiss the claim of the McEnery legislature from further consideration.

After the legislature became duly organized, as already stated, it was invested with power expressly conferred by the constitution of Louisiana to determine the qualifications and elections of its own members. This is in its nature an exclusive power. One house cannot divide it with the other, nor can the exercise of it be controlled by courts. From that time each house has the exclusive control over its membership, whether in the retention of old members or in the admission of new ones. If in the original organization a number of persons were admitted as members who had not been legally elected, but whose names were on the list of persons furnished by the secretary of state returned as elected by the proper returning board, their seats were liable to contest, and such contest could only be determined by the house of which they claimed to be members; and under no circumstance could a court inquire into the expulsion of a member of either house or the admission of a new one. Such a power has never been recognized in any State or by any Federal court in regard to Congress. If a quorum in each house, who were on the list furnished by the secretary of state as having been returned as elected by the legal returning board, take their seats and proceed to the work of organization, such organization must in contemplation of law be held to be legal.

The action of Congress in regard to Georgia is no exception to this principle. That was put upon the ground that Georgia had not been fully reconstructed, and that the fundamental conditions upon which reconstruction was to take place, as prescribed by Congress, had been violated before the work of reconstruction had been completed. But this precedent will not apply to the case of any State which has been fully received into the Union and occupies the situation of other States. This principle that each house has the exclusive jurisdiction over all questions touching the election and qualification of its members, and is to determine for itself whether a lawful quorum is present to do business, is so well established that it has been holden by the courts in all the States in which the question has arisen, as well as by the Supreme Court of the United States, that the validity of a statute cannot be impeached by a plea that members took part in its enactment who were not lawfully elected, or that it was passed in the absence of a lawful quorum, or that its enactment was procured by bribery, or attended by other gross irregularity.

After the organization of the two houses was completed, the house of representatives passed a resolution impeaching Governor Warmoth of high crimes and misdemeanors, of which the senate was notified, and then a joint resolution was passed by both houses suspending him from office pending the trial. This devolved the duties of governor, under the constitution, upon Lieutenant-Governor Pinchback. Early in December, Lieutenant-Governor Pinchback, acting as governor, nominated to the senate for confirmation P. H. Morgan for associate justice of the supreme court to fill the vacancy occasioned by the resignation of W. W. Howe. The nomination was confirmed; but J. H. Kennard, who had been previously appointed by Governor Warmoth to fill the vacancy occasioned by the resignation of Howe and not confirmed by the senate, refused to surrender his seat, and a proceeding was instituted by Morgan to get possession of the office, which was carried by appeal to the supreme court, and on the 31st day of January the supreme court decided that Pinchback was lieutenant-governor, and by the impeachment of Governor Warmoth was legally acting as governor; that his nomination of Morgan to the senate for associate justice was in accordance with law; that the senate by which Morgan was confirmed was the legal senate of Louisiana, and that Morgan was entitled to take his seat upon the bench. The legislature during its extra session, which terminated on the 6th of January, passed a number of laws of a general character, which went into operation and were recognized by the courts as being the laws of the State, and among them one abolishing the seventh and eight district courts and creating the superior district court of New Orleans, which court was duly organized and is in the active discharge of its duties. A few minutes after the adjournment of the extra session the regular session began, as provided by the constitution of the State, and the legislature proceeded to the business of the session.

Under the laws of Louisiana the life-time of a legislature, like that of a Congress, is two years, and when once it is organized that organization extends throughout the period. The organization at the beginning of the extra session rendered any subsequent one unnecessary, and at the opening of the regular session the members who had been admitted at the extra session appeared and took their seats without further qualification, and by the rules the unfinished business of the extra session was continued in the regular session as if no interregnum had taken place. Should the President convene an extra session of Congress in the month of March, the organization of the House of Representatives then made would continue through the Congress just as if it was made at the beginning of the regular session.

On the 14th of January, an act was passed to promote the speedy trial of contests for judicial offices, the validity of which came before the supreme court in the case of Morgan *vs.* Kennard, and in regard to which the court held that while they could not determine judicially the persons who composed the legislature, yet that they could take judicial notice of the body constituting the legal legislature, and that the law in question was passed by the legal legislature. This legislature has continued in session up to this time engaged in general and special legislation, the validity of which is recognized by all the courts of the State and generally by the people.

Louisiana has a constitution which has been ratified by the people; a code of laws enacted by her legislature from time to time; a general system and body of law which is recognized and administered by her courts; a supreme court in full operation, district and subordinate courts discharging their duties without obstruction in every part of the State. She has her full complement of parish and local officers, who are performing their duties without resistance or interruption. She has a legislature which was organized under the forms of law, the members of which were declared elected by a tribunal which has been pronounced by the supreme court the lawful one for that purpose, and this legislature has been expressly recognized by the supreme court as being the lawful legislature. She has an acting governor who has been declared elected by the legislature and installed in office under the forms of law. It cannot be said, therefore, that Lou-

isiana has not a State government, and that the government is not in all outward aspects legal and normal.

The late insurrectionary States at the end of the war were without governments of any kind. They were without governors, legislatures, courts, State or subordinate officers; and the United States had the power to provide for the reconstruction of the State governments, and it was their duty to do so. The broad difference between the condition of Louisiana at present and the insurrectionary States at the end of the war must be comprehended by all. The interference of the United States at that time, and undertaking the work of reconstruction, was a constitutional and political necessity. The Constitution declares that the United States shall guarantee to each State a republican form of government, and, by generally received construction, this does not limit the power of Congress to a mere inquiry as to the form, but it is construed to mean as if it read, "the United States shall guarantee to each State a government, republican in its form." Where there are two rival governments in a State, Congress must first ascertain which is the legal government before it can determine the question whether it is republican in form; and if there be no legal actual government, it is impossible that it should be republican in form. But it is not every irregularity in a State government that will destroy its existence or impair its republican or legal character. A State government consists of too many constituent parts to say that the absence of the governor or the presence of a fraudulent one will destroy its existence, and the Constitution and laws have provided the machinery by which the intruder may be expelled and the lawful governor put in his place. Should the legislature be broken up by the secession or resignation of a majority of its members leaving it without a quorum—which has happened in many of the States—that would not destroy the existence of a State government; or, if it be irregularly or fraudulently organized by the admission of persons as members who were not elected, it could not be said to have destroyed the existence of the State government. It is hardly necessary to consider how many of the constituent parts of a State government must disappear before the government ceases to exist. The presence of governors and State officers who secured their offices by fraud has occurred many times in our political history, and has never been held to have destroyed the existence of a State government or its legal character. And we know that there have been numerous instances where State legislatures have been broken up by the resignation of members, or by what is commonly called "bolting," and yet it was never claimed that such a result destroyed the State government or took away its legal character.

The theory of our system is that every State government possesses the power and machinery to correct the wrongs and frauds within itself, practiced under color of or in open violation of its own laws, and that the decision of its own tribunals, created by its constitution and laws for such purpose, must be received as final. When the constitution of a State provides that each house of its legislature shall be the judge of its election and qualification of its members, full faith and credit must be given to their action; and should the Government of the United States go behind their action to inquire whether the members have been lawfully elected to the legislature, their independence would be wholly destroyed and the validity of their action made to depend upon the will of Congress. So, when the laws of a State have constitutionally created a returning board to ascertain who are elected State officers and members of the legislature, if Congress may go behind the decision of that board and inquire whether they had the returns before them, and whether they were acting in accordance with the laws of the State, the election of State officers and members of the legislature would be placed absolutely under the control of Congress.

The Constitution says that "the Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years." The manner of constituting the legislature is left absolutely to each State, and the question of its organization must be left to be decided by such tribunals or regulations as are provided by the constitution and laws of the State; and the only question about which the Senate may inquire in determining the admission of Senators is whether they have been chosen by the legislature of the State—that legislature recognized by the State, or whose organization has been accepted by other departments of the State government. Under our complex system of government all questions of the organization of State governments, under their own laws, must be left to the decision of the tribunals in such States created for that purpose; and when such decisions have been made they must be accepted by the Government of the United States in their dealings with such States. It is no answer to this to say that in a particular case such tribunals will or have decided wrongfully. The Government of the United States has no right to review their decisions so long as the State possesses a government republican in its form.

The doctrine that all questions of election arising exclusively under the constitution and laws of a State must be left to the settlement and determination of the proper tribunals created by the State for the adjustment of such matters, was distinctly recognized

by the Supreme Court of the United States in the celebrated case of Luther *vs.* Borden, growing out of the attempt in the State of Rhode Island to overturn the old charter government and establish a new one in its stead. In that case the Supreme Court said:

"The point, then, raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of the State; and the well-settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of a State. Upon what ground could the circuit court of the United States, which tried this case, have departed from this rule and disregarded and overruled the decision of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals."

But the reason for the rule in Luther *vs.* Borden is much stronger in this case than in that. In that case there was an attempt to set up a new constitution over the old charter under which it was claimed that a new government had been organized throughout, involving a new supreme court, as well as legislature and State officers. But in Louisiana there is but one constitution, and but one supreme court, which is recognized by all parties, and no attempt made to set up another in its stead, and the only question is as to who were elected State officers and members of the legislature under the recognized constitution and laws of the State, of which the supreme court must necessarily be the final arbiter.

There is no impeachment of the supreme court of Louisiana presented to the committee or to the country. All its members but one were placed upon the bench in 1868, before the present troubles arose, and hold their office for four years longer; and although imputations have been cast upon its action, I know of no foundation for them, and it is not legitimate for Congress to make an inquiry into its motives. The power and duty conferred upon the United States by the fourth article to guarantee to every State in the Union a republican form of government is political in its character, and not subject to revision by the judiciary; but when, upon inquiry, it is ascertained that a State has an existing government in active operation, which is not obstructed by violence, in which each department is mutually recognized by the other, and which is republican in its form, there is no foundation for the interference of Congress, and no condition to which its power can attach; and although its officers may have been elected by fraud or installed without election, yet all questions in relation to them must necessarily arise under the constitution and laws of the State, and, under the decision in Luther *vs.* Borden, be referred for determination to the tribunal of the State.

This whole affair, on both sides, is unfortunate and painful, and if Congress could, without exercising a dangerous power and establishing a perilous precedent, set aside the election and provide for a new one, with security that it should be fair, it would be far more satisfactory to the people of the whole nation. Murder is the highest crime; but it is not every court that has jurisdiction to punish it; and one court cannot assume such jurisdiction upon the ground that another, to which it has been granted, will not properly exercise it; and Congress has not the jurisdiction to examine and redress every great wrong that may take place in a State. Where, by the constitution and laws of a State, legal remedies are provided for the redress of all wrongs that may take place in regard to elections, it would be inconsistent with the independence and integrity of the State governments for the United States to interfere and assume jurisdiction upon the ground that the State tribunals have acted wrongfully and fraudulently, or will so act. The Government of the United States is not a Don Quixote, going forth to hunt up and redress all the wrongs that may be inflicted upon the people in any part of the country; but is a Government limited and restrained in its jurisdiction by the charter of its creation, and that charter distinctly recognizes the existence of State governments to be constituted legally by the States themselves, subject only to the provision of the higher law that they shall be republican in form. This doctrine in no wise recognizes the blood-stained theory of State sovereignty, which has been the evil spirit in our political system, and to which the present troubles in Louisiana may be traced back, but springs from the great fact that the States have a vast body of rights distinctly guaranteed and recognized by the Constitution of the United States, and that among these is the right to constitute their own legislatures, and determine by their own tribunals the legality of their organization.

This great power to guarantee to each State a republican form of government is intended only for the highest and most solemn occasions. If it is invoked for every disorder in a State, it must result in the absorption of the State governments and subvert the whole theory and plan of our political institutions. While we are a nation, in which alone the

sovereignty resides, yet local self-governments which preceded the Constitution, and are recognized and continued by it as a part of the great plan of political salvation, are indispensable to our liberty, progress, and happiness, and must be preserved. It should be exercised only upon well-defined principles, in cases coming clearly within their limits, and with all the more caution because it is political in its character, and the use or abuse of it cannot be reviewed by the courts. While it would be imprudent to attempt to define the cases that come within its scope, it may be safely said that it does not comprehend a disorder in a State arising under its own constitution and laws, for which those laws provide remedies, a State in which there is profound peace, and in which the State government is republican in its form, and discharging its functions in every department without interruption. Even in cases that come within its scope it should not be exercised except in the last resort, and the States should be left to work out their own relief and reformation as long as there is any hope.

There is a government in Louisiana. In all outward aspects it is legal and normal. Profound peace prevails throughout the State. The government, through the courts and through its legislature and administrative officers, is operating without interruption or hindrance. Should Congress determine to undertake the work of reconstruction, it must first overturn an actually existing government which is republican in its form.

The conduct of Judge Durell, sitting in the circuit court of the United States, cannot be justified or defended. He grossly exceeded his jurisdiction, and assumed the exercise of powers to which he could lay no claim. The only authority he had in the matter grew out of the act of Congress of 1870 to enforce the fifteenth amendment, and the act amendatory of that, passed in 1871, which gave to the courts of the United States jurisdiction in all cases in law and equity arising under the former act. Under the first act two classes of cases might arise: First, actions to enforce the rights of those who had been illegally denied the right to vote upon the ground of race, color, or previous condition of servitude; and second, actions to enforce the rights of those who had been deprived of office by reason of the denial to persons of the right to vote on account of race, color, or previous condition of servitude; and suits in equity ancillary or in aid of these rights of action would come within the jurisdiction of the circuit court of the United States, among which would be a suit to perpetuate testimony. But the pretense that in a suit to perpetuate testimony the court could go beyond the natural and reasonable jurisdiction to decide who constituted the legal returning board under the laws of Louisiana, and to enforce the rights of such as it might determine to be members of that board, and to enjoin others who were not, is without any foundation in law or logic.

In the Antoine case Judge Durell not only assumed to determine who constituted the legal returning board, but to prescribe who should be permitted to take part in the organization of the legislature and to enjoin all persons from taking part in such organization who were not returned by the Lynch board as elected; and this assumption of jurisdiction was made in the face of the express provision in the act of 1870 that its benefits should not extend to candidates for electors, for Congress, or for the State legislature. His order issued in the Kellogg case to the United States marshal to take possession of the State-house for the purpose of preventing unlawful assemblages, under which the marshal called to his aid a portion of the Army of the United States as a posse comitatus, can only be characterized as a gross usurpation.

It was not for the United States marshal or for the President to review the decisions and order of Judge Durell, and determine whether he had exceeded his jurisdiction. By the tenth section of the act of 1870, under which Judge Durell had assumed jurisdiction in the case, it is declared to "be the duty of all marshals and deputy marshals to aid and execute all warrants and precepts issued under the provisions of this act when to them directed;" and that they "shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged."

Under this authority the United States marshal called upon the general in command of the United States troops at New Orleans for a detachment to aid him in the enforcement of the orders and decree of the court, which demand was complied with.

The Constitution enjoins the President to "take care that the laws be faithfully executed," and this involves the enforcement of the orders, decrees, and judgments of the courts of the United States. But by the provisions of the act of 1870 it would seem that the United States marshal has a right to summon upon the instant a portion of the land or naval forces of the United States, without previous authority from the President, to enforce the orders or precepts of the courts.

But conceding all the facts in regard to Judge Durell, the question arises how they affect the legal rights of the parties, and the actual status of the Kellogg government. The Lynch returning board has been decided by the supreme court of the State to be the legal one, and the other boards, known as the Wharton, the De Feriet, and the Forman

boards, to have been without any authority whatever. Has the legal character of that board been impaired or vitiated by the illegal interference of Judge Durell? Conceding that interference to have been in every way wrongful, would it have the effect to vitiate the title of the Lynch returning board, as determined by the supreme court of the State? I think not. A title which the highest legal tribunal has declared to be good is not impaired by unlawful interference, even by violence in its support. And the case stands thus: That the circuit court of the United States has unlawfully interfered to do certain things which the highest tribunal of the State decides to be lawful and proper in themselves. The supreme court of the State having held that the legislature was the lawful one which was organized by the admission of such persons only as were returned by the Lynch board as elected members, is the legality of that organization affected by the fact that the circuit court of the United States interfered to prevent the organization of a legislature by persons who were not returned as elected by the Lynch board? If an officer in the performance of his duty were aided by a mob, the performance would not be made illegal by the presence and co-operation of an unlawful assemblage.

The Kellogg government is a fact, and its legality is sustained by the judicial tribunals of the State, and it is in active operation in all its departments without actual resistance anywhere. The McEnery government exists only on paper. McEnery and all those claiming office under it have never been returned as elected by any person having authority under the laws of Louisiana.

Every offense complained of on either side in this case was against the constitution and laws of Louisiana, and the question now presented broadly is whether the Congress of the United States shall interfere to correct violations of the laws of the State and to redress wrongs for which redress is provided by the State tribunals.

In the report of the majority of the committee it is alleged that the election on the 4th of November was so grossly fraudulent as to make it void; that if it had been fair, Kellogg and the other candidates on the Republican ticket would have been elected by a large majority. Without concurring in the opinion that the election was void, I entertain no doubt that it was an organized fraud of the largest dimensions, and that a decided majority of the people of Louisiana sympathize with the Kellogg government and earnestly desire to see it maintained.

Should Congress declare that Louisiana has no legal State government and provide by law for a new election, it would establish a precedent for overturning State governments and setting up new ones under which the government of every State would be at the mercy of Congress as controlled by the passions or exigency of parties.

Deploring this condition of things in Louisiana, and earnestly hoping that the people will take warning, and with one accord insist upon honest elections and the faithful observance of the laws, it is my deliberate judgment that it is better for them to bear the ills they have and seek reformation and relief under their own laws and tribunals than to invoke the National Government to the assertion of a power under which State governments would exist hereafter only by sufferance.

VIEWS OF MR. HILL.

Assenting as I do in the main to the correctness of the statement of facts touching the recent election in the State of Louisiana, and the history of the legal proceedings connected therewith, as set forth in the report of the committee, and commending the just though severe criticisms of a judicial tribunal for its improper intervention, I am still of opinion that the remedy for existing evils proposed by the committee is of questionable expediency and not the most effectual method of restoring order and quiet to a distracted community.

While it must be conceded that the election in certain parishes was not conducted with entire fairness, and in others frauds were committed, it is nevertheless true, according to the evidence before the committee, that on the whole the election was as fair and certainly as peaceable as the people of Louisiana are accustomed to hold. Irregularities and frauds in State elections, unfortunately, are not of rare occurrence beyond the limits of Louisiana. The intervention of a judge without jurisdiction of the cause presented to him prevented the counting of the election returns according to the forms of law. As it is, there has been no legal count of the returns.

No one doubts but that for the interposition of a judge of the United States district court the returns of the election would have been counted by a board of canvassers under the laws of the State, and that a result would have been reached, at least, with all the appearances of regularity in which a majority of the people would have acquiesced. Shall the unauthorized act of this official, condemned as it is by all legal minds, be permitted of itself to reverse the expressed will of a majority of the voters of Louisiana, or at least a majority of those that voted? Surely it cannot be a sound principle in politics or ethics that an admitted usurpation can create anything more than a government

de facto. To assert that it may bring into existence by its mere recognition a government that lives, moves, and has its being solely by such adoption is to declare that the usurping tribunal is supreme and its decisions and orders are irreversible. What boots it to rebuke the illegal and tyrannical assumptions of a judge if his orders and decrees must have all the effect he designed to give them? Of what consequence is it that his violations of law should be reviewed and censured if the effect is the same as though he had not exceeded his jurisdiction and abused the authority of his office? It would seem to be an act of supererogation to pause to wonder at the fatuity that dictated his course, if its end and aim are to stand as facts accomplished. In the light of policy it would seem better in deciding that a government foully and fraudulently set up by the fiat of a judge shall stand because it is a *de facto* government; that no discredit should be cast upon the integrity or intelligence of the magistrate. It certainly cannot commend a State government to those who are to live under it to inform them that the National Legislature, after a thorough examination into the history of its origin, have ascertained that it was born of fraud and arrogated power, and but for these could never have had existence.

To avoid the exercise by Congress of a power so delicate as that of annulling the entire election of a State, embracing the highest officials and parish officers of every grade, and a State legislature besides, I would prefer that only such legislation be had as is necessary to preserve order and respect for law in the State. This I think may be effected by enacting a law convening by name the members-elect to the two houses of the legislature (whose election has not been disputed before the committee by the contending partisans) on a day certain, in their respective chambers in the Mechanic's Institute in the city of New Orleans, and requiring them to organize their said houses by electing the necessary officers, and having organized, to proceed to count the said election returns and to declare the result of such count; to seat only such members as may appear by said returns to have been elected to the particular house, as the case may be, and to announce the election of a governor and lieutenant-governor, who shall thereupon be inaugurated for the terms for which they have been chosen at said election, and who shall thereupon proceed to execute the duties required of them by the constitution and laws of the State.

JOSHUA HILL.

COMPENSATION OF MESSRS. RAY AND M'MILLEN.

MONDAY, *March* 3, 1873.

Mr. West submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay to John Ray and W. L. McMillen, each, full compensation as Senator for the unexpired term for which they were elected, as shown by their respective credentials, until the 4th of March, 1873; and also mileage."

[Special session of Senate, March, 1873.]

THURSDAY, *March* 13, 1873.

Mr. West submitted the following resolution; which was referred to the Committee on Privileges and Elections.

[Resolution same as that submitted March 3, given above.]

[First session of the Forty-third Congress.]

Mr. West submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

[Resolution same as that submitted March 3, given above.]

MONDAY, *June* 22, 1874.

Mr. Carpenter, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution to pay John Ray and William L. McMillen compensation as Senators from the State of Louisiana, submitted a report (No. 476), accompanied by the following resolution; which was ordered to be printed.

[Resolution found at end of report.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Morton (chairman), Carpenter, Logan, Alcorn, Anthony, Mitchell, Wadleigh, Hamilton of Maryland, and Saulsbury.]

IN THE SENATE OF THE UNITED STATES.

JUNE 22, 1874.—Ordered to be printed.

Mr. Carpenter submitted the following report:

The Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution offered by Senator West, as follows: "*Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay John Ray and William L. McMillen, each, full compensation as Senator for the unexpired term for which they were elected, as shown by their respective credentials, until the 4th of March, 1873," submit the following report:

Owing to the fact that in the State of Louisiana, in 1872 and 1873, there were two bodies claiming to be the legislature of that State, one known as the McEnery and the other as the Kellogg legislature, John Ray and William L. McMillen each claimed the seat made vacant in the Senate by the resignation of Hon. William P. Kellogg, and appeared and presented their credentials to the Senate, and attended before the Committee on Privileges and Elections, charged with the investigation of their claims. The committee reported against seating either of them, but both had incurred expenses in the prosecution of their claims.

By analogy to the precedents of the Senate, your committee are of opinion that both Ray and McMillen would be entitled to the salary of a Senator from the time of their election until the disposition of their claims respectively by the Senate; but regarding this precedent as vicious, your committee recommend the adoption of the following resolution:

"*Resolved*, That the actual expenses necessarily incurred by John Ray and William L. McMillen, claimants to a seat in the Senate from the State of Louisiana in the Forty-second Congress, in presenting their respective claims to a seat in the Senate, be paid out of the contingent fund of the Senate, which expenses shall be presented itemized and verified by the oath of the said Ray and McMillen respectively, and the amounts shall be audited by the Committee to Audit and Control the Contingent Expenses of the Senate.

[First session of the Forty-fourth Congress.]

Mr. West submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Committee on Contingent Expenses be instructed to report what amounts of compensation, if any, are, in their opinion, due to the respective contestants, William L. McMillen and John Ray, claimants to a seat in the Senate for the unexpired term of William P. Kellogg; and to William L. McMillen as claimant heretofore to a seat in the Senate for the term commencing March 4, 1873."

WEDNESDAY, *July* 5, 1876.

Mr. West submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the claims of William L. McMillen and John Ray, contestants for the seat vacated by the resignation of William P. Kellogg, a Senator from Louisiana, for pay and mileage as Senators for the unexpired term named, be referred to the Committee on Privileges and Elections."

[Second session of the Forty-fourth Congress.]

Mr. West submitted the following resolution for consideration:

"*Resolved*, That John Ray, claimant for the seat in the Senate vacated by the resignation of William P. Kellogg, late Senator of Louisiana, be paid the sum of $1,329.14 out of the contingent fund of the Senate."

[Second session of the Forty-fifth Congress.]

TUESDAY, *January* 15, 1878.

Mr. Kellogg submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay out

*Taken from Senate Reports, 1st sess. 43d Cong., No. 476.

of the contingent fund of the Senate full compensation and mileage as Senators to John Ray and William L. McMillen for the unexpired term of William P. Kellogg in the Forty-second Congress."

FRIDAY, *March* 22, 1878.

Mr. Hoar, from the Committee on Privileges and Elections, to whom was referred the resolution submitted by Mr. Kellogg January 15, 1878, directing the Secretary of the Senate to pay to John Ray and William L. McMillen the compensation and mileage of Senators for the unexpired term of William P. Kellogg in the Forty-second Congress, reported it with an amendment, and submitted a report (No. 182) thereon.

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

MARCH 22, 1878.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred Senate resolution to pay John Ray and William McMillen compensation and mileage, report as follows:

The full term of William P. Kellogg, Senator from Louisiana, expired March 3, 1873. He resigned January 13, 1873.

At the last-named date there were two bodies in Louisiana claiming to be the legal legislatures of that State. One of these bodies elected John Ray to fill the unexpired term; the other elected William L. McMillen. Their respective credentials in due form were presented to the Senate on the 22d day of January, 1873. Those of John Ray were certified to by William P. Kellogg, governor; those of William L. McMillen were certified to by John McEnery. Both sets of credentials were, on the day of their presentation to the Senate, referred to the Committee on Privileges and Elections.

On the 20th of February, 1873, the Committee on Privileges and Elections reported—

1. That there is no State government at present existing in the State of Louisiana.

2. That neither John Ray nor W. L. McMillen is entitled to a seat in the Senate, neither having been elected by the legislature of the State of Louisiana.

The first proposition was submitted by the committee to the Senate by virtue of a resolution passed January 16, 1873, in the following terms:

"*Resolved*, That the Committee on Privileges and Elections be instructed to inquire and report to the Senate whether there is a legal State government in Louisiana, and how and by whom it was constituted."

As part of the committee's report of February 20, 1873, a bill was submitted ordering an election in Louisiana. This measure was considered at great length by the Senate, and was rejected February 27, 1873. A motion to reconsider was laid on the table March 1, 1873.

No decision was ever made by the Senate of the question whether there was or was not, at the time specified, a legal State government in Louisiana, but the Senate rejected the bill ordering a new election to be held in Louisiana.

The second proposition submitted by the committee, that neither Ray nor McMillen were entitled to a seat in the Senate, was never acted upon by the Senate, as the term for which they claimed to be elected expired without the question having been considered.

Throughout the investigation made by the Committee of Privileges and Elections, by order of the Senate, of the affairs of the State of Louisiana, both Ray and McMillen were in constant attendance, aiding the committee by their knowledge of the case and by their testimony in the discharge of the duty imposed upon it.

In the Forty-third Congress a resolution that Ray and McMillen be paid as Senators for the unexpired term to which they were elected was referred to the Committee to Audit and Control the Contingent Expenses of the Senate. Mr. Carpenter, of Wisconsin, who made the report on the Louisiana case from the Committee of Privileges and Elections, was chairman of the Committee on Contingent Expenses. He submitted the following report upon the resolution giving compensation:

"Owing to the fact that in the State of Louisiana, in 1872 and 1873, there were two bodies claiming to be the legislature of that State, one known as the McEnery and the other as the Kellogg legislature, John Ray and William L. McMillen each claimed the seat made vacant in the Senate by the resignation of Hon. William P. Kellogg, and appeared and presented their credentials to the Senate, and attended before the Com-

*Taken from Senate Reports, 2d sess. 45th Cong., No. 182.

mittee on Privileges and Elections, charged with the investigation of their claims. The committee reported against seating either of them, but both had incurred expenses in the prosecution of their claims.

"By analogy to the precedents of the Senate, your committee are of opinion that both Ray and McMillen would be entitled to the salary of a Senator from the time of their election until the disposition of their claims respectively by the Senate; but regarding this precedent as vicious, your committee recommend the adoption of the following resolution:

"'*Resolved*, That the actual expenses necessarily incurred by John Ray and William L. McMillen, claimants to a seat in the Senate from the State of Louisiana in the Forty-second Congress, in presenting their respective claims to a seat in the Senate, be paid out of the contingent fund of the Senate; which expenses shall be presented itemized and verified by the oath of the said Ray and McMillen respectively, and the amounts shall be audited by the Committee to Audit and Control the Contingent Expenses of the Senate.'"

No action was ever had by the Senate upon this recommendation; it was not made until eighteen months after the respective credentials were presented. The claimants to the seat could not have been expected to preserve an account of items of their expenditure, nor could they have anticipated that a proposition would be submitted so entirely at variance with the idea of compensation attending Senatorial service, and so contrary to the uniform practice of the Senate.

The chairman of the Committee on Contingent Expenses of the Forty-third Congress was entirely familiar with the claims of Ray and McMillen. He made the report from that committee that they were entitled to compensation, but he proposed an innovation upon the precedents of the Senate in the manner of that compensation. The proposition to change the usages of the Senate did not meet with favor, and by the action had upon the cases of Mr. Pinchback, of Louisiana, and of Mr. Sykes, of Alabama, occurring and passed upon subsequently, the Senate confirmed its uninterrupted usage. In acting upon the two last-cited cases the Senate stipulated "that in no case shall any pay be allowed to a Senator to begin earlier than the date of his election or appointment."

Upon the foregoing facts we are of opinion that each of the contestants was justified in making the contest for the seat. If the usage of the Senate in such cases be followed each should be allowed the sum of $1,334.67, being the amount of compensation and mileage from the date of his alleged election to the end of the term. But we do not recommend such an allowance, but prefer to allow to each claimant only his actual and reasonable expenses incurred in making the contest.

Under the circumstances, however, it would be clearly unjust to require of the claimants an itemized account of such expenses. They allege that they kept no such account, relying on the unbroken usage of the Senate to allow salary and not compensation, and that they cannot now furnish either items or vouchers. It appears, however, that each of these gentlemen traveled from New Orleans to Washington, remained here more than a month, laying aside all other business, and wholly devoting himself to this contest. The question required an elaborate and thorough examination of the history of the Louisiana election and the claims of the rival State governments. In this examination the contestants acted as counsel, and rendered a service in which, if they had employed other suitable counsel, they might properly pay a large fee, which should be reimbursed by the Senate.

On the whole, we recommend the payment to each of the sum of $1,000, which is considerably less than the salary and mileage, and is a moderate estimate of the actual cost and expense incurred by each.

We therefore recommend that the resolution be amended by substituting therefor the following, and that, so amended, the same be adopted: Strike out all after the words "contingent fund of the Senate" and insert "the sum of $1,000 each to John Ray and William L. McMillen, as full compensation for their expenses as contestants for a seat in the Senate for the unexpired term of William P. Kellogg in 1873."

WEDNESDAY, *March* 27, 1878.

On motion by Mr. Hoar, the Senate proceeded to consider the resolution submitted by Mr. Kellogg January 15, 1878, to pay John Ray and William L. McMillen compensation and mileage as Senators from Louisiana; and the amendment reported by the Committee on Privileges and Elections having been agreed to,

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay out of the contingent fund of the Senate the sum of $1,000 each to John Ray and William L. McMillen, as full compensation for their expenses as contestants for a seat in the Senate for the unexpired term of William P. Kellogg in 1873,"

It was determined in the affirmative—yeas 51, nays 7.

On motion by Mr. Cockrell, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Armstrong, Bailey, Blaine, Booth, Bruce, Burnside, Butler, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Conkling, Conover, Davis of West Virginia, Dennis, Dorsey, Eustis, Ferry, Garland, Gordon, Grover, Hamlin, Hereford, Hill, Hoar, Ingalls, Johnston, Jones of Florida, Kernan, Kirkwood, Lamar, McCreery, McMillan, Matthews, Maxey, Merrimon, Mitchell, Morgan, Morrill, Oglesby, Paddock, Randolph, Rollins, Saulsbury, Saunders, Spencer, Teller, Thurman, Windom, and Withers.

Those who voted in the negative are Messrs. Cockrell, Coke, Eaton, McDonald, Sargent, Wallace, and Whyte.

So the resolution was agreed to.

[The debate is found on pages 2053–2056 of the Congressional Record, volume 7, part 3, 2d sess. 45th Cong.]

McMILLEN vs. PINCHBACK (MARR AND EUSTIS).

Contest for seat for term beginning March 4, 1873.

TUESDAY, *January* 21, 1873.

Mr. West presented the credentials of Pinckney B. S. Pinchback, elected a Senator by the general assembly of the State of Louisiana for the term of six years commencing March 4, 1873.

Ordered, That they lie on the table.

MONDAY, *March* 3, 1873.

The Vice-President presented a telegraphic dispatch, signed by John McEnery as governor of Louisiana, notifying him of the election of W. L. McMillen as a Senator from that State; and,

Objection having been made by Mr. West to the reception of the dispatch,

On motion by Mr. Sherman,

Ordered, That the question of the reception of the dispatch lie on the table.

[The debate is found on page 2147 of the Congressional Globe, part 3, 3d sess. 42d Cong.]

* * * * * * *

Mr. Schurz presented the memorial of W. L. McMillen, praying that the Senate may take notice of his election as a Senator from the State of Louisiana for the term commencing March 4, 1873.

Ordered, That it lie on the table.

FRIDAY, *March* 7, 1873.

Mr. West presented the credentials of William L. McMillen, elected a Senator by the legislature of Louisiana for the term of six years commencing March 4, 1873; which were read.

Ordered, That they lie on the table and be printed.

[First session of the Forty-third Congress.]

THURSDAY, *December* 4, 1873.

On motion by Mr. Morton,

Ordered, That the credentials of P. B. S. Pinchback and W. L. McMillen, claiming seats as Senators from the State of Louisiana, on the files of the Senate, be referred to the Committee on Privileges and Elections.

MONDAY, *December* 15, 1873.

Mr. Morton, from the Committee on Privileges and Elections, to whom were referred the credentials of P. B. S. Pinchback and W. L. McMillen, claiming seats in the Senate as Senators from Louisiana, reported that the committee were evenly divided upon the question as to whether Mr. Pinchback is, upon his credentials, entitled to be sworn in as a member, and asked to be discharged from the further consideration of the subject, and to refer the whole matter to the determination of the Senate.

* * * * * * *

Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

"*Resolved*, That the credentials of P. B. S. Pinchback for a seat in the Senate of the

United States for six years, commencing on the 4th of March, 1873, being in regular form, he is entitled under the law, and in conformity with the usages of the Senate, to be sworn in as a member; and that whatever grounds of contest there may be as to his right to a seat should be made thereafter."

[The debate is found on pages 189–191 of the Congressional Record, vol. ii, part 1.]

TUESDAY, *December* 16, 1873.

On motion by Mr. Morton, the Senate resumed the consideration of the resolution declaring P. B. S. Pinchback entitled to a seat in the Senate from the State of Louisiana.

After debate,

Ordered, That the said resolution lie on the table.

[The debate is found on pages 220–228 of the Congressional Record, vol. ii, part 1.]

MONDAY, *January* 12, 1874.

Mr. West presented a paper purporting to be a joint resolution of the legislature of Louisiana, expressive of confidence in Hon. P. B. S. Pinchback, claiming a seat in the Senate as Senator from that State.

Ordered, That it lie on the table.

TUESDAY, *January* 20, 1874.

Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

"*Resolved*, That the credentials of the Hon. P. B. S. Pinchback be referred to the Committee on Privileges and Elections; that the committee have power to send for persons and papers, and be instructed to investigate the circumstances attending the election of said Pinchback to a seat in this body."

MONDAY, *January* 26, 1874.

On motion by Mr. Morton, the Senate resumed the consideration of the resolution submitted by him on the 15th December last, viz:

"*Resolved*, That the credentials of P. B. S. Pinchback for a seat in the Senate of the United States for six years, commencing on the 4th of March, 1873, being in regular form, he is entitled under the law, and in conformity with the usages of the Senate, to be sworn in as a member; and that whatever ground of contest there may be as to his right to a seat should be made thereafter."

Mr. Morton having modified his resolution to read as follows:

"*Resolved*, That the credentials of the Hon. P. B. S. Pinchback be referred to the Committee on Privileges and Elections; that the committee have power to send for persons and papers, and be instructed to inquire into the conduct of said Pinchback in connection with said election,"

After debate,

On motion by Mr. Sherman,

Ordered, That the further consideration of the said resolution be postponed to Wednesday next at 1 o'clock.

[The detate is found on pages 913–921 of the Congressional Record, vol. ii, part 1.]

TUESDAY, *January* 27, 1874.

On motion by Mr. McCreery,

Ordered, That the credentials of W. L. McMillen, claiming a seat in the Senate as Senator from the State of Louisiana, be recommitted to the Committee on Privileges and Elections.

THURSDAY, *January* 29, 1874.

On motion by Mr. Carpenter to postpone the further consideration of the unfinished business, and that the Senate resume the consideration of the resolution submitted by Mr. Morton on the 15th December last, and modified by him on the 26th instant to read as follows:

"*Resolved*, That the credentials of the Hon. P. B. S. Pinchback be referred to the Committee on Privileges and Elections; that the committee have power to send for persons and papers, and be instructed to inquire into the conduct of said Pinchback in connection with said election,"

Pending debate,

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

FRIDAY, *January* 30, 1874.

The Senate resumed, &c.

[The debate of the last two days, including a speech by Mr. Carpenter, is found on pages 1036–1058 of the Congressional Record, vol. ii, part 2. Mr. Morton's speech is found on pages 41–43 of the Congressional Record, vol. ii, Appendix.]

MONDAY, *February* 2, 1874.

The Senate resumed, &c.

[The debate is found on pages 1109–1111 of the Congressional Record, vol. ii, part 2. Mr. Morton's speech is found on pages 43–48 of the Congressional Record. vol. ii, Appendix.]

[Second session of the Forty-third Congress.]

WEDNESDAY, *December* 16, 1874.

The Vice-President laid before the Senate a letter of W. L. McMillen requesting the speedy action of the Senate upon his credentials as Senator-elect from the State of Louisiana; which was referred to the Committee on Privileges and Elections.

WEDNESDAY, *December* 23, 1874.

Mr. Morton submitted the following resolution for consideration; which was ordered to be printed:

"*Resolved*, That the Senate recognize the validity of the credentials of P. B. S. Pinchback as certified to by Governor William P. Kellogg, of Louisiana, under the seal of said State; and the Committee on Privileges and Elections are instructed to examine and report if said Pinchback is entitled to be admitted on the *prima facie* case thus made, or if such admission should be postponed until investigation is made as to the charges of corruption in his election alleged against him."

FRIDAY, *January* 22, 1875.

Mr. West presented the credentials* of Pinckney B. S. Pinchback. elected a Senator by the legislature of Louisiana for the term expiring March 3, 1879; which were read.

On motion by Mr. Sherman,

Ordered, That the credentials, together with the papers in relation to the contested seat in the Senate from the State of Louisiana on the files of the Senate, be referred to the Committee on Privileges and Elections.

SATURDAY, *February* 6, 1875.

Mr. West presented a memorial of P. B. S. Pinchback, praying speedy and definite action upon his credentials as Senator-elect from the State of Louisiana; which was referred to the Committee on Privileges and Elections.

MONDAY, *February* 8, 1875.

Mr. Morton, from the Committee on Privileges and Elections, to whom were referred the credentials of P. B. S. Pinchback, by unanimous consent submitted a report (No. 626), accompanied by the following resolution:

"*Resolved*, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873."

[The debate is found on page 1063 of the Congressional Record, vol. iii, part 2.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Morton (chairman), Carpenter, Logan, Alcorn, Anthony, Mitchell, Wadleigh, Hamilton of Maryland, and Saulsbury.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 8, 1875.—Ordered to be printed.

Mr. Morton, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to which were referred the credentials of

* A copy of the credentials is found on page 647 of the Congressional Record, vol. iii, part 1.

P. B. S. Pinchback for a seat in the Senate from the State of Louisiana, have had the same under consideration, and submit the following report:

That the certificate of William Pitt Kellogg, then and now the governor of the State of Louisiana, which certificate is verified by the great seal of the State, shows that on the 17th day of January, 1873, the Hon. P. B. S. Pinchback was elected to a seat in the Senate of the United States for the term of six years, beginning on the 4th March, 1873, by the legislature of Louisiana, in manner and form as prescribed by the act of Congress regulating the elections of Senators of the United States. Upon this certificate the committee are of opinion that Mr. Pinchback has a *prima facie* title to admission as a member of the Senate, and that whatever objections may exist, if any, as to the manner of his election or as to the legal character of the body by which he was elected, should be inquired into afterward.

The committee, therefore, recommend the adoption of the following resolution:

Resolved, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 11, 1875.—Ordered to be printed to accompany Report No. 626.

VIEWS OF THE MINORITY.

The undersigned members of the Committee on Privileges and Elections beg leave to submit their views in relation to the admission of P. B. S. Pinchback as a Senator from the State of Louisiana.

The importance that the subject has attained by reason of the complications which now surround it impress it with a gravity not hitherto surpassed by any since the organization of the Government. We feel it to be a proper occasion to give our reasons for the course which our convictions of what is due alike to this body, to the people of Louisiana, and to the whole country impel us to pursue.

The resolution to be reported by the committee to the Senate for its consideration is as follows:

"*Resolved*, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873."

The certificate upon which this resolution is based is as follows:

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, January 15, 1873.

I, William Pitt Kellogg, governor of the State of Louisiana, do hereby certify that on the fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, Pinckney B. S. Pinchback was duly elected by the general assembly of this State to represent this State in the Senate of the United States for the full term of six years from the fourth day of March, one thousand eight hundred and seventy-three.

Given under my hand and the seal of this State this fifteenth day of January, A. D. one thousand eight hundred and seventy-three, and the Independence of the United States the ninety-seventh.

WM. P. KELLOGG.

By the governor:
[SEAL.]

P. G. DESLONDE,
Secretary of State.

The power of the Senate under section 5, article 1 of the Constitution, to "judge of the election, returns, and qualifications of its own members" is absolute and unlimited.

The object in this case is to seat P. B. S. Pinchback upon this certificate alone, irrespective of his election, and which in effect for the present excludes any consideration of the election itself.

It may be admitted that the general practice has been to admit the person chosen as a Senator to his seat upon credentials sufficiently authenticated either by the legislature or the governor of the State, subject of course to any contest that might be thereafter prosecuted in respect to his right to the seat. The credentials in themselves, it will be conceded, have no substantial value. It is the election, and the election alone, that gives to the person chosen the right to be a Senator.

The certificate of the governor of a State directed to be given by the act of Congress approved July 25, 1866, upon the election of a Senator, is but the certificate of a fact upon which the official existence of the person chosen depends. It gives to it no force whatever, and without it the election is just as good. It is merely one of the evidences

of the election in a solemn form, and to which due respect should always be paid. In the act referred to there is nothing said as to what effect should be given to such a certificate. It has, however, been generally regarded as sufficient in itself to presume a lawful election of the person represented by it to be chosen. It is most certainly appropriate that this act did not define the force of such a certificate. It prescribes a duty that the governor might or might not observe. The Constitution of the United States provides for the election of Senators by the legislatures of the States. This is their absolute right. Congress may regulate the time and manner of choosing Senators, and the power of Congress over the subject is limited to this only. The right of choosing Senators belongs to the legislatures alone, and such election is alone in all cases of inquiry to be determined by its records. The governor is not known in the election; no duty is imposed upon him by the Constitution in respect to it, or in respect to its authentication. The legislature, to which is alone confided the high trust of choosing Senators, can speak through its own organization, its own officers, and its own acts, as its official record will show.

The right of election is sacred; the right of having this election determined by its own record is equally sacred; for it might be that if other independent departments of the Government, as the executive, for example, possessed the right or power of authentication in the election of a Senator, you might impinge upon the full enjoyment of the power of the legislature in the due choosing of Senators. This absolute right to choose we hold should not and does not depend for its efficiency upon the action of the executive or any other officer of the State or Federal Government.

It will be observed that the certificate, such as we now have under consideration, necessarily involves these elements of belief before it can have the force which is now attempted to be given to it by the report of the committee in this case: first, that the facts stated in regard to the election are true; and second, that the person certifying as governor is in fact what he represents himself to be. The efficacy sought to be impressed upon this certificate, in at once admitting the person represented to be chosen to a seat, alone depends upon the latter fact. With this in dispute the efficient power is gone. Investigation is at once inaugurated to settle the disputed point. Inquiry leads to inquiry, and the real life of the certificate is lost in the strife, for it can be readily seen that in a contest as to whether the certificate has any validity, either by reason of the allegation that the person certifying was not in fact the governor, or from any other reason, the State might be left without a Senator, when by reference to the acts of the legislature the records would show a lawful election by a lawful body, and who could deny that a person so chosen and with such a record could not be admitted without regarding at all the contest about the certificate of the governor, or whether he was in fact governor?

We advert to this to show that a contest upon the subject of certificates at all for any legitimate cause destroys their force. It was intended that by their force alone there should be immediate unobstructed admission to a seat. It must be conceded, in order to give this effect to the certificate before us, that William Pitt Kellogg was at the time the governor of Louisiana. If he were not the governor, then it is no more than waste paper. All will admit, we presume, that this has been a subject of dispute at least since the State election which took place on the 4th day of November, A. D. 1872. A constant, earnest, and at times an aggressive protest has been made against Kellogg, as not only not entitled to be the constitutional and rightful governor of Louisiana, but as a notorious usurper, held in the position he has seized without color of right by means of the armed forces of the United States. Events occurring at the time, and continually since, and some of the most painful character, prove that he does not hold this place practically by any other tenure or power. Whatever else may be said of this notable prominent fact, all are well advised that the right of Kellogg to be governor of Louisiana is in good faith denied and resisted in every way possible to a peaceful resistance.

This at once, most naturally, opens up the inquiry as to the certificate itself, and no efficacy is to be ascribed to it until this is satisfactorily settled, for without this it is worthless for any purpose. We apprehend there is no diversity in the committee on this point. The report of the committee insists that Kellogg is the governor of Louisiana, and would proceed to show it by a course of argument and a system of evidence satisfactory to gentlemen uniting in that report. On the contrary, another course of argument, and other evidence equally satisfactory, have brought the undersigned to a very different conclusion. The broad field of inquiry and investigation is therefore opened up, for it must be manifest to an unprejudiced mind that an examination into the fact whether Kellogg was the rightful governor of Louisiana at the time he signed this certificate must bring us to his pretended election, and, with it, to the election of the body which chose Pinchback. The whole subject relating to the affairs of this State, in connection with the election held on the 4th of November, 1872, for the election of governor and other State officers, and members of the legislature, becomes involved in the very first

branch of the inquiry which it is conceded by all must be made and settled before any force can be imparted to the certificate.

Before entering upon this inquiry we submit most respectfully, putting it in the mildest form, whether this is not an exceptional case from the ordinary one, where it is conceded that there was a rightful governor to sign certificates and where there was a legislature to elect. It must be admitted that no such case was ever before presented to the consideration of the Senate. Notwithstanding it has been the usual practice to admit, in the first instance, persons to a seat upon such certificates, leaving the contest, if any, to be proceeded with thereafter in the usual way, yet the very first question as to the official character of the person pretending to be governor impairs, as we have before said, the wonted efficacy of such certificate; so that when in the examination of this primary question is involved the body that chose Pinchback, and in fact the whole State government of Louisiana, would it be fair, rational, and just to stop short of the substantial merits of the case when all can be settled at once?

It will be admitted, we think, that in such a controversy, opening up both the official character of the governor and the legal validity of the legislature choosing the Senator, we could determine against the validity of the certificate, and at the same time determine the validity of the election upon the record of the legislature and upon its official power of election. Suppose that such certificates should be attacked for fraud, as they could be, could any one say that such attack would involve alone the fraudulent character of the certificate, and not the rightful issue—the election itself? The attack would involve both, and involving both, common reason would dictate that we should decide the substantial question. While we could, in such an inquiry, set aside the certificate, we would give to the person rightfully chosen his seat, and all done in the same proceeding. For if our inquiry should be alone confined to the certificate, for whatever cause, we would be exposed to the fallacy of setting it aside and then remitting the case to the governor for other or further certificate of a fact simply, when we could, and it would be our duty, ascertain the fact ourselves to end the matter.

Therefore we conceive that even in a technical sense, upon a question submitted as this is, an examination of the whole subject is necessary to come to right conclusions; but when we view it in its broad sense, and as we have it in the light of history and events daily transpiring, many of which we must or are presumed to know, as legislators and members of this body, we would consider it a gross dereliction of public duty did we confine ourselves to a technical consideration of matter not substantial when in it are involved questions of the greatest moment, and which in their proper solution demand our earnest efforts and soundest judgment.

The facts present the broadest grounds for interposition in the broadest sense to ascertain the real right and settle a question that has already given, and, until rightly settled, will give to the country the greatest concern. The facts cannot be denied that imperatively call for such an interposition; mere parchment titles, mere certificates, sink into insignificance before the patent and undeniable facts which environ this case. Never before has such a case been made, and it is to be hoped that no such one will ever be made again.

A brief reference to the prominent facts will show how entirely and necessarily the whole case is before us.

A general election was held in the State of Louisiana on the 4th day of November, 1872, for governor and other State officers, for one-half of the senate, and for all the members of the house. John McEnery and William Pitt Kellogg were the opposing candidates for governor, the former in politics being the Democratic and the latter being the Republican candidate. By the official returns made by the regular officers of election to Henry C. Warmoth, then the acknowledged governor of Louisiana, and canvassed and counted by a returning board claiming to be a legal tribunal for this purpose, McEnery was found to have 9,606 majority over Kellogg; and, in respect to the legislature, according to these same official returns, and with the overholding senators; the senate stood—Democrats and Conservatives, 22; Republicans, 11; and there were two vacancies. The house of representatives stood—Democrats and Conservatives, 71; Republicans, 39; and there were seven vacancies, showing a large majority of Democrats and Conservatives in both branches of the legislature.

Another board of returning officers, claiming also to be legally constituted, found that Kellogg was elected, and also found that a large majority of Republican members were elected to the legislature. It is admitted on all hands that this board had no official returns of the election before it, but that its canvass and count were made up from newspaper reports, the statements of unofficial persons, the political complexion of the parish, and also by counting as votes cast a large number of affidavits of persons who represented in such affidavits that they were from various causes prevented from voting, and the large mass of which, in the end, turned out to be forgeries.

In this condition of things, Governor Warmoth, by his proclamation of the 20th Novem-

ber, 1872, called an extra session of the legislature, to be held on the 9th day of December thence following. The regular session, as provided by the constitution, would begin on the 6th day of January, A. D. 1873. On the night of the 5th day of December, just five days before the meeting of the legislature in extra session, as called to convene by this proclamation, E. H. Durell, a judge of the district court of the United States at New Orleans, passed an order directing Packard, the United States marshal, to take possession of the State-house, and to hold it subject to his further order, and meanwhile to prevent all unlawful assemblages therein. Packard, with a detachment of United States troops, seized the State-house, held it for weeks, and refused admission to any member of the legislature not returned by the board of returning officers headed by John Lynch, and which, in the course of these views, we shall designate as the Lynch board to distinguish it from the other boards. The consequence was that on the day of meeting, the 9th of December, no member not returned by the Lynch board was permitted to enter into the State-house. The members meeting there organized. The members, or rather the Democratic and Conservative portion of them, returned by the board of returning officers, which we shall designate by calling it the De Feriet board, met at the city hall and organized. Governor Warmoth at once recognized the latter body as the lawful legislature of Louisiana, and their place of meeting as the State-house.

Upon the organization of the body at the State-house, so called—it being the Mechanics' Institute hall, it being improvised into a State-house, there being no State-house for the purpose provided by the State since the removal of the capital to New Orleans—consisting of Republicans, it at once passed articles of impeachment against Warmoth, and, by virtue thereof, P. B. S. Pinchback, then lieutenant-governor, took upon himself the office of governor, and claimed to act as such. Kellogg, who was a Senator in Congress at the time he became a candidate for governor, resigned his seat in the Senate, by reason of which a vacancy took place in this body from that State. Each of these bodies thus organized elected a Senator to fill this vacancy. One, the McEnery body, as we shall designate it, elected Mr. McMillen, and the other, the Kellogg body, elected Mr. Ray for the unexpired term. Each presented their credentials regularly signed and attested, Mr. McMillen by Governor Warmoth, and Mr. Ray by Acting Governor Pinchback, each claiming to be the lawful governor of Louisiana. The extra session closed, and on the 6th day of January, 1873, the regular session began. Both bodies met at the same places and both organized. The one, Democratic, declared John McEnery duly elected, and the other, Republican, declared William P. Kellogg duly elected. Both qualified, and both proclaimed themselves to be the governor of Louisiana.

On Tuesday, the 15th day of January, the day fixed for electing a Senator for the long term, commencing on the 4th day of March, 1873, the one body, the Democratic, elected W. L. McMillen, and the other, the Republican, P. B. S. Pinchback. Both came here with credentials, those of McMillen signed by McEnery, and those of Pinchback signed by Kellogg, each representing himself to be governor, and in all other respects are in due form, and attested by the seal, or the pretended seal, of the State. The certificates of both were presented in March, 1873, and ultimately referred to the Committee on Privileges and Elections.

We have, therefore, presented to our consideration by the certificates before us the fact of two rival bodies and of two rival governors in the State of Louisiana—in fact, of two rival governments, each claiming to be the rightful government of Louisiana, each body claiming to be the lawful legislature of Louisiana and each sending rival Senators for a seat in this body, and each coming accredited with his certificate of election from the respective governors, each claiming to be the rightful governor of Louisiana. It is due alike to the people of Louisiana and to the dignity and constitution of this body that we use all the means in our power for a fair and just ascertainment of the rights of each to send a representative here. It must be acknowleged that as presented it is an exceedingly delicate question, and should be approached with all the spirit of fairness and candor of which the human judgment is capable. It is the first time in our history in which any such case has ever been presented to us, and it grows out of the unsettled condition of society in that State.

The question involves an inquiry into the fact as to which of two governors and of two bodies constitute the rightful governor and the rightful legislature of the State. And, indeed, further, in the progress of such an inquiry, whether there is any legislature at all qualified to elect a representative in this body to legislate not only upon matters affecting the affairs of Louisiana but of the whole country.

To our minds such a development of facts as we have, both historically and by the investigations and reports of both Houses of Congress made upon the subject-matter, that we should be confined to the inquiry only of ascertaining whether the certificate of the governor was surreptitious, or whether the person certifying was, in truth, the governor he represents himself to be, and not permitted to inquire whether the governor and the body electing (of which he is certifying) are both surreptitious, is beyond our compre-

hension, and where, especially as in this case, the examination of one is the examination of both, one is incidental to the other, and the facts upon which either claim their right of action are interwoven with the facts that apply to both—the one an examination of the certificate of what was done, and the other of the fact of what was done.

With these views we beg leave to examine the whole case, and to submit the conclusions to which we have arrived.

In the first place, however, we propose to confine ourselves to the consideration of the case as presented by the committee upon the certificate alone of Kellogg. It will be observed that the report of the committee puts the question in definite terms. It declares Kellogg "then and now the governor of Louisiana." It asserts what is denied, and presents as the sole question to be determined whether Kellogg was the governor of Louisiana at the time he signed this certificate; and this being so, we are then estopped from going behind it in the first instance by the usage of the Senate.

Thus confined in this stage of our inquiry to this single question, it becomes important for us to know all the facts and circumstances upon which Kellogg must rely in order to constitute him the rightful governor of Louisiana, and to this point we shall now direct our attention.

When we speak of the governor of Louisiana of course we must mean only that he is the governor according to the constitution and laws of that State. By the forty-eighth article, title 3, of the constitution of Louisiana it is provided that the supreme executive power shall be vested in a governor, who is to hold his office for four years, to be elected by the people. The person having the greatest number of votes shall be declared duly elected. In case of a tie between two or more candidates one of them shall be immediately chosen governor by the joint vote of the members of the general assembly.

No one, therefore, can be the constitutional governor of that State unless he be chosen in the manner prescribed.

We should, however, always be careful when the question, so grave in its nature, is raised, as in this case, to consider all the direct as well as the indirect facts and circumstances proving or tending to prove the real issue.

And here it is important to remember, in order to avoid misconception, that in determining this question in this or any similar case we are confined solely to powers conferred upon this body to judge of the elections, returns, and qualifications of its own members. Within this scope we possess all power, and our judgment is binding upon all, and cannot be brought into question by any person or tribunal whatever. But beyond this we cannot go; our acts can only have reference to one thing—whether the person chosen is entitled to be a member. Our decision is only binding when applied to this one particular fact. Our decision may be right or it may be wrong—that is for us to bear; but it does not bind other persons or other departments of the Federal or State governments, having other and different relations with the governor or legislature, or both, from contesting or confirming the rights of either or both to legal existence. Our decision here may be cited to show what we did, but it can be used only as an illustration of what others thought and did, and not as binding upon them except, as we have before stated, upon the fact of Senatorship, in which our jurisdiction is complete and final and binding upon all. The decision of this body upon this question, be it what it may, does not establish or disestablish the Kellogg government, so as to affect or conclude the rights of others not involved in the election of Senator itself. The people of Louisiana may consider themselves outraged by our action in receiving a Senator not elected by what they may hold to be the rightful legislature; nevertheless they are bound by it, because we have the right to judge and determine; but will any one pretend to say that the separate action of this body upon this single question, committed exclusively to its jurisdiction, should bind and conclude any other person and any other department, either State or Federal, in their own separate and distinct relations with this legislature, or as to any rights they may have as against or instead of it? Surely not! Therefore our decision does not vest a single right or confer a single power upon any other human being save the person upon which we have passed and admitted to membership upon this floor.

But to recur to the question. If, in the course of the investigation, from all the facts drawn from all the sources to which we have referred, we conclude that the pretended governor is a mere usurper, then his acts are void and avail nothing. Persons hold office or place under three different tenures—first, *de jure;* second, *de facto;* and, third, as a usurper—the only three modes, we believe, known to the law; and by one or the other of these tenures does the person exercise the office or place that he holds.

The first is clothed with all the powers that right, combined with possession, can give. The second is only clothed with the powers possession can give, that possession being obtained under a color of right; and these powers are limited to certain well-defined acts. The third refers to a person undertaking to hold office without any color of right; he is a mere usurper, whose acts are void.

The distinguishing differences between officers *de jure* and *de facto* and a mere usurper are well laid down in the books in the earlier days, and the same are observed to this

day. In a leading case, decided so far back as 1738, the general principles relating to officers *de jure* and *de facto* were well defined. In this case one Goldwire, "under pretense and color of being elected mayor of Christ Church, in the county of Southampton," was presented unto William Willis, steward of the court leet, and was there sworn into the office of mayor, and, in fact, exercised the office till —— day of ——, 1736, and that being in the exercise of said office, and under "pretense of being elected, and sworn into the same, he issued a summons to the several burgesses of the corporation to meet," &c., and at such meeting he nominated the defendant Lisle as one of the burgesses, and the question was whether, when he made such nomination, he was mayor *de facto*, for it was found that he had never been elected, and, if mayor *de facto*, whether he had the power to make the appointment. It was held by the court that Goldwire was not so much as a mayor *de facto;* for in order to constitute a mayor *de facto* it is necessary that there be some form or color of an election: but without this, the taking the title and regalia of the office, and the acting and being sworn in as mayor are not sufficient. Now, here it appears that Goldwire was never elected in fact; and though it be stated that he was sworn at the leet, it does not appear (as it ought) that this was agreeable to the constitution of the borough. And it is not material that he acted as mayor, as it is found that a *quo warranto* was recently prosecuted against him, pending which the present election was made, and that he was thereupon adjudged to be a usurper." (Andrews's Reports, Henry *vs.* Lisle, 173.) The distinctions then made are continued to this day, and are as clearly defined:

"An officer *de facto* is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right, and on the other from an officer *de jure,* who is in all respects legally appointed and qualified to exercise the office. These distinctions are very obvious, and have always been recognized."—(17 Connecticut, Plymouth *vs.* Painter, 588; 7 Johnson, People *vs.* Collins, 549; 2 Kent.)

It is claimed by some that though it be a question whether Kellogg be a governor *de jure*, yet he is a governor *de facto*, and as such his certificate of the election of Pinchback is to be recognized as equally binding upon us as if he were governor *de jure*.

Holding, as we do, that he is neither the governor *de jure* nor *de facto*, but a mere usurper, and a usurper not keeping himself in position by his own unaided local power, but by the aid of armed forces of a foreign power—in its true relations to this case as much a foreign power as that of Great Britain could be—we desire, briefly, to examine this phase of the subject.

Keeping in view the rulings we have cited, is Kellogg so much as a governor *de facto?* In disposing of this we dispose of his character as governor *de jure*.

As we have already noticed, the constitution of Louisiana provides that the governor shall be elected by the people. To be such *de facto*, he must be in by color of an election. If he has no color of an election, he is nothing but a usurper, "who is one undertaking to act without a color of right." Two propositions are to be here considered, in order to arrive at correct conclusions—

1. Was Kellogg elected by a majority of the votes of the people at the election held on the 4th day of November, 1872?

2. If he was not, then had he such a color of an election as to constitute him governor *de facto?*

This brings us to the wider domain of fact which at every step has marked this controversy from its inception in 1872 to the present period. In the direct examination of the matter, all the facts that may tend to a correct result should be considered. We have a great variety of facts and circumstances, some historical in their character, some which we are obliged to know or are assumed to know from our constitutional relations to the State, her people, her government, her officials, whether judicial, ministerial, executive, or political, and those which we have gathered ourselves through committees of this body in the investigation had by resolution of this body passed on 16th January, 1873, and which is as follows: "*Resolved*, That the Committee on Privileges and Elections be instructed to inquire and report to the Senate whether there is any existing State government in Louisiana, and how and by whom it is constituted;" and to which committee were also referred the certificates of John Ray and W. L. McMillen, both claiming the seat in this body supposed to have been made vacant by the resignation of William Pitt Kellogg.

This committee, composed of Messrs. Morton, Carpenter, Logan, Anthony, Trumbull, Alcorn, and Hill, made a diligent and laborious investigation of all the matters connected with both questions, and made an elaborate report to the Senate, accompanied by a large amount of testimony. It is Senate report No. 457, Forty-second Congress, third session. From all the evidence, then, and which covers and exhausts the whole subject, was Kellogg in fact elected by the people of Louisiana the governor of that State? The testimony shows that the election was held on the 4th day of November, 1872, and that

it was held under the election laws of that State, approved March 16, 1870, and that official returns were made of that election to the governor of the State by the supervisors of registration as required by the fifty-third section of that act.

The fifty-fourth section of the same act provides for a returning board, before whom all returns are to be laid by the governor, the governor being one of the board by virtue of his office, and this board is to canvass and compile these returns of elections and make returns of the persons elected to the secretary of state. Henry C. Warmoth was then governor of the State of Louisiana, having been elected in 1868, and who, by article 53, title 3 of the constitution, was to hold his office till the second Monday of January thence following the election held on the 4th day of November, 1872, and until the Monday next succeeding the day that his successor shall have been declared as duly elected, and shall have taken the oath of office as required by the constitution. It is not our purpose just now to refer to the difficulties occurring in the organization of the board of returning officers; upon another branch of the subject we shall revert to it; but it is sufficient for our present purpose to ascertain that the election was held and the official returns were made of that election, and that they were counted and the result ascertained.

The official returns were made to the governor by the supervisors, and were by him laid before a board of returning officers, claiming to be legally constituted for this election. It may be necessary here to state that by the election law of 1870 the governor, lieutenant-governor, the secretary of state, one John Lynch, and T. C. Anderson, or a majority of them, were made the returning officers for all elections in the State.

The governor had in his possession the official returns of the election, but by reason of the changes in the board through disqualifications and from other causes, and through which two boards were organized, each claiming to be the legal one, and both appealing to the courts of the State to settle their respective rights, he did not lay the official returns before either board; but, in view of the condition of things, and to get rid of the difficulties of the situation, and to get rid of both boards, he approved the law passed at the preceding session of the legislature providing the mode of conducting elections, and which repealed entirely and absolutely the election law of 1870. He approved this act November 20, 1872, and it provided specially for the selection of a board of returning officers, to be made by the senate. This at once put out of official existence the contending members of the rival boards. The senate not being in session, Warmoth then, by virtue of the power claimed by him under the constitution to fill vacancies, appointed De Feriet, Wiltz, Isabelle, Austin, and Taylor, who took the oath of office, and before whom, on the 4th day of December, 1872, he laid the official returns, and they proceeded to canvass and compile them for senators and members of the house of representatives, and declared the results, and which were then officially promulgated by Governor Warmoth. This return gave the results in both branches of the legislature as we have already stated them. On the 20th day of November, 1872, the day on which he signed the act abolishing the old board, he issued his proclamation calling an extra session of the legislature, to convene on the 9th of December.

The majority of the members of both branches of the legislature declared to be elected by this returning board met on the 9th December at the city hall in New Orleans, and organized both houses. They were recognized by Governor Warmoth as the legal legislature of Louisiana. After organization, the senate proceeded to elect five persons, taken from all political parties, to constitute the board of returning officers for elections, as required by section 2 of the act of November 20, 1872, and accordingly elected Mitchel, Forman, Thomas, Hunsaker, and Todd as such returning officers. The official returns were laid before this board by the secretary of the De Feriet board, which had just before completed a canvass of them for members of the legislature, as we have stated, and they were all again canvassed by this new board, and with the following result:

McEnery	66,767
Kellogg	54,479
Majority for McEnery	11,288

The witness, Mr. Forman, a member of this board, brought with him the official returns and had them before the committee of the Senate, then investigating the case, and in all his testimony gave a satisfactory account of the manner in which the canvass was made. His evidence will be found, together with the official vote for governor, in the report made by Mr. Carpenter, and accompanying testimony on pages 75 to 83, inclusive. There was no pretense that these were not the official returns; they were before the committee. There was no effort made to invalidate them in any way. Every opportunity was given. The same section of the law requiring the supervisor of registration to send the voting list and returns to the governor also required him to make triplicates and retain one. No effort was made by the production of any duplicates to

impair their correctness. It must be conceded that they were the official results, and that according to them McEnery was elected. There can be no other conclusion. It must be conceded, too, that Kellogg was not elected. Whatever right to the position as governor Kellogg may have, he certainly has none by the regular official returns of the votes of the people, as cast and returned under the constitution and laws of Louisiana.

Then, having no right whatever by virtue of the election itself, has he any right by color of an election? And this brings us to the second proposition. We can well conceive that this right by color of an election is somewhat indefinite in meaning and subject to many deductions in inferences from a given statement of facts, as in this case. Some may ascribe a more rigid construction as to what may be meant by a colorable right to a place than others. But this must be determined upon all the facts and circumstances as they are presented, and we must gather from them whether there is in good faith any colorable right to hold the place; otherwise it is a fraud and a usurpation. There must be some reasonable meaning attached to the words "colorable right," or "under color of an election." Why use them in order to create an officer *de facto*, and to distinguish him from a usurper, unless they do mean something or have some force?

We hold that, giving the weakest possible force to these words, there is nothing in this whole case that can give a pretense to the color of an election. It has been shown that Kellogg was not elected. Then what is there to impress him with the color of an election? Nothing whatever. A more bold, shameless, reckless usurpation is not found in history.

He stands upon one thing, and upon one thing alone, and that is the declaration that if the people had voted and voted their sentiments he would have been elected If this can give a color to a right, and dignify him with official power, even for the most limited purposes, then he is endowed with it. He pretends to hold his election by virtue of a canvass under a board claiming to be returning officers—consisting of Lynch and Herron for a time, then Bovee, Longstreet, and Hawkins—in which they gave some 17,000 majority to Kellogg.

The objections to this canvass are, first, that these gentlemen had not a tittle of authority to canvass, the law under which they pretended to act being absolutely repealed, and therefore they possessed no power whatever to do so.

And next, that there was not an official return before them to canvass; but it is admitted by Lynch in his testimony taken by the committee, found on page 155, that there were no returns before them, and that they obtained their information as to the results of the election from all kinds of sources, and from one particularly, the known political divisions of the voters of a county.

Comment upon such a canvass is unnecessary. The machinery of elections by means of which public sentiment is definitely ascertained, and our governments, both Federal and State, are carried on, is an essential element in the American system. There is no substitute for it, and without it there is no order, government, or law. It must be established for the public good, and it must be supported when established for the public safety. The collected will of the people is only known through it. The voter that does not resort to it for the expression of his will from any cause cannot be heard above it or outside of it. True, an election may be set aside for fraud, intimidation, or other pregnant cause, but still the collected will of the people must be expressed through its machinery. A citizen not voting is as dead in law as if he were in fact dead so far as concerns the affirmative expression of his political will. The question is not what the voter may have done had he voted or offered to vote, but what did he do by his vote?

But to characterize properly the power of this board to make this canvass, and the supreme folly of the canvass itself, it will only be necessary to refer to the report from the Committee on Privileges and Elections, signed by Messrs. Carpenter, Logan, Anthony, and Alcorn, and to which we have already referred. The following extracts are to be found on pages 26, 27, and 28:

"One of two things is certain, the governor's approval of the new election law on the 20th of November gave it effect on that day or it did not.

"Assuming that the approval on that day was regular, the new law absolutely repealed all the laws under which the Warmoth board and the Lynch board were pretending to act, and of course abolished both boards without regard to the question which was the legal one. All that had been done in the election of November, 1872, in pursuance of the old laws, that is, the registration, voting, and returns, was as valid after the act of November 20 as before. If the canvass had been made by the proper board under the old law, and in all things completed, the rights of parties based upon that canvass would not have been affected by the repeal of the laws. But the act of November 20 taking effect after the returns were made and before they were canvassed, transferred the duty of canvassing to the new board created by the act."

Again:

"On the 6th of December, 1872, the Lynch board—Bovee (who was then acting as

secretary of state in place of Herron), Lynch, Longstreet, and Hawkins—pretended to have canvassed the returns of the election, and certified to the secretary of state that Kellogg had been elected governor; Antoine, lieutenant-governor; Clinton, auditor; Field, attorney-general; Brown, superintendent of education; and Deslondes, secretary of state; and also certified to a list of persons whom they had determined to be elected to the legislature.

"There is nothing in all the comedy of blunders and frauds under consideration more indefensible than the pretended canvass of this board. The following are some of the objections to the validity of their proceedings:

"1. The board had been abolished by the act of November 20.

"2. The board was under valid and existing injunctions restraining it from acting at all, and an injunction in the Armstead case restraining it from making any canvass not based upon the official returns of the election.

"3. Conceding the board was in existence, and had full authority to canvass the returns, it had no returns to canvass.

"The returns from the parishes had been made under the law of 1870 to the governor, and not one of them was before the Lynch board.

"It was testified before your committee by Mr. Bovee himself, who participated in this canvass by the Lynch board, that they were determined to have a Republican legislature, and made their canvass to that end. The testimony abundantly establishes the fraudulent character of their canvass. In some cases they had what were supposed to be copies of the original returns, in other cases they had nothing but newspaper statements, and in other cases where they had nothing whatever to act upon they made an estimate based upon their knowledge of the political complexion of the parish of what the vote ought to have been. They also counted a large number of affidavits purporting to be sworn to by voters who had been wrongfully denied registration or the right to vote, many of which affidavits they must have known to be forgeries. It was testified by one witness that he forged over a thousand affidavits and delivered them to the Lynch board while it was in session. It is quite unnecessary to waste time in considering this part of the case, for no person can examine the testimony ever so cursorily without seeing that this pretended canvass had no semblance of integrity."

It may be well enough to observe here that besides the distinguished gentlemen who united in this report, Judge Trumbull and Mr. Hill, who were members of the committee, in this respect concurred with the report, whilst differing upon some other things, and in conclusions upon the whole case. The ability of all these gentlemen in the performance of the grave duty assigned to them is unquestioned; their labor and attention about it known and appreciated; and their party affiliations must stamp their detail of facts with freedom from all political bias in favor of McEnery and his government. Can anything more be added to show that there is not a pretense by which Kellogg can manufacture a colorable title to an election in fact?

It must be remembered that we are not in this controversy obliged to show that Mr. McEnery was elected in fact. Our purposes are answered when we show that Kellogg is not elected, or that he has no colorable title to an election.

In simple justice to the gentlemen of the committee making the report to which I have referred, whilst thus admitting that Kellogg was not elected, they come to the conclusion that, from irregularities, intimidations, and frauds, and other causes, no fair election had been held, and that it should be annulled and a new one ordered by Congress, and to be conducted under the auspices of the General Government. In order that there may be no misconception, we give the following extract from their report, which will be found on pages 44 and 45:

"The testimony shows that leading and sagacious politicians of the State, who were acting with Warmoth, entertained the opinion before the election that Warmoth's control of the election machinery was equivalent to 20,000 votes; and we are satisfied by the testimony that this opinion was well founded. We believe that, had registration been accessible to all, and the polling places been properly established, the result of the election would have been entirely different. And although we cannot approve of such a canvass as that made by the Lynch board, who seem to have acted upon the principle of 'fighting the devil with fire,' and circumventing fraud by fraud, and cannot say that Kellogg's government was elected, nevertheless we believe that Kellogg's government was defeated and the popular voice reversed by the fraudulent manipulation of the election.

"If the Senate should be inclined not to go behind the official returns of the election, then the McEnery government and legislature must be recognized as the lawful government of the State; and McMillen, if regularly elected by that legislature, should be seated in the Senate in place of Kellogg. But your committee believe that this would be recognizing a government based upon fraud, in defiance of the wishes and intention of the voters of that State."

In all this it will be observed that, whilst they condemn the manner of the election of McEnery, they take care to affirm again that Kellogg was not elected.

Then, so far as Kellogg is concerned, there is nothing to show that he had the slightest right, either by an election or the color of an election, to hold this office. He must therefore be regarded as a usurper; for in no other character could he hold the place, if not in that of governor *de jure* or *de facto*.

The principles are well and plainly defined in the case of Plymouth *vs.* Painter, 17 Conn., already quoted, in respect to the acts of persons holding place under one or the other of these modes. The following is from page 593:

"The acts of a mere usurper of an office, without any color of title, are undoubtedly wholly void, both as to individuals and the public. But where there is a color of a lawful title, the doings of an officer, as it respects third persons and the public, must be respected until he is ousted on a *quo warranto*, which is the appropriate proceeding to try the validity of a title to an office, and in which it would be necessary for him to show a complete title in all respects; although in a suit against a person for acts which he would have an authority to do only as an officer, he must, in order to make out a justification, show that he is an officer *de jure;* because the title to the office being directly drawn in question, in a suit to which he is a party, may be regularly decided. So where he sues for fees, or sets up a title to property by virtue of his office, he must show himself to be an officer *de jure*."

It is here laid down—

First, that the acts of a usurper are void.

Secondly, that the acts of an officer in by a color of title—that is, an officer *de facto*, where the rights of third persons or the public are concerned—are to be respected.

Thirdly, that where he is directly concerned he must show himself to be an officer *de jure* whenever the direct issue is made, either as to title, or fees, or as a trespasser, or otherwise.

If Kellogg, then, be a usurper, the certificate relied upon in this case has no value for any purpose. But let us assume, for the sake of the argument, that Kellogg was governor *de facto;* that he was in by color of an election, and by color of an election only, and not by an election itself; with such knowledge upon our part, with the known fact, besides, that his right to the place is denied and contested, that there is a rival governor, in fact a rival government, we should proceed with great caution in giving such efficacy to his simple certificate. True, the third section of the act of Congress of 1866, making provision for the election of Senators, makes it the duty of the governor to certify the election to the President of the Senate; it still stops short of prescribing the force of such a certificate. No doubt Congress intended that ordinarily it should be regarded as sufficient for admission to a seat, but it must be manifest that this certificate is not the real credentials of a Senator-elect, but intended originally, we may presume, as a substitute for it. The real credentials of the election is a copy of the record of the election itself, properly certified by the officers of the body electing; for Congress has no right to impose this duty upon the governor, and that neither it nor the person elected can compel the governor to issue any such certificate.

There must be design in not presenting a certified copy of the record of election by the legislature instead of depending alone upon this certificate of the governor, when it was well known that every step in the progress of this case would be contested. The declaration in the report submitted by the committee, that Kellogg was then and now the governor of Louisiana, defines the spirit of the whole proceeding; and that is that it is more of an object to get Kellogg recognized in some way as governor by this body than the admission of Pinchback to a seat in it.

Therefore should we be more careful still how we undertake, in giving ostensible credence alone to a certificate, to pass upon a higher matter—the legal character of the person giving it. Why not, in such an acknowledged condition of things, recur to his credentials, which the record of the election or a copy of it can make? But, that produced, it is too apparent that the contest would be transferred from the governor to the legislature; the legislature is out of being, and therefore the fact of an election by it can only be inquired into; but the governor is still living in the place in which he was put, and still kept by an armed force, and to be kept there if his acts are to be respected or sanctioned by us. How shall we close our eyes to the facts staring us in the face? We again beg leave to repeat that with the assumption that Kellogg is at best but a governor *de facto*, with a rival governor claiming the right, and with the acknowledged power to exercise it in the absence of the troops of the United States, should we not be careful, if we can in any way abstain from determining questions of the present, which concern alone the present, and which should be determined in a different way and by all branches of the Government, if to be determined at all by it. The election of Pinchback does not concern the present; the body electing him is *functus officio*. He must stand or fall by the action of that body. Let us go back to that, and upon the acts and legal validity of

that body determine the right to a seat. We say again that the passage of the resolution decides only one thing, the right of membership, and binds no one to anything besides; but the fact that in doing this we have acknowledged the legal validity of Kellogg's official character may influence others or justify others in doing things to the infinite injustice of the people of Louisiana, and to the persons there claiming to be officers by virtue of a rightful election.

Again, we well understand the principles which limit and qualify the powers of an officer *de facto*. His acts are scanned and judged; he can do only those that are to be considered as necessary to be done; indeed, so confined in this respect that it was held, in the case of King *vs.* Lisle, that the proper question in a case would be "whether the person be an officer *de facto* as to the particular purpose under consideration;" he can do nothing for himself; he cannot set up title by virtue of his office; he cannot sue for his fees or salary; he cannot justify in a trespass; he can do nothing that may bring in issue his right to hold the office without showing that *de jure* right for the exercise of it. As a judge *de facto* his judgment in a litigation between third parties would be good; a sale of property under such a judgment would be good to pass title; and for the reason that third parties are not supposed to be able to inquire into the rights of one holding and exercising the duties of the office, and must therefore act upon what appears to be the right. But a sheriff *de facto* seizing and selling the property under that or any other judgment in a suit against him for the seizure by the owner or possessor of the property, he must for his defense show that he held his office *de jure*, for this concerns himself only, and he should know whether he was in right an officer.

Shorn of the general and enlarged powers of an officer *de jure* by the plainest principles of law, limited and circumscribed by rules founded in reason and having the sanction of ages, shall we be disposed to give to the act of such an officer—governor *de facto*, if even he be such—that full and unqualified effect in this case, with the extraordinary circumstances surrounding it, as if he were an officer *de jure*, when that act, too, bears directly upon the constitution of this body, which we are bound to guard, and upon the right of a State to have its true representatives upon this floor? In regard to the constitution of this body the direct issue is made; this pretended governor represents himself to be the governor of Louisiana, and upon this alone does the committee rest the case. It is admitted that he must be the governor to give the certificate any power whatever. In raising the question it is shown that he is only governor *de facto*, if governor at all, and not *de jure*, that is, governor for a purpose only, and that purpose to be judged of, whether proper or not, when the exigency arises. It is upon us, and it is whether we shall constitute members of this body upon the certificates of such a governor, or shall we not rather recur, as we have before inquired, into the election itself or the record of it.

Upon this body rests the duty of preserving its own organization, and of admitting its own members. Here its power is supreme, and for its independence it must depend upon this power, and its proper and legal and rational exercise; and it is to judge of the fact whether a certificate (not of a governor, as contemplated by the law, a rightful governor in all respects—but of such a governor) shall have the efficacy now asked for it.

Indeed, in this very case, in the complications in Louisiana, the troubles and disorders there, the very soul of the objection that we now urge against the recognition of this certificate is made to appear. There is trouble about the State government in that State. There is trouble as to who is the constitutionally elected governor, both claiming it, and as to which body of the two claiming to be the legislature is the real one. In this contest, where so much right is involved, and where right should be done, might it not be that, if we should admit Pinchback upon the certificate of Kellogg, we would to that extent recognize him as the rightful governor of Louisiana, and possibly direct additional power against the other side. Would this be wise, and just, and expedient; and when we know, too, that so far as the certificate in itself is concerned it adds nothing to title, but that the election constitutes this? If it is the policy to settle these disturbances in Louisiana, to recognize either governor or none, do it in the usual manner known to the laws, and that is by legislation upon the part of Congress, when the whole subject can be considered, and the remedy, if any, be applied.

Having come to the conclusion that Kellogg was a mere usurper and the certificate not entitled to respect, or if it should be considered by some that he was the governor *de facto*, that even in this view no force ought to be given to his certificate, we are brought to the consideration of the main fact itself, the election of Pinchback by a legislature. While this is not technically before us, it is substantially. While the report of the committee bases its action entirely upon the force of the certificate, the resolution submits the question of admission generally. It cannot be denied that the inquiry upon one branch opens up the whole subject, and one cannot be well considered without considering both.

This brings us to the examination of the body organized under the returns made by the Lynch board, to which we have referred in the other branch of the case. In looking

into the organization that elected Pinchback, the surreptitious inauguration of Kellogg into the gubernatorial office pales into insignificance before the fraudulent creation of this body into a legislature and of its shameless pretension to power.

Even admit that Kellogg was the rightful governor of Louisiana, and that his certificate should have all the force which could properly under ordinary circumstances attach to it, still all the facts are before us, and they are of the gravest character. The question is not who are members of the legislature of Louisiana—for that body is the judge of this, and of their elections and qualifications; with these we have nothing to do; but the question is as to the legislature as organized, whether there is one in being to elect, and whether such an one elected Pinchback. The existence of a legislature competent to elect a Senator is not only a historical fact to be known to us as any other patent fact, but it is one which is susceptible of proof.

It will be necessary again to give a brief résumé of the facts known to exist in Louisiana respecting the organization of the body claiming to be the legislature of that State, and which elected Pinchback.

It will be remembered that the election occurred on the 4th day of November, 1872, and it was held under the election law passed in 1870. The law provided for a board of returning officers, before whom all the returns of the State were to be laid by the governor, to be canvassed and compiled; and further provided that the governor, Warmoth; the lieutenant-governor, Pinchback; secretary of state, Herron, and John Lynch, and T. C. Anderson comprise this board. It met on the 13th and 14th November. Pinchback and Anderson, being candidates for office, were disqualified. The governor, Warmoth, removed Herron and appointed Wharton in his stead as secretary of state, by virtue of which he claimed to be a member of the board. Differences arose in supplying the vacancies occasioned by the disqualification of Pinchback and Anderson. The result was two sets of returning officers, each claiming to be the rightful, legal board; one headed by Warmoth as governor, consisting of himself as governor, Wharton as secretary of state, Hatch and Da Ponte, the latter being chosen to fill the vacancies. The other board, headed by Lynch, consisting of himself, Herron, who still claimed to be secretary of state, Longstreet, and Hawkins, the latter being chosen to fill the vacancies. Both boards applied to the courts of the State, and in the midst of the litigation as to which was the legal board, the governor, Warmoth, on the 20th day of November, A. D. 1872, approved an act which had been passed at the previous session of the legislature, repealing entirely the act passed March 16, 1870, for conducting elections, and under which this election had been conducted up to this time. This act abolished the returning board established by the act of 1870, and made provision for another one to be elected by the senate. This disposed of both boards. No election returns had been laid before either. There being no returning board in legal existence to canvass the returns, and there being no session of the senate, so that a board could be elected as provided by the law, to consist of five persons, the governor claimed his right to make the appointments under the power to fill vacancies as provided by this article of the constitution of Louisiana (article 61, title 3): "The governor shall have power to fill vacancies that may happen during the recess of the senate by granting commissions which shall expire at the end of the next sessien thereof unless otherwise provided for in this constitution," &c. On the 3d day of December he appointed De Feriet, Wiltz, Isabelle, Austin, and Taylor. On the day following he submitted the official returns to them, and they canvassed and compiled them, and with the results we have before given, showing a large majority of Democrats and Conservatives in both branches of the legislature. Upon the same day he made official proclamation of the results ascertained by this board, as follows:

Proclamation.

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
New Orleans, December 4, 1872.

Whereas P. S. Wiltz, Gabriel De Feriet, Thomas Isabelle, J. A. Taylor, and J. E. Austin, returning officers appointed by the governor to fill vacancies existing, in accordance with the constitution and laws of the State of Louisiana, have made declaration of the result of an election held November 4, 1872, and have declared certain persons elected to the senate and house of representatives of the State of Louisiana, as will appear from the returns herewith attached and made a part of this proclamation; and

Whereas such returns are compiled from the official returns of commissioners of election and supervisors of registration, on file in this office, and are in fact and in form accurate and correct, and made in accordance with law:

Now, therefore, I, Henry Clay Warmoth, governor of the State of Louisiana, do issue this my proclamation, making known the result of said election aforesaid, and command all officers and persons within the State of Louisiana to take notice of and respect the same.

Given under my hand and the seal of the State this 4th of December, A. D. 1872, and of the Independence of the United States the ninety-seventh.

H. C. WARMOTH.

By the governor:

Y. A. WOODWARD,
Assistant Secretary of State.

At the same time the Lynch board, continuing its organization notwithstanding the repeal of the act under which they pretended to canvass, and from the data to which we have already referred, declared who were elected members of the legislature, a large majority of whom were Republicans.

Governor Warmoth, when he approved the bill on the 20th November repealing the election law of 1870, at the same time called an extra session of the legislature to convene on the 9th day of December, A. D. 1872, the regular session being that to begin in January, 1873.

Warmoth was the regularly constituted governor of Louisiana. The only board of returning officers in existence having the semblance of law to sustain a legal character was the De Feriet board, appointed by him. This board, and only this board, had canvassed the official, regular returns of the election, and announced the result, and gave certificates of election. It was well known that the governor, wielding the whole executive authority of Louisiana, would recognize the members as returned elected by the De Feriet board to be rightfully entitled to organize the legislature; that the members would meet on the 9th of December, as was directed by his proclamation, and organize the legislature; and that it would be recognized as the legislature of that State, as it would be in right and in fact the legislature. It was well known that that organization would run into the regular session, and that, continuing the legislature of this State, the returns as examined by the De Feriet board would be submitted to it, and that McEnery would have been declared elected, and would have peaceably entered into the exercise of the office of governor, which would, of course, have closed the career of Kellogg, Pinchback, and their associates for the present in this respect.

All this was well apprehended by Kellogg and his associates. The State courts had failed them, and the determination was to resort to another and a stronger tribunal. Kellogg, Pinchback, and Packard determined to enlist the courts of the United States in their behalf. So early as the 16th of November William Pitt Kellogg filed his bill in the circuit court of the United States for the district of Louisiana against Governor Warmoth and others, ostensibly for the purpose of preserving or perpetuating the evidence of the official returns of the election, then in the hands of Warmoth, or under his control, and praying, among other things, for an injunction. On the day following, the injunction was issued as prayed by the bill.

On the 20th November the defendants answered the bill, and the case rested until the 5th of December.

On the 4th of December Governor Warmoth issued the proclamation before cited, whereupon the judge, E. H. Durell, without any application or motion whatever made in the cause, issued the following order:

"Circuit court of the United States, fifth circuit and district of Louisiana, in equity.

"WILLIAM P. KELLOGG *vs.* H. C. WARMOTH ET AL. } No. 6830.

"Whereas Henry C. Warmoth, one of the respondents herein, has, in violation of the restraining order herein, issued the following proclamation and returns of certain persons claiming to be a board of returning officers, all in violation and contempt of said restraining order, as follows, viz, &c., &c.:

"Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and, further, to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana shall forthwith take possession of the building known as the Mechanics' Institute, and occupied as the State-house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court, and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers in contempt and violation of said restraining order; but the marshal is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

"E. H. DURELL."

This was done on the night of the 5th of December, and at 2 o'clock on the morning of the 6th of December Marshal Packard, with a detachment of United States soldiers, seized the State-house and held it for weeks.

Under that order this pretended legislature was organized, and the members only who were returned by the Lynch board were permitted to enter the hall or participate in the organization. This organization continued to be protected by the military power of the United States through the extra session into the regular, which began its session on the 6th day of January, and all the time under the protection of the military authority of the United States, and, indeed, which protection has continued to this day. It will be proper to observe that Kellogg commenced his proceedings in the United States courts on the 16th of November. A few days thereafter, on the 27th of November, Kellogg writes to Attorney-General Williams the following:

"I therefore respectfully suggest that General Emory, who I think appreciates the necessity and sympathizes with the Republican party here, be instructed to comply with any requisition that the United States courts may make upon him in support of its mandates and to preserve peace. As at present advised, I think General Emory understands that he is to use the troops in no contingency without instructions from Washington."

On December 3 the following order was received from Washington:

DEPARTMENT OF JUSTICE, *December* 3, 1872.

S. B. PACKARD, Esq.,
United States Marshal, New Orleans, La.:

You are to enforce the decrees and mandates of the United States courts, no matter by whom resisted, and General Emory will furnish you with all necessary troops for that purpose.

GEO. H. WILLIAMS,
Attorney-General.

On the night of the 5th of December the mandate of Judge Durell was made, and on the morning of the 6th the military, in pursuance of the order of Attorney-General Williams, seized the State-house, and the plot to seize the State government of Louisiana was consummated.

The simple detail of these facts ought to be sufficient in themselves to characterize the whole transaction without any illustration upon our part. There was not a step taken in the whole proceeding that is to be justified; there is no single act to be supported by any resort to reason, law, or justice. The reckless assumption of Judge Durell to interpose in matters wholly belonging to the State authorities, and in terms prohibited from doing what he did by the very law of Congress under which he pretended to derive authority to act, is beyond all precedent, and one cannot adequately characterize it in language to be used here. The atrocity of his action in directing the marshal of the United States to seize the State-house, where the legislature of the State was to convene, and further directing him to allow certain of its members only to enter it, has but few parallels anywhere, and none before in American history. The whole proceeding from its inception down to its final consummation was a gross usurpation accompanied with every species of fraud and tyranny. The body that was organized under this mandate and its military enforcement is not entitled to any legal existence that any American should acknowledge. The whole is a product of fraud, conspiracy, and of armed force, and is entitled to no consideration.

We wish it to be remembered that we are not inquiring into the component parts of a legislative body. Each house of the legislature must do that for itself. We are inquiring into the aggregate character of the body as organized and as it represents itself to be—a legislature; how it was brought into being; how supported; and under what authority. We find no single element in it to constitute it a legislature representing the free people of Louisiana under their constitution and laws; but, on the contrary, simply a body organized under the mandate of a Federal judge supported by the armed force of the United States, based upon a pretended election found by a returning board without a single official return, and not having a tittle of authority, and acting in violation and in defiance of all law. We find that body, pretending to be the legislature of Louisiana, the mere creature of a conspiracy as bold, as reckless, and as wicked as any that has ever disgraced the annals of history. We speak thus strongly because our instincts as American citizens prompt us to the reprobation it so signally deserves. This body thus organized chose P. B. S. Pinchback a Senator in Congress for the period he claims.

The large mass of the members of it were never elected in fact; the returning board declaring them to be elected had not a single power to do so; it never had an official return before it. Judge Durell had no power to issue his mandate and the troops had no

right to enforce it. In the whole tragedy of events, as each succeeded the other, there was not one single act that could for a moment give a color of right to any other. Every one was an undoubted wrong, crime, or usurpation, and yet all combined, and nothing else, organized this body and kept it in being. Can such a body, we ask, so organized, put upon the Senate and upon the people of Louisiana their creature, and he one of the main conspirators? Kellogg, Pinchback, Casey, Packard, Durell, and Williams—names indelibly written upon every page of this most unnatural history of political crime and folly! There is not a single act in the whole proceeding to mitigate the unqualified condemnation it must receive at the hands of every honest man and of every sincere lover of American liberty and of constitutional government.

We have stated that the Lynch board, pretending to canvass the returns, had no legal existence; that no official returns were before it to canvass; that the order of Judge Durell was not only void for want of jurisdiction, but that it was a gross usurpation. To sustain all this it is not necessary to depend upon our own declarations; but we recur, and with pleasure, to the able report so often referred to. In addition to what we have already quoted upon this subject, we give the following. In speaking of this order of Judge Durell, and in connection with it of the De Feriet board, the committee say on page 17:

"It is impossible to conceive of a more irregular, illegal, and in every way inexcusable act on the part of a judge. Conceding the power of the court to make such an order, the judge out of court had no more authority to make it than had the marshal. It has not even the form of judicial process. It was not sealed, nor was it signed by the clerk, and had no more legal effect than an order issued by any private citizen.

"There had been no amendment of the bill of complaint. The law of November 20 had been promulgated. The De Feriet board had been appointed in pretended pursuance thereof. Whether, under the constitution, the governor had the power, in the vacation of the legislature, to appoint that board, upon the ground that the act of November 20 created offices, and therefore vacancies in office, your committee do not inquire. But it is understood that the constitution has been so construed in that State, and that Judge Dibble was appointed by the governor under similar circumstances.

"The De Feriet board, therefore, had color of official existence. Their canvass was completed and the result promulgated under color of the State law, and it is clear that this gave the Federal court no more right to seize the State-house than to seize the Capitol."

Further, in speaking of Judge Durell, the committee say on page 27:

"Viewed in any light in which your committee can consider them, the orders and injunctions made and granted by Judge Durell in this cause are most reprehensible, erroneous in point of law, and are wholly void for want of jurisdiction; and your committee must express their sorrow and humiliation that a judge of the United States should have proceeded in such flagrant disregard of his duty, and have so far overstepped the limits of Federal jurisdiction."

Again, on page 28, the committee say:

"But for the interference of Judge Durell in the matter of this State election, a matter wholly beyond his jurisdiction, the McEnery government would to-day have been the *de facto* government of the State. Judge Durell interposed the Army of the United States between the people of Louisiana and the only government which has the semblance of regularity, and the result of this has been to establish the Kellogg government, so far as that State now has any government. For the United States to interfere in a State election, and by the employment of troops set up a governor and legislature without a shadow of right, and then to refuse redress of the wrong upon the ground that to grant relief would be interfering with the rights of the State, is a proposition difficult to utter with a grave countenance. Besides, it is impossible to determine to what extent the supreme court may have been influenced in rendering this decision by the fact that the Kellogg government, the creation of the Lynch board, had already been established, and the expectation that it would be sustained by Federal authority."

Again, the committee, in discussing another point of the subject, allude incidentally to the manner in which the Kellogg legislature was organized. The committee say, on page 47 of their report:

"In November, 1872, Judge Howe, of the supreme court, resigned, and Governor Warmoth commissioned J. H. Kennard to fill the vacancy. After the Kellogg legislature was organized under Judge Durell's injunction, enforced by United States troops, the house of representatives of that legislature pretended to impeach and suspend Governor Warmoth, whereupon Pinchback, who had been elected president of the senate in place of Lieutenant-Governor Dunn, deceased, which under the constitution made him lieutenant-governor, proclaimed himself acting governor in place of Warmoth, impeached and suspended. Pinchback afterward nominated Morgan, who was confirmed by the senate, to fill the same vacancy."

Also, we cannot refrain from giving the following from the chairman of the committee, Mr. Morton, who in a dissenting opinion used this language respecting Judge Durell and his official conduct:

"The conduct of Judge Durell, sitting in the circuit court of the United States, cannot be justified nor defended. He grossly exceeded his jurisdiction, and assumed the exercise of powers to which he could lay no claim. * * *

"But the pretense that in a suit to perpetuate testimony the court could go beyond the natural and reasonable jurisdiction to decide who constituted the legal returning board under the laws of Louisiana, and to enforce the rights of such as it might determine to be members of that board and to enjoin others who were not, is without any foundation in law or logic.

"In the Antoine case Judge Durell not only assumed to determine who constituted the legal returning board, but to prescribe who should be permitted to take part in the organization of the legislature and to enjoin all persons from taking part in such organization who were not returned by the Lynch board as elected; and this assumption of jurisdiction was made in the face of the express provision in the act of 1870 that its benefits should not extend to candidates for electors, for Congress, or for the State legislature. His order, issued in the Kellogg case to the United States marshal to take possession of the State-house for the purpose of preventing unlawful assemblages, under which the marshal called to his aid a portion of the Army of the United States as a posse comitatus, can only be characterized as a gross usurpation."

Thus it appears that the whole committee regarded the acts of Judge Durell as a gross usurpation; yet upon that act alone rests the organization of the Kellogg legislature. A body thus organized and thus constituted, as shown by all the facts in the case, is not entitled to any respect, and particularly is not entitled to impose a Senator upon this chamber, upon the country, and especially upon the people of Louisiana, as their representative upon this floor. In contrast with this body, we know there was a rival body, a rival State government, so far as the State and local officers were concerned; a rival government, too, not depending upon armed forces for organization and existence. A government, though not in active power, was still in being. That rival government, the facts most conclusively show, depended for its legal existence—

First. Upon the official returns of the votes cast at the regular election, and canvassed and counted by a board of returning officers known as the De Feriet board, appointed by the governor, as he claimed he had the right to do under the act of November 20, 1872, and the board, in the opinion of the undersigned, that possessed the power to canvass the returns.

Second. Upon the official returns as canvassed and counted by the board elected by the senate of the McEnery legislature, as provided under the same act, and known as the Forman board.

Third. Upon the undoubted fact that the official returns were true and gave the results as ascertained by both boards.

Fourth. Upon the undoubted fact that the people of Louisiana are satisfied that their real will was expressed in these official returns, and that this—the McEnery—is their chosen government.

Fifth. Upon the undoubted fact that nothing could have prevented its going into peaceful operation and being the government to-day, except for the interposition of Judge Durell and his associates in that crime, supported by the armed forces of the United States.

Upon the other hand, the Kellogg government depends—

First. Upon the canvass of a returning board having no authority and having no official returns to canvass.

Second. Upon the illegal order of Judge Durell, and the enforcement of it by United States troops.

Third. Upon the military protection of the United States, and upon that protection alone, as it is an undoubted fact that the withdrawal of this protection would result in an instant dissolution and dispersion of his government.

Can the Senate hesitate to determine between such governments? The interposition of mere force without cause and without right, by which one for the present may be put up and the other down, should not deter us in determining which is the rightful one. The soldiers of the United States should not be allowed to step in between our judgment and our duty. The day is not yet upon us, we trust, when the sword is to settle questions alone for us to determine. Taking all the facts as they appear in the case before us, from the inception of each rival body to the final consummation in their respective organizations, we can determine between them. It is our duty to do so; and we have facts sufficiently numerous and authentic to determine fairly and intelligently between them. Each has chosen Senators, and both are here with certificates.

There can be no doubt that where there are rival bodies, each claiming to be the right-

ful legislature of a State, and each presenting a Senator for admission upon this floor, we must judge between them, for the reason that we are to judge of the elections, the qualifications, and returns of our own members; and in this we are to know whether the body choosing a Senator is the legislature having the constitutional right to do so, and that such an one did choose a Senator.

This was clearly submitted in the case of Robbins and Potter, contesting Senators from Rhode Island. Mr. Poindexter, who submitted the majority report in that case, says:

"There was but one governor and but one senate in the State claiming to be a part of the general assembly. If there had existed another body of men, however chosen, contending for the offices of the governor and senators in the State, it will not be denied that their respective rights might be the subject of inquiry in deciding a contested election in the Senate of the United States."

The right of the Senate is undoubted to judge in this respect. Its power is not limited, for the sound reason that its independence can only be absolutely preserved in possessing such a right. In exercising it here, we should not be capricious, but governed in our conduct by rules that good sense, honest intention, and a desire for truth and justice should naturally inspire. No other department of the Government ought to control it; no other department of the Government should be allowed, under any pretext or in the exercise of any power, to trench upon it. It is a primary right, for in its free and absolute exercise the very life, existence, and organization of free legislative bodies depend.

Coming to the main point again, should the Senate hesitate between the rival governments? How can the Senate recognize the Kellogg government, stamped, as it is, all over with fraud, conspiracy, and force? There is not an element of free constitutional government in it. Mere intruders and usurpers in all departments of it, how shall the Senate, in respect for constitutional government, admit that such a body as that organized under the order of Durell shall impose upon us a Senator? We might receive with just as much plausibility and complacency a Senator from the soldiery who guarded that body when it went through the forms of choosing one. The bayonet organized it, kept it in being, protected it by day and by night, and without it no one would be here pressing a claim to a seat by virtue of any authority from it.

Speaking for ourselves, we cannot in any manner acknowledge any such election. We cannot give any respect or efficacy to the certificate under consideration as that of a rightful governor, and must, therefore, declare that in our opinion P. B. S. Pinchback is not entitled to a seat as a Senator from the State of Louisiana.

It is said that the Senate is bound, or ought to be bound, by decisions of the judicial tribunals of the State when inquiring into the existence of a government or of its officers; also by the action of other departments of the State government; also by the late act of the President and by reason of the possession of the office for a length of time. We shall only briefly remark that this body is bound by nothing in the exercise of its undoubted power. But admitting that any or all of these combined should have more or less influence upon the judgment of the Senate in coming to conclusions, we may be permitted to say that, in regard to the judicial action of the courts of Louisiana in relation to this subject, the question in issue never was fairly presented, and with the further remark that it is painfully evident that a majority of the court deciding cases having relevancy at all to the subject was in complicity with the Kellogg government to maintain its power; and so with the other departments of the State government, for all depended for their very existence upon the official being of Kellogg. As to the action of the President having any binding force upon the Senate, we say that his power to act relates alone to one thing, and that is the suppression of violence when legally called upon for aid in suppressing such violence. His action cannot bind beyond the simple fact and its real dependents; it decides no right for us or for Congress. One word as to the continuous possession of Kellogg, and which it is claimed gives him some standing to be considered in this body. His possession is that of fraud and force, and this possession is to-day only held by this force. It is the possession of might against right, and the weakness of the title will at once be witnessed upon the withdrawal of the force which keeps him in place. In our opinion, there is nothing in the matters that would be set up to secure a recognition of the Kellogg government. The whole is a crime against our civilization and a blot upon our free institutions.

WILLIAM T. HAMILTON.
ELI SAULSBURY.

THURSDAY, *February* 11, 1875.

Mr. Hamilton, of Maryland, submitted the views of the minority of the Committee on Privileges and Elections, to whom were referred the credentials of P. B. S. Pinchback; which were ordered to be printed, to accompany the report.

[See Report No. 626, submitted February 8, 1875.]

MONDAY, *February* 15, 1875

On motion by Mr. Morton, the Senate proceeded to the consideration of the resolution reported by the Committee on Privileges and Elections on the 8th instant, that P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

Pending debate,

A message from the House, &c.

[The debate is found on pages 1277–1289 of the Congressional Record, vol. iii, part 2.]

TUESDAY, *February* 16, 1875.

The Senate resumed, &c.

[The debate is found on pages 1306–1310 of the Congressional Record, vol. iii, part 2.]

WEDNESDAY, *February* 17, 1875.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to admit P. B. S. Pinchback to a seat in the Senate as a Senator from the State of Louisiana; and,

After further debate,

On motion by Mr. Morrill, of Maine, at 3 o'clock and 45 minutes p. m. (Thursday), that the resolution lie on the table, it was determined in the affirmative—yeas 39, nays 22.

On motion by Mr. Morton, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Bayard, Bogy, Conkling, Cooper, Davis, Dennis, Eaton, Edmunds, Fenton, Frelinghuysen, Goldthwaite, Gordon, Hager, Hamilton of Maryland, Hamilton of Texas, Ingalls, Johnston, Kelly, McCreery, Merrimon, Morrill of Maine, Morrill of Vermont, Norwood, Ransom, Robertson, Saulsbury, Schurz, Scott, Sprague, Stevenson, Stockton, Thurman, Tipton, Wadleigh, Washburn, Windom, and Wright.

Those who voted in the negative are Messrs. Boreman, Cameron, Chandler, Clayton, Conover, Cragin, Ferry of Michigan, Flanagan, Hamlin, Harvey, Howe, Jones, Logan, Morton, Oglesby, Patterson, Pratt, Ramsey, Sargent, Spencer, Stewart, and West.

So the motion was agreed to.

[The debate is found on pages 1327–1353, 1358–1382 of the Congressional Record, vol. iii, part 2.]

THURSDAY, *February* 18, 1875.

Mr. Boutwell presented a memorial of citizens of Massachusetts in favor of the admission of P. B. S. Pinchback as a member of the United States Senate from the State of Louisiana.

[Special session of Senate, March, 1875.]

FRIDAY, *March* 5, 1875.

Mr. Morton submitted the following resolution:

"*Resolved*, That P. B. S. Pinchback be admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873."

Ordered, That it lie on the table and be printed.

MONDAY, *March* 8, 1875.

The Senate proceeded to consider the resolution providing for the admission of P. B. S. Pinchback to a seat in the Senate as a Senator from the State of Louisiana; and,

Pending debate,

On motion by Mr. Sherman, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 3–7 of the Congressional Record, vol. iv, part 1.]

TUESDAY, *March* 9, 1875.

The Senate resumed, &c.

[The debate is found on pages 9–17 of the Congressional Record, vol. iv, part 1.]

WEDNESDAY, *March* 10, 1875.

The Senate resumed, &c.

[The debate is found on pages 17–25 of the Congressional Record, vol. iv, part 1.]

FRIDAY, *March* 12, 1875.

The Senate resumed, &c.

[The debate is found on pages 32–41 of the Congressional Record, vol. iv, part 1.]

SATURDAY, *March* 13, 1875.

The Senate resumed, &c.; and,

On motion by Mr. Edmunds to amend the resolution by inserting the word "not" before the word "admitted,"

Pending debate,

On motion by Mr. Conkling, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 41–53 of the Congressional Record, vol. iv, part 1.]

MONDAY, *March* 15, 1875.

The Senate resumed, &c.; and

The question being on the amendment proposed by Mr. Edmunds, viz, insert the word "not" before the word "admitted,"

Pending debate,

On motion by Mr. Morton, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 55–62 of the Congressional Record, vol. iv, part 1.]

TUESDAY, *March* 16, 1875.

The Senate resumed the consideration of the resolution to admit P. B. S. Pinchback to a seat in the Senate as a Senator from the State of Louisiana; and,

After debate,

On motion by Mr. West that the further consideration thereof be postponed to the second Monday in December next, it was determined in the affirmative—yeas 33, nays 30.

On motion by Mr. West, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Alcorn, Allison, Boutwell, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Clayton, Conover, Cragin, Dawes, Dorsey, Ferry of Michigan, Frelinghuysen, Hamilton, Hamlin, Harvey, Howe, Ingalls, Jones of Nevada, McMillan, Mitchell, Morrill of Maine, Morrill of Vermont, Morton, Oglesby, Paddock, Patterson, Sargent, Sherman, Spencer, West, and Windom.

Those who voted in the negative are Messrs. Bayard, Bogy, Booth, Caperton, Christiancy, Cockrell, Cooper, Davis, Eaton, Goldthwaite, Gordon, Hitchcock, Johnson of Tennessee, Johnston of Virginia, Jones of Florida, Kelly, Kernan, McCreery, McDonald, Maxey, Merrimon, Norwood, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Wallace, Whyte, and Withers.

So the motion was agreed to.

[The debate is found on pages 62–91 of the Congressional Record, vol. iv, part 1.]

[First session of the Forty-fourth Congress.]

THURSDAY, *December* 9, 1875.

Mr. West presented a letter* of W. L. McMillen, asking permission to withdraw from the files of the Senate his credentials as Senator-elect from the State of Louisiana, and submitted the following order:

Ordered, That the request of W. L. McMillen, heretofore claiming a seat in the Senate from the State of Louisiana, for the return of his credentials be granted.

TUESDAY, *December* 14, 1875.

Ordered, That the request of William L. McMillen, heretofore claiming a seat in the Senate from the State of Louisiana, for the return of his credentials be granted.

After debate,

On the question to agree thereto, it was determined in the affirmative—yeas 30, nays 28.

On motion by Mr. Howe, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Boutwell, Bruce, Burnside, Cameron of Wisconsin, Christiancy, Clayton, Conkling, Conover, Cragin, Edmunds, Ferry, Frelinghuysen, Hamlin, Harvey, Hitchcock, Howe, Ingalls, McMillan, Morrill of Vermont, Morton, Paddock, Patterson, Robertson, Sargent, Sherman, Spencer, West, Windom, and Wright.

Those who voted in the negative are Messrs. Bayard, Bogy, Caperton, Cockrell, Cooper, Davis, Dawes, Eaton, English, Goldthwaite, Gordon, Johnston, Jones of Florida, Kelly,

* A copy of the letter is found on page 190 of the Congressional Record, vol. iv, part 1.

Kernan, Key, McCreery, McDonald, Merrimon, Norwood, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Wallace, Whyte, and Withers.

So it was

Ordered, That the request of Mr. McMillen be granted, and that his credentials be returned to him by the Secretary.

[The debate is found on pages 200–204 of the Congressional Record, vol. iv, part 1.]

CREDENTIALS OF MR. MARR.

MONDAY, *December* 20, 1875.

Mr. Bayard presented a paper signed by John McEnery as governor of Louisiana and purporting to be the credentials of Robert H. Marr, appointed a Senator to fill the vacancy occasioned by the resignation of William L. McMillen.

Ordered, That it lie on the table.

CREDENTIALS OF MR. EUSTIS.

TUESDAY, *January* 18, 1876.

Mr. Thurman presented papers purporting to be the credentials of J. B. Eustis as a Senator from the State of Louisiana for the term ending March 3, 1879.

Ordered, That they lie on the table.

[The debate and a copy of the credentials are found on pages 451–455 of the Congressional Record, vol. iv, part 1.]

MONDAY, *January* 24, 1876.

On motion by Mr. Morton,

Ordered, That the papers purporting to be the credentials of J. B. Eustis as a Senator from the State of Louisiana be referred to the Committee on Privileges and Elections.

WEDNESDAY, *January* 26, 1876.

Mr. West presented a memorial* of certain State senators of Louisiana in relation to the election of Hon. James B. Eustis as United States Senator from that State; which was referred to the Committee on Privileges and Elections, and ordered to be printed.

FRIDAY, *January* 28, 1876.

Mr. Morton, from the Committee on Privileges and Elections, to whom were referred papers purporting to be credentials of J. B. Eustis, claiming a seat in the Senate as a Senator from the State of Louisiana, submitted the following report:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Morton (chairman), Logan, Mitchell, Wadleigh, Cameron of Wisconsin, McMillan, Saulsbury, Merrimon, and Cooper.]

The Committee on Privileges and Elections, to whom were referred the papers relating to the election of J. B. Eustis to a seat in this body by the legislature of the State of Louisiana, beg leave to report:

That in their opinion there is no vacancy in the office of Senator from the State of Louisiana, P. B. S. Pinchback having been elected in January, 1873, to the term beginning on the 4th of March, 1873. They therefore recommend that the papers relating to Mr. Eustis be laid upon the table.

THURSDAY, *February* 3, 1876.

On motion by Mr. Morton, the Senate proceeded to consider the resolution submitted by him March 5, 1875, for the admission of P. B. S. Pinchback to a seat in the Senate as a Senator from the State of Louisiana; and,

On motion by Mr. Edmunds, the Senate proceeded to the consideration of executive business.

FRIDAY, *February* 4, 1876.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Edmunds, viz, before the word "admitted," in the said resolution, insert the word "not,"

Pending debate,

On motion by Mr. Cameron, of Pennsylvania, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 886–889 of the Congressional Record, vol. iv, part 1.]

*Found in Senate Miscellaneous, 44th Cong., 1st sess., No. 41.

MONDAY, *February* 7, 1876.

The Senate resumed, &c.
[The debate is found on pages 907–913 of the Congressional Record, vol. iv, part 1.]

TUESDAY, *February* 8, 1876.

The Senate resumed, &c.
[No debate took place.]

MONDAY, *February* 14, 1876.

The Senate resumed, &c.
[The Congressional Record states (page 1065, vol. iv, part 2) that Mr. Morton's speech made this day would be printed in the Appendix, but it does not appear there.]

WEDNESDAY, *March* 1, 1876.

The Senate resumed, &c.
[The debate is found on pages 1382–1392 of the Congressional Record, vol. iv, part 2.]

THURSDAY, *March* 2, 1876.

The Senate resumed, &c.
[No debate took place.]

FRIDAY, *March* 3, 1876.

The Senate resumed, &c.
[The debate is found on pages 1436–1444 of the Congressional Record, vol. iv, part 2.]

MONDAY, *March* 6, 1876.

The Senate resumed, &c.
[No debate took place.]

TUESDAY, *March* 7, 1876.

The Senate resumed, &c.
[The debate is found on pages 1511–1516 of the Congressional Record, vol. iv, part 2.]

WEDNESDAY, *March* 8, 1876.

The Senate resumed the consideration of the resolution to admit P. B. S. Pinchback to a seat in the Senate as a Senator from the State of Louisiana; and,

The question being on the amendment proposed by Mr. Edmunds, viz, before the word "admitted" in the said resolution insert the word "not,"

After debate, it was determined in the affirmative—yeas 32, nays 29.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Caperton, Christiancy, Cockrell, Cooper, Davis, Dennis, Eaton, Edmunds, English, Gordon, Johnston, Jones of Florida, Kelly, Kernan, Key, McCreery, McDonald, Maxey, Merrimon, Morrill of Maine, Morrill of Vermont, Norwood, Paddock, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs Allison, Anthony, Boutwell, Bruce, Cameron of Pennsylvania, Conkling, Conover, Cragin, Dorsey, Ferry, Frelinghuysen, Hamilton, Hamlin, Harvey, Hitchcock, Howe, Ingalls, Jones of Nevada, Logan, McMillan, Mitchell, Morton, Patterson, Sargent, Sharon, Sherman, Spencer, West, and Windom.

So the amendment was agreed to.

On the question to agree to the resolution as amended, it was determined in the affirmative—yeas 32, nays 29.

On motion by Mr. Morton, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Caperton, Christiancy, Cockrell, Cooper, Davis, Dennis, Eaton, Edmunds, English, Gordon, Johnston, Jones of Florida, Kelly, Kernan, Key, McCreery, McDonald, Maxey, Merrimon, Morrill of Maine, Morrill of Vermont, Norwood, Paddock, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Boutwell, Bruce, Cameron of Pennsylvania, Conkling, Conover, Cragin, Dorsey, Ferry, Frelinghuysen, Hamilton, Hamlin, Harvey, Hitchcock, Howe, Ingalls, Jones of Nevada, Logan, McMillan, Mitchell, Morton, Patterson, Sargent, Sharon, Sherman, Spencer, West, and Windom.

So it was

Resolved, That P. B. S. Pinchback be not admitted as a Senator from the State of Louisiana for the term of six years beginning on the 4th of March, 1873.

[The debate is found on pages 1545–1558 of the Congressional Record, vol. iv, part 2.]

[Special session of Senate, March, 1877.]

THURSDAY, *March* 8, 1877.

Mr. Thurman submitted the following resolution for consideration:

"*Resolved*, That the credentials of J. B. Eustis, claiming to be a Senator from the State of Louisiana, be taken from the files and referred to the Committee on Privileges and Elections when that committee shall be appointed."

FRIDAY, *March* 9, 1877.

On motion by Mr. Thurman, the Senate proceeded to consider the resolution yesterday submitted by him for the reference of the credentials of J. B. Eustis to the Committee on Privileges and Elections; and

The resolution was agreed to, as follows:

"*Resolved*, That the credentials of J B. Eustis, claiming to be a Senator from the State of Louisiana, be taken from the files and referred to the Committee on Privileges and Elections."

[First session of the Forty-fifth Congress.]

THURSDAY, *October* 18, 1877.

Mr. Thurman submitted a motion that Mr. J. B. Eustis be now sworn as a Senator from the State of Louisiana for the term expiring March 3, 1879.

Mr. Conkling objected to the consideration of the motion, and raised the question of order, viz, that the credentials of Mr. Eustis having been referred to the Committee on Privileges and Elections at the last special session of the Senate and not having been reported upon, were not before the Senate, but still in possession of the committee under the fifty-ninth rule, which prescribes that all subjects referred to committees and not reported upon at the close of a session of Congress shall be returned to the office of the Secretary, to be by him retained until the next session, when they shall be returned to the several committees.

The Vice-President submitted the question of order to the Senate in the following words:

"Shall all subjects referred to committees and not reported upon at the close of the last preceding session of this body, in March last, and returned to the office of the Secretary of the Senate, be referred to the several committees to which they had previously been referred?"

And it was determined in the affirmative.

On motion by Mr. Thurman that the Committee on Privileges and Elections be discharged from the further consideration of the credentials of J. B. Eustis,

Mr. Edmunds objected to the consideration of the motion this day.

When,

On motion by Mr. Thurman (at 3 o'clock and 16 minutes p. m.), the Senate adjourned.

[The debate is found on pages 107, 108 of the Congressional Record, vol. vi.]

FRIDAY, *October* 19, 1877.

The Senate proceeded to consider the motion yesterday submitted by Mr. Thurman to discharge the Committee on Privileges and Elections from the further consideration of the credentials of J. B. Eustis; and,

After debate,

On motion by Mr. Thurman,

Ordered, That the motion lie on the table.

[The debate is found on pages 109–115 of the Congressional Record, vol. vi.]

SATURDAY, *December* 1, 1877.

Mr. Wadleigh, from the Committee on Privileges and Elections, to whom were referred papers purporting to be credentials of James B. Eustis, claiming a seat as a Senator from the State of Louisiana, reported the following resolution:

"*Resolved*, That James B. Eustis is lawfully entitled to a seat in the Senate of the United States from the State of Louisiana, from the 12th day of January, 1876, for the term ending March 3, 1879; and that he be admitted thereto upon taking the proper oath."

Mr. Ingalls asked and obtained leave of the Senate to submit the views* of a minority of the Committee on Privileges and Elections on the papers purporting to be credentials

* Never submitted.

of James B. Eustis, claiming a seat in the Senate as a Senator from the State of Louisiana.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

DECEMBER 1, 1877.—Ordered to be printed.

Mr. Wadleigh, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of James B. Eustis for a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing March 4, 1873, ask leave to submit the following report:

Mr. Eustis claims to have been elected on the 12th of January, 1876. The body which elected him was that formed by what is known as the Wheeler compromise; and there is no doubt that it was the lawful legislature of Louisiana.

Two questions arise in this case: First, whether Mr. Eustis was lawfully elected; second, whether at the time of his election a vacancy existed which the legislature of Louisiana had the right to fill.

The legislature of Louisiana on the 12th day of January, 1876, consisted of a house containing one hundred and eleven members and a senate with thirty-six senators. On the 11th day of January, 1876, the house voted to go into an election for United States Senator, and the senate on the same day refused to do so. On the 12th day of January, it appearing that there had been no election on the day before, sixty-four members of the house and twelve members of the senate, being a majority of all entitled to seats in both houses, met in joint convention and elected Mr. Eustis.

Your committee find that although the senate refused to take part as such in said election, and although a minority of the senate only did take part in it, yet there was a substantial compliance with the act of Congress of 1866. Upon the constitutionality of that act your committee express no opinion. The Senate has repeatedly, however, by its action affirmed its constitutionality; and your committee feel bound by the precedents which the Senate has established.

The second question, whether or not a vacancy existed at the time of Mr. Eustis's election which the legislature of Louisiana had the right to fill, is one of some difficulty. At the time of said election Mr. P. B. S. Pinchback was the claimant for the same seat under two elections—one in 1873, the other in 1875. His credentials and claims under said elections had been presented to the Senate and by it referred to the Committee on Privileges and Elections. Said committee, on the 5th day of March, 1875, reported a resolution to the Senate that Mr. Pinchback be admitted thereto. On the 8th day of March, 1876, that resolution was amended so as to change it to a resolution that he be not admitted. The resolution was passed as thus amended on the same day.

Your committee feel bound to regard that vote of the Senate as a final adjudication of the claims of Mr. Pinchback and a decision that he had no right to a seat. Mr. Eustis's election took place while Mr. Pinchback's case was pending in the Senate, and it may be contended with much force that until the final adjudication by the Senate of Mr Pinchback's claims there was no vacancy which the legislature was authorized to fill.

This question arose at the first session of the Twenty-third Congress, in the case of Potter *vs.* Robbins, where a majority of the special committee of the Senate held that the legislature of Rhode Island had no authority to proceed to the election of another Senator until the seat of the Senator-elect had been vacated by a solemn decision of the Senate of the United States. Silas Wright, of New York, made a report in behalf of the minority of said committee, in which it was contended that if the election of Mr. Robbins was not made by the lawful legislature of the State it was absolutely void, and that therefore Mr. Potter's election while Mr. Robbins's claim to a seat in the Senate was still pending was valid.

Your committee do not question the soundness of the rule laid down in that case, but are not disposed to apply it to this case, where the circumstances are very different. In the case of Potter *vs.* Robbins, Mr. Robbins had been admitted to the Senate, the committee had before it both his credentials and those of Mr. Potter; but here there is no contest. The Senate never admitted Mr. Pinchback to his seat, but decided that he had no right thereto.

This seat has long been vacant. Mr. Eustis is the only person who appears to claim it. The lawful character of the legislature which elected him is admitted. His election

was substantially in compliance with the law of Congress. No one appears to contest his right to a seat. Under these circumstances your committee believe that Mr. Eustis should be admitted to the Senate, and report a resolution to that effect and recommend its passage.

[Second session of the Forty-fifth Congress.]

MONDAY, *December* 10, 1877.

On motion by Mr. Wadleigh, the Senate proceeded to consider the resolution reported by the Committee on Privileges and Elections declaring James B. Eustis entitled to a seat in the Senate as a Senator from the State of Louisiana; and,

After debate,

On the question to agree to the resolution, as follows:

"*Resolved*, That James B. Eustis is lawfully entitled to a seat in the Senate of the United States from the State of Louisiana, from the 12th day of January, 1876, for the term ending March 3, 1879, and that he be admitted thereto upon taking the proper oath,"

It was determined in the affirmative—yeas 49, nays 8.

On motion by Mr. Ingalls, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bailey, Barnum, Bayard, Beck, Booth, Bruce, Burnside, Chaffee, Christiancy, Cockrell, Coke, Davis of West Virginia, Dawes, Dorsey, Eaton, Ferry, Garland, Gordon, Harris, Hereford, Hill, Johnston, Jones of Florida, Jones of Nevada, Kernan, Kirkwood, Lamar, McCreery, McDonald, McPherson, Matthews, Maxey, Merrimon, Mitchell, Morgan, Oglesby, Paddock, Patterson, Plumb, Randolph, Ransom, Saulsbury, Teller, Thurman, Voorhees, Wadleigh, Wallace, and Withers.

Those who voted in the negative are Messrs. Allison, Cameron of Wisconsin, Hamlin, Howe, Ingalls, McMillan, Morrill, and Saunders.

So the resolution was agreed to.

Mr. Eustis then appeared, and the oaths prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[The debate is found on pages 82–87 of the Congressional Record, vol. vii, part 1.]

COMPENSATION OF MR. PINCHBACK.

MONDAY, *April* 17, 1876.

Mr. Mitchell, from the Committee on Privileges and Elections, submitted a report (No. 274), accompanied by the following resolution. [Resolution found at end of report.]

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

APRIL 17, 1876.—Ordered to be printed.

Mr. Mitchell, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, having under consideration the question of the allowance proper to be made to P. B. S. Pinchback, late a contestant for a seat in the Senate from the State of Louisiana, submit the following report:

The great length of time that elapsed between the beginning of the term for which Mr. Pinchback was a contestant and the date of the final determination of that contest by the Senate, as also the remarkably close vote by which such contest was decided, have impressed your committee with the belief that the full measure of compensation which the uniform action of the Senate heretofore has given to contestants should be allowed in this case.

Your committee are advised by the journals of the Senate that the rule established by this body in similar cases is the payment to the contestant of the amount he would have been entitled to receive in case he had been admitted and served the time the contest was pending; in other words, an amount equal to the compensation and mileage of a Senator for the time covered by the contest.

A few citations will suffice to show the uniformity of this rule.

O. B. Hart, contesting the seat of A. Gilbert, of Florida, was paid from the contingent fund from the 1st to 28th of April, 1870, under the following resolution, passed May 11, 1870 (Senate Journal, second session Forty-first Congress, pages 585 and 634):

"*Resolved*, That the Secretary of the Senate be directed to pay, out of the contingent fund of the Senate, to O. B. Hart, claimant of a seat in the Senate from the State of Florida, the usual mileage of a Senator, and monthly pay from the date of presenting his credentials until the passage of the resolution declaring him not entitled to a seat."

H. P. Farrow and R. H. Whitely, contesting respectively with J. Hill and H. V. M. Miller, from Georgia, were paid from the 16th of February, 1870, to the 30th of January, 1871, under the following resolution, passed February 25, 1871 (Senate Journal, third session Forty-first Congress, page 369):

"*Resolved*, That the Secretary of the Senate be directed to pay to H. P. Farrow and R. H. Whitely, contestants from the State of Georgia, compensation from the 16th day of February, 1870, the date of their election by the reorganized legislature of Georgia, to the 30th day of January, 1871, when the Senate decided they were not entitled to seats."

Foster Blodgett, claiming a seat from the State of Georgia, was paid from March 4, 1871, to December 19, 1871, in pursuance of the following resolution, passed January 9, 1872 (Senate Journal, second session Forty-second Congress, page 94):

"*Resolved*, That the Secretary of the Senate be directed to pay, out of the pay and mileage account, to Foster Blodgett, claiming a seat as Senator-elect from the State of Georgia, the pay and mileage of a Senator from March 4, 1871, to December 19, 1871, when the question of his right to his seat was determined by the Senate."

Again, J. C. Abbott, of North Carolina, contesting the seat of Senator Ransom, was paid from March 4, 1871, to the 23d of April, 1872, under the following resolution:

"*Resolved*, That Joseph C. Abbott, late contestant for a seat in this body from the State of North Carolina, be allowed his salary from 4th of March, 1871, to the 23d of April, 1872, and one mileage each way."

This resolution was passed April 24, 1872. (See Senate Journal, second session Forty-second Congress, page 595.)

Numerous other citations might be adduced; these will suffice, however, to establish the uniform rule of the Senate.

This committee, on the 8th of March, 1876, in reporting back Senate resolution No. 10, to pay Francis W. Sykes, of Georgia, contesting with Senator Spencer, the compensation and mileage of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874, when said contest was decided, submitted (by Mr. Cooper) the following report:

"The rule established by the Senate in cases similar to the present one has been uniform. A person applying for a seat in this body by reason of an election by the legislature of a State, although his application has been refused and another adjudged entitled to the seat, has been paid the amount he would have been entitled to receive if he had been admitted and served the time the contest was pending. The action of the Senate upon such cases has been with such great unanimity as to call for little or no debate. The reasons therefor upon which the rule is based can only be surmised. It may be said the person claims his seat in pursuance of an implied duty imposed upon him to thus assert the right of his State to be represented in this body, which duty he owes to the public, and the expenses incurred in the performance of a public duty should be paid out of the common treasury.

"A proper respect for the action of a State in the choice of a Senator may also justify the rule.

"The committee see nothing in the present case to take it out of the general rule; and therefore recommend the passage of the resolution."

The case of Pinchback is (considering the final action of the Senate in the contests of the two cases) parallel with that of Sykes in this, that each claimed under an election by a body adjudged by the Senate afterward not to have been the legislature of the State. The case of Pinchback, however, is much the stronger from the fact that the alleged legislature from which Mr. Sykes claimed his election was never recognized as the legislature of the State of Alabama by any of the departments of Government, while the Kellogg legislature of Louisiana, by which Mr. Pinchback was elected, was recognized as the legisiature of that State not only by the State courts but by the Executive of the nation, and also by the national House of Representatives, by admitting to its membership persons claiming seats under certificates from Governor Kellogg; and inferentially by the Senate, in the adoption of a resolution recognizing Kellogg as the governor of the State. In view of these judicial, executive, and legislative recognitions of the Kellogg legislature, and of the fact that the Senate, after three years of discussion and consideration, was so evenly divided on the ultimate question as to Mr. Pinchback's right to a seat, it would seem difficult to imagine a stronger case of reasonable cause than that moving Mr Pinchback to make claim to a seat, and to persevere as he did in that claim for over three years.

Your committee, therefore, in view of the precedents and the facts of this case, report the following resolution and recommend its adoption:

Resolved, That P. B. S. Pinchback, late contestant for a seat in the Senate from the State of Louisiana, be allowed an amount equal to the compensation and mileage of a Senator from the beginning of the term for which he was a contestant up to the period of the determination of the contest by the Senate.

SATURDAY, *July* 1, 1876.

The Senate proceeded to the consideration of the resolution to pay P. B. S. Pinchback, late a contestant for a seat in the Senate from the State of Louisiana; and,

On motion by Mr. Sargent, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 4319–4323 of the Congressional Record, vol. iv, part 5.]

MONDAY, *July* 3, 1876.

The Senate resumed, &c.

[The debate is found on pages 4368–4372 of the Congressional Record, vol. iv, part 5.]

WEDNESDAY, *July* 5, 1876.

On motion by Mr. Morton, the Senate resumed the consideration of the resolution to pay P. B. S. Pinchback, late a contestant for a seat in the Senate from the State of Louisiana; and,

On motion by Mr. Merrimon to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting the following:

"That the sum of $5,000 be allowed to P. B. S. Pinchback to pay the reasonable expenses incurred by him as contestant for a seat in the Senate as a Senator from the State of Louisiana,"

After debate,

It was determined in the negative—yeas 10, nays 31.

On motion by Mr. Merrimon, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Cockrell, Davis, Jones of Florida, Kelly, McCreery, McDonald, Merrimon, Norwood, Saulsbury, and Withers.

Those who voted in the negative are Messrs. Alcorn, Allison, Anthony, Bruce, Cameron of Wisconsin, Conkling, Cragin, Dawes, Dennis, Dorsey, Edmunds, Ferry, Frelinghuysen, Hamlin, Harvey, Hitchcock, Howe, Ingalls, Logan, McMillan, Mitchell, Morrill of Maine, Morrill of Vermont, Morton, Paddock, Sherman, Spencer, Wadleigh, West, Windom, and Wright.

So the amendment was not agreed to.

On motion by Mr. Edmunds to amend the resolution by inserting at the end thereof the words:

"*Resolved*, That in cases of disputed claims to seats in the Senate hereafter arising, no other or greater allowance shall be made to a defeated claimant than in such case shall seem to the Senate just;

"*Resolved*, That in no case shall any pay be allowed to a Senator to begin earlier than the date of his election or appointment,"

It was determined in the affirmative.

On motion by Mr. Spencer to amend the resolution by striking out all after the word "Louisiana," as reported by the committee, and inserting: "and Francis W. Sykes, late a contestant for a seat in the Senate as a Senator from the State of Alabama, be each allowed an amount equal to the pay and mileage of a Senator from the beginning of the term for which they were respectively contestants up to the period of the determination of the respective contests by the Senate," it was determined in the affirmative.

On motion by Mr. Mitchell to amend the resolution by inserting at the end of the first clause, "and the amount required by this resolution to be paid out of the contingent fund of the Senate," it was determined in the affirmative.

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That P. B. S. Pinchback, late contestant for a seat in the Senate from the State of Louisiana, and Francis W. Sykes, late a contestant for a seat in the Senate as a Senator from the State of Alabama, be each allowed an amount equal to the pay and mileage of a Senator from the beginning of the term for which they were respectively contestants up to the period of the determination of the respective contests by the Senate; and the amount required by this resolution to be paid out of the contingent fund of the Senate;

"*Resolved*, That in cases of disputed claims to seats in the Senate hereafter arising no

other or greater allowance shall be made to a defeated claimant than in such case shall seem to the Senate just;

"*Resolved*, That in no case shall any pay be allowed to a Senator to begin earlier than the date of his election or appointment,"

It was determined in the affirmative—yeas 27, nays 11.

On motion by Mr. Mitchell, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Alcorn, Allison, Anthony, Bruce, Cameron of Wisconsin, Conkling, Cragin, Dawes, Ferry, Frelinghuysen, Harvey, Hitchcock, Howe, Logan, McMillan, Mitchell, Morrill of Maine, Morrill of Vermont, Morton, Paddock, Sargent, Sherman, Spencer, Wadleigh, West, Windom, and Wright.

Those who voted in the negative are Messrs. Cockrell, Davis, Gordon, Kelly, Key, McCreery, McDonald, Merrimon, Norwood, Saulsbury, and Withers.

So the resolution was agreed to.

[The debate is found on pages 4382–4400 of the Congressional Record, vol. iv, part 5.]

SPOFFORD vs. KELLOGG (MANNING).

Contest for seat for term beginning March 4, 1877.

SATURDAY, *January* 20, 1877.

Mr. Morton presented the credentials of William Pitt Kellogg, elected a Senator by the general assembly of the State of Louisiana for the term of six years commencing March 4, 1877.

The credentials were read.

[Special session of Senate, March, 1877.]

MONDAY, *March* 5, 1877.

Mr. William Pitt Kellogg, whose credentials were heretofore presented as a Senator from the State of Louisiana, having appeared to take the oaths of office,

Mr. Bogy objected to the oaths of office being administered to Mr. Kellogg;

Whereupon

Mr. Anthony submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials of Senators-elect in all disputed or contested cases lie upon the table until to-morrow."

[The debate is found on pages 1, 2 of the Congressional Record, vol. vi.]

TUESDAY, *March* 6, 1877.

Mr. Blaine submitted the following resolution for consideration:

"*Resolved*, That the oaths prescribed by law be now administered by the Vice President to William Pitt Kellogg, whose credentials as a Senator from the State of Louisiana were presented on the 20th of January, 1877."

On motion by Mr. Bayard to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting "the credentials of William Pitt Kellogg, claiming to be a Senator from the State of Louisiana, do now lie upon the table until the appointment of a Committee on Privileges and Elections, to whom they can be referred,"

Pending debate,

On motion by Mr. Thurman (at 3 o'clock and 15 minutes p. m.), the Senate adjourned.

[The debate is found on pages 15, 16 of the Congressional Record, vol. vi.]

WEDNESDAY, *March* 7, 1877.

The Senate resumed the consideration of the resolution of Mr. Blaine; and

Mr. Bayard having modified his said amendment, on the question to agree thereto, as follows, viz: Strike out all after the word "resolved," and in lieu thereof insert "the credentials of William Pitt Kellogg, claiming to be a Senator from the State of Louisiana, do now lie upon the table until the appointment of a Committee on Privileges and Elections, to whom they shall be referred,"

After debate,

It was determined in the affirmative—yeas 35, nays 29.

On motion by Mr. Sargent, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Barnum, Bayard, Bogy, Booth,

Burnside, Christiancy, Coke, Conkling, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Johnston, Jones of Florida, Jones of Nevada, Kernan, Lamar, McCreery, McDonald, McPherson, Maxey, Morrill, Randolph, Ransom, Saulsbury, Thurman, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Blaine, Bruce, Cameron of Pennsylvania, Chaffee, Conover, Dawes, Dorsey, Hamlin, Hoar, Howe, Ingalls, Kirkwood, McMillan, Mitchell, Morton, Oglesby, Paddock. Patterson, Plumb, Rollins, Sargent, Saunders, Sharon, Sherman, Teller, Wadleigh, and Windom.

So the amendment was agreed to.

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That the credentials of William Pitt Kellogg, claiming to be a Senator from the State of Louisiana, do now lie upon the table until the appointment of a Committee on Privileges and Elections, to whom they shall be referred,"

It was determined in the affirmative—yeas 42, nays 21.

On motion by Mr. Blaine, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bailey, Bayard, Barnum, Beck, Bogy, Booth, Burnside, Christiancy, Conkling, Conover, Davis of Illinois, Davis of West Virginia, Dawes, Dennis, Dorsey, Eaton, Garland, Gordon, Harris, Hereford, Hill, Hoar, Johnston, Jones of Florida, Jones of Nevada, Kernan, Lamar, McCreery, McDonald, McPherson, Maxey, Morrill, Paddock, Randolph, Ransom, Sargent, Saulsbury, Thurman, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Blaine, Bruce, Cameron of Pennsylvania, Chaffee, Hamlin, Ingalls, Kirkwood, McMillan, Mitchell, Morton, Oglesby, Patterson, Plumb, Rollins, Saunders, Sharon, Sherman, Teller, Wadleigh, and Windom.

So the resolution was agreed to.

[The debate is found on pages 17–23 of the Congressional Record, vol. vi.]

[First session of the Forty-fifth Congress.]

WEDNESDAY, *October* 17, 1877.

Mr. Thurman presented the credentials of Henry M. Spofford, elected a Senator by the legislature of the State of Louisiana for the term of six years commencing March 4, 1877.

The credentials were read.

Mr. Thurman then submitted the following resolution, and asked for its present consideration:

"*Resolved*, That Henry M. Spofford, whose credentials as a Senator from the State of Louisiana have been this day read, be now sworn and admitted as such Senator."

Mr. Edmunds objected to the consideration of the said resolution this day, and raised the point of order that under the thirty-third rule of the Senate, which requires that all resolutions shall lie over one day for consideration, the resolution could not now be considered.

The Vice-President overruled the point of order raised by Mr. Edmunds. and decided that under the seventh rule of the Senate the presentation of the credentials of a Senator being a question of privilege, all questions and motions arising thereon were in order at this time, and that the consideration of the resolution could now be proceeded with.

On motion of Mr. Mitchell to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting:

"That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections,"

After debate,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

Mr. Edmunds submitted the following resolution for consideration:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the credentials of William Pitt Kellogg as a Senator from the State of Louisiana, now under its consideration."

On motion by Mr. Thurman, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 78–83 of the Congressional Record, vol. vi.]

THURSDAY, *October* 18, 1877.

The Senate proceeded to consider the resolution yesterday submitted by Mr. Thurman,

to admit Henry M. Spofford to a seat in the Senate as a Senator from the State of Louisiana; and

The question being on the amendment proposed by Mr. Mitchell, viz: Strike out all after the word "resolved," and in lieu thereof insert the following:

"That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections,"

After debate,

On the question to agree thereto, it was determined in the affirmative—yeas 36, nays 33.

On motion by Mr. Edmunds, the yeas and days being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Blaine, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Ferry, Hamlin, Hoar, Howe, Ingalls, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Patterson, Plumb, Rollins, Sargent, Saunders, Spencer, Teller, and Wadleigh.

Those who voted in the negative are Messrs. Armstrong, Bailey, Barnum, Bayard, Beck, Cockrell, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Grover, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Maxey, Merrimon, Morgan, Randolph, Ransom, Saulsbury, Thurman, Wallace, Whyte, and Withers.

So the amendment was agreed to.

On motion by Mr. Whyte further to amend the resolution by adding thereto the words "and that said committee report thereon on or before the 1st day of November, 1877,"

After debate,

It was determined in the negative—yeas 31, nays 35.

On motion by Mr. Whyte, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Barnum, Bayard, Beck, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Grover, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Maxey, Merrimon, Morgan, Randolph, Ransom, Saulsbury, Thurman, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Blaine, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Ferry, Hamlin, Hoar, Howe, Ingalls, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Patterson, Rollins, Sargent, Saunders, Spencer, Teller, and Wadleigh.

So the amendment was not agreed to.

On motion by Mr. Conkling to further amend the resolution by adding thereto the following: "and the said committee shall also consider and report upon the credentials of William Pitt Kellogg," it was determined in the affirmative; and

The resolution as amended was then agreed to, as follows:

"*Resolved*, That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections; and the said committee shall also consider and report upon the credentials of William Pitt Kellogg."

The Senate proceeded to consider the resolution yesterday submitted by Mr. Edmunds to discharge the Committee on Privileges and Elections from the further consideration of the credentials of William Pitt Kellogg; and

Mr. Edmunds withdrew the said resolution.

[The debate is found on pages 99–108 of the Congressional Record, vol. vi.]

THURSDAY, *October* 25, 1877.

Mr. Mitchell submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections in the contested cases of William Pitt Kellogg and Henry M. Spofford, claiming seats as Senators from the State of Louisiana, and whose credentials have been referred to such committee, be authorized to send for persons and papers and administer oaths with a view of enabling said committee to determine and report upon the title, respectively, on the merits of each of said contestants to a seat in the Senate."

MONDAY, *November* 26, 1877.

Mr. Wadleigh, from the Committee on Privileges and Elections, to whom were referred the credentials of William Pitt Kellogg and the credentials of Henry M. Spofford,

claiming seats as Senators from the State of Louisiana, submitted a report (No. 16) thereon, accompanied by the following resolution:

"*Resolved*, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath.

"*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States."

Mr. Merrimon asked and obtained leave of the Senate to submit the views of a minority of the Committee on Privileges and Elections on the credentials of William Pitt Kellogg and the credentials of Henry M. Spofford; which were ordered to be printed to accompany the report of the committee.

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

NOVEMBER 26, 1877.—Ordered to be printed.

Mr. Wadleigh, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the credentials of William Pitt Kellogg and the credentials of Henry M. Spofford, for the same seat in the Senate of the United States, ask leave to submit the following report:

Mr. Kellogg claims to have been elected on the 10th day of January, 1877. Mr. Spofford claims to have been elected on the 24th of April, 1877. In an inquiry into these cases upon their merits, the first question which arises is, whether the body which elected Mr. Kellogg was the lawful legislature of Louisiana at the time of such election.

There was in said State on the 6th of November, 1876, an election for governor, lieutenant-governor, and members of the general assembly. The statements of the votes cast at such election were required by law to be sent to a board of returning officers for all elections in the State. Said returning officers were by law authorized and required to ascertain, return, and certify the election of members of the general assembly. No other tribunal was clothed with that power or duty. They were required to report their decisions to the secretary of state, and it was by law provided that the secretary of state should transmit to the clerk of the house of representatives and secretary of the senate of the last general assembly a list of the names of such persons as, according to the decisions of the returning officers, were elected to either branch of the general assembly.

It was the duty of the said clerk and secretary to place the names of such persons so furnished upon the roll of the house and senate, respectively, and those representatives and senators whose names were so placed by the clerk and secretary, and none others, were competent to organize the house of representatives or senate.

The secretary of state, in obedience to the statute, transmitted to the clerk of the former house and secretary of the senate a list of the names of persons by the said returning officers decided to have been elected to either branch of the general assembly, and from the list thus furnished the clerk and secretary organized each house of the State legislature on the 1st day of January, 1877.

By the constitution of Louisiana the house of representatives is composed of one hundred and twenty members and the senate of thirty-six members. There is no doubt that sixty-one members of the house constitute a quorum of that body, and that nineteen members constitute a quorum of the senate. There were present at the organization, and took part in the proceedings, eight senators holding over, and eleven newly elected—nineteen in all—having the certificates of said returning officers, which was a quorum, and sixty-eight representatives, thus declared to have been elected, being seven over a quorum. After such organization the members of the two houses assembled in joint convention on the 10th day of January, 1877, to elect a Senator of the United States.

Upon reading the journal of each house it was found that no election of Senator had been made the day before. The roll of each house was called, and it was found there were present in the joint convention seventeen senators and sixty-six representatives, they composing a majority of all the members of the general assembly of the State. Nominations were then made for Senator, and a *viva voce* vote was had, and William Pitt Kellogg received the votes of seventeen senators and sixty-six representatives, and was declared by the president of the senate (the presiding officer of the joint convention) to

* Taken from Senate Reports, 1st sess. 45th Cong., No. 16.

have received a majority of all the votes of the general assembly, and to have been duly elected a Senator of the United States for the term of six years beginning on the 4th day of March, 1877.

Your committee find that said election was held strictly in accordance with the act of Congress of 1866 to regulate the times and manner of holding elections for Senator. The credentials of Mr. Kellogg are signed by Stephen B. Packard as governor of the State of Louisiana, and bear date the 11th day of January, 1877.

It appears to your committee that Mr. Packard was on that day the lawful governor of the State of Louisiana. By the constitution of Louisiana the returning officers are required to seal up and transmit the returns of the election of governor and lieutenant-governor to the secretary of state, who shall deliver them to the speaker of the house of representatives on the second day of the session of the general assembly then to be holden.

On the second day of the session the legislature proceeded to count the votes for governor and lieutenant-governor, there being then present twenty-one senators and sixty-eight representatives, two over a quorum of the senate and seven over a quorum of the house. The committee appointed by the two houses to make and canvass the votes for governor and lieutenant-governor reported that Stephen B. Packard was elected governor and C. C. Antoine lieutenant-governor of said State, and that by the following vote:

For governor:	
Stephen B. Packard	74,624
Francis T. Nicholls	71,198
For lieutenant-governor:	
C. C. Antoine	74,669
L. A. Wiltz	71,093

Upon the facts hereinbefore stated your committee are of the opinion—

First, that the returning officers of Louisiana were a lawful tribunal, solely authorized and required to ascertain, return, and certify to the election of members of the general assembly.

Second, that those, and only those, who held certificates of election from said returning officers were entitled to seats in the general assembly at the organization thereof.

Third, that the body which first organized with a quorum of the members in each branch thereof, having such certificates, and which was duly recognized by the lawful governor of said State, was the lawful legislature.

The proof before your committee seems conclusive that at the time the legislature which elected Kellogg was organized there were present a quorum of each house thereof then lawfully entitled to seats therein; that at the time of his election there were present a quorum of the general assembly then lawfully entitled to seats therein; all of whom voted for said Kellogg, and that said legislature was recognized by the lawful governor of said State. It was, however, contended by Mr. Spofford that it was the duty of your committee to go behind the certificates of the returning officers and investigate the elections of individual members of the general assembly. At his request your committee did investigate such elections and find the following facts:

Of the lawful election of fifty-seven members of the house of representatives which aided in electing Mr. Kellogg there is no dispute whatever, and they now sit in the Nicholls house, which took part in the election of Mr. Spofford. Three more of the members of the Packard house, from the parish of Orleans, were until recently admitted on all hands to have had a majority of the votes cast, and your committee find that they were lawfully elected. Besides these sixty members of the house, there were eleven more whose election is disputed by Mr. Spofford upon the ground that they did not receive a majority of the votes cast. Of the twenty-one members of the senate which participated in the election of Mr. Kellogg, there were sixteen whose right to hold their seats is admitted.

The election of three more from the twelfth, eighteenth, and twenty-second senatorial districts is disputed upon the ground that they did not receive a majority of the votes cast. Two more, Baker and Kelso, were not declared elected by the returning board, but were seated by a vote of the senate acting under its constitutional right to judge of the election of its own members.

Complaint is made by Mr. Spofford that one Steven, a lawful senator, was taken against his will into the senate and detained there against his will for the purpose of making a quorum. Your committee believe there is no good reason for such complaint. If the senate had organized with a quorum of members lawfully entitled to seats therein, as was the case, it had the undoubted right to compel the attendance of absent members.

The senators and members whose title to seats is disputed on the ground that they did not receive a majority of the votes cast were those declared elected by the returning

board on account of the rejection of the votes cast at certain polls in the parishes of East Baton Rouge, De Soto, West Feliciana, La Fayette, Morehouse, Ouachita, and Webster, in the twelfth senatorial district, composed of the parishes of East Feliciana, West Feliciana, and Point Coupée; the eighteenth senatorial district, composed of the parishes of Ouachita and Caldwell; and the twenty-second senatorial district, composed of the parishes of Natchitoches, De Soto, Red River, and Sabine.

There were no votes rejected in the parishes of Sabine, Point Coupée, and Red River. A comparatively small number of the votes were rejected on account of the obvious illegalities, informalities, and misconduct of the election officers, and there is little complaint on account of the rejection of such votes. The rest were rejected on account of violence and intimidation which prevented a fair election. The evidence of such intimidation is overwhelming and irrefutable. Many of the Republican leaders were killed, others were tortured, others driven into exile. Companies of armed men paraded the parishes by night, carrying terror wherever they went.

Your committee has no space to recount or refer to a tithe of the horrible outrages perpetrated to prevent the Republicans from exercising the free right of suffrage. They were evidently perpetrated in localities where the result of the election would thereby be most strongly affected, and they had their intended effect. But for these numerous and horrible crimes, your committee believe that the candidates upon the State and National Republican tickets would have been elected beyond dispute, and that the general assembly would have been overwhelmingly Republican.

In forty parishes, where it is admitted on all hands the election was fair and peaceable, the colored registration in 1876 numbered 87,999, the white registration 72,034, showing a colored majority of 15,965. Those forty parishes returned 65,747 Republican votes and 59,392 Democratic votes, a Republican majority of 6,353 votes. In the seventeen terrorized parishes the colored registration was 27,269, the white registration was 20,320, a colored majority of 6,949, almost half as large as the registered colored majority in all the rest of the State. But the vote in those seventeen parishes as cast showed but 10,970 Republicans and 21,123 Democrats. Thus those seventeen parishes, with a colored majority of nearly 7,000 registered, cast a Democratic majority of 10,153. In the ten parishes of East Baton Rouge, Caldwell, De Soto, East Feliciana, West Feliciana, La Fayette, Morehouse, Natchitoches, Ouachita, and Webster, in which (on account of the rejection of polls by the returning board) the eleven disputed members of the house and three disputed members of the senate were declared elected by the returning officers, there were in 1876 19,174 colored voters and 11,212 white voters registered, being a colored majority of 7,962.

In the same parishes there were cast 14,510 Democratic and 8,489 Republican votes, being a Democratic majority of 6,021. In the strong Republican parish of East Feliciana, where leading Republicans had been terrorized into procuring the appointment as sheriff of a Democratic leader, whose career had been that of a brigand, upon his promise of peace and conciliation, only three Republicans dared to vote. There is no evidence to show and it is not pretended that the same arguments and methods of persuasion were not employed by the Democrats in the forty parishes above referred to as were used in the seventeen terrorized parishes; but in the seventeen parishes numerous and frightful crimes were deliberately perpetrated to carry the election; in the others not. The difference in the vote shows too strongly to be affected by argument or clouds of perjured witnesses the perpetration of such outrages and their effect.

It was contended by Mr. Spofford before your committee that the returning officers were guilty of fraud in rejecting the polls hereinbefore referred to, and that in so doing they exceeded the authority conferred upon them by law. Your committee find, however, that the returning board in so doing acted not fraudulently but in good faith; and that in their construction of the law under which they acted they were sustained by precedents and by able legal opinions.

They were charged by Mr. Spofford with having committed forgery in altering the statement of votes from the parish of Vernon. Testimony in reference to that matter was taken at great length by the Field and Morrison committees of the House and the Howe committee of the Senate. It clearly and conclusively shows, in the opinion of your committee, that the returning officers had no motive to commit such crime; that they before had published the true statement of the vote, and must therefore have known that if such a crime was committed it would be immediately detected; and that the real, the only criminal, was the witness by whose hand the alterations were made, who confessed that he did not know the true vote had been published, who had the strongest personal motives to commit the crime, and who testified with the understanding that he should have a good office if Mr. Tilden was elected.

But the law is clear that, even had the returning officers been guilty of fraud, or had mistakenly exceeded their authority, it was the right and the duty of the persons returned by them as elected to take their seats in the general assembly. The law on this point

is thus laid down by Cushing in his Law and Practice of Legislative Assemblies, page 52, section 141:

"It remains to be observed, in conclusion, that the proceedings of these [returning] officers, from the necessity of the case, are, in the first instance, uncontrollable by any other authority whatever; so that if, on the one hand, notwithstanding an election has been effected, the returning officers refuse or neglect to make the proper return, the party thereby injured is without remedy or redress until the assembly to which he is chosen has examined his case and adjudged him to be duly elected; and, on the other hand, if the returning officers make a return when no election has in fact taken place, or of one who is not eligible, the person returned will not only be entitled, but it is his duty, to assume and discharge the functions of a member until his return and election are adjudged void."

A strong case in point occurred in the State of New Hampshire in 1875. The governor and council of that State, whose duty it was to count the votes for and issue certificates of election to State senators, rejected and threw out 3,771 votes, being all those cast and returned for Natt Head, a candidate for senator, upon the ground that the name by which he had been universally known, by which he had been commissioned adjutant-general of the State, and which he had regarded and used as his real name during many years of business and political life, was not his full Christian name. They also threw out and rejected 46 votes cast for Author Dearing, also a candidate for senator, on the ground that he was not a resident of the State. By such action the governor and council were enabled to give certificates of election to James Priest and John Proctor, thus giving the Democrats the control of the senate. Application was made to the supreme court of the State, as provided for by the constitution, for the opinion of said court upon the effect of such action. In their opinion, which may be found in the fifty-sixth volume of New Hampshire Reports, the court say:

"By this action of the governor and council, whether it be regarded as within or exceeding their constitutional powers, Messrs. Priest and Proctor received the usual credentials, which authorized them to assemble with the other ten senators and take the oath of office; and they thereupon became senators, subject to the constitutional authority of the senate as final judges of the qualifications and elections of its members."

When your committee decided to go behind the certificates of the returning officers, and to seek the real merits of the case in the thousands of pages of printed testimony taken for the use of the Senate and House, Mr. Spofford contended that your committee should simply ascertain the number of votes deposited in the ballot-boxes at the election. Your committee believe, however, that if their inquiry is to extend beyond the question as to who were the lawful governor of Louisiana and the lawful members of the general assembly, it should go far enough to ascertain how far the freedom of election was impaired by intimidation, violence, and crime. The law on this subject is thus stated by Cushing in his Law and Practice of Legislative Assemblies, pages 67, 68, section 181:

"The great principle, which lies at the foundation of all elective governments, and is essential indeed to the very idea of election, is that the electors shall be free in the giving of their suffrages. This principle was declared by the English Parliament, with regard to elections in general, in a statute of Edward I, and with regard to elections of members of Parliament, in the Declaration of Rights. The same principle is asserted or implied in the constitutions of all the States of the Union. Freedom of election is violated by external violence, by which the electors are constrained, or by bribery, by which their will is corrupted; and in all cases where the electors are prevented, in either of these ways, from the free exercise of their right, the election will be void without reference to the number of votes thereby affected."

The evidence clearly proves, and your committee believe, that by intimidation, violence, and crime freedom of election was utterly destroyed at those polls in the ten parishes heretofore referred to, whose votes were rejected by the returning officers; that in throwing out such polls and declaring the Republican candidates elected, the returning officers did that which they believed to be legal, and which was really equitable and just, and what the two houses of the general assembly would have been bound in law to do with the facts before them. They believe, therefore, that the members by whose votes the general assembly was organized, and a sufficient number of the members by whose votes Mr. Kellogg was elected, were not only lawfully but equitably entitled to their seats.

It is contended by Mr. Spofford that the legislature which elected Mr. Kellogg and the governor who signed his credentials have vanished from political existence, and ceased to have any authority in the State of Louisiana, and that, therefore, if for no other reason, his own election is valid. Your committee find that at and after the organization of the legislature which elected Mr. Kellogg an overwhelming array of armed and organized military force was used to destroy and crush out the lawful State government of Louisiana. By it the courts were overthrown and annihilated, and under its constantly

impending menace the lawful legislature gradually melted away, and its terrorized members sought safety in the so-called Nicholls legislature or abdicated their rights.

By such, and perhaps other equally illegal means, the so-called Nicholls legislature at length came to contain an undisputed majority of the members lawfully elected to the general assembly; and on the 24th day of April that legislature chose Mr. Spofford, the contestant, a Senator of the United States. Your committee are of the opinion that his claim is not well founded. Until and after the election of Mr. Kellogg, Governor Packard, and what is known as his legislature, were *de facto* and *de jure* the government of Louisiana. Upon that legislature devolved the duty of electing a Senator of the United States. That duty was performed by them in the election of Mr. Kellogg. No subsequent events, especially successful revolution, through treasonable force, could undo what had been lawfully done. The doctrine contended for by Mr. Spofford, if established, would render insecure all political vested rights. It would offer a premium to overthrow by force the result of every sharply contested election, and at no distant day reduce this country to the unhappy condition of those wretched communities which are continually a prey to disorder and civil war.

Your committee therefore report the following resolutions, and recommend their passage:

Resolved, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years, commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath.

Resolved, That Henry M. Spofford is not entitled to a seat in the Senate of the United States.

VIEWS OF THE MINORITY.

On the 18th day of October last the Senate referred to the Committee on Privileges and Elections a resolution, of which the following is a copy:

"*Resolved*, That the credentials of Henry M. Spofford, claiming to be a Senator from the State of Louisiana, be referred to the Committee on Privileges and Elections; and the said committee shall also consider and report upon the credentials of William Pitt Kellogg."

That committee having had the subject embraced by that resolution under consideration, a majority of the committee have agreed to a report in favor of seating Mr. Kellogg as Senator. The undersigned, members of the committee, do not concur in that report and beg leave to submit to the Senate some of the reasons which impel them to dissent.

An election was held in the State of Louisiana on the 7th day of November, A. D. 1876, for a governor and members of the legislature. Francis T. Nicholls and Stephen B. Packard each claimed that he was elected governor at that election, and on and after the 8th day of January last each claimed to be the governor of that State. Two rival bodies of men composed of persons claiming to have been elected at that election were organized on the 1st day of January last in the city of New Orleans, and each claimed to be the lawful legislature of the State, one of these bodies commonly called "the Nicholls legislature" and the other "the Packard legislature." This conflict of claim, aggravated by the recollections of like repeated contests in the past, produced general angry commotions among the contestants and the people which seriously threatened the peace of society and a state of anarchy. Detachments of the Army of the United States were employed for many weeks to preserve the peace and prevent bloodshed. It will not be denied that the people of that State of all classes and conditions were profoundly and fearfully agitated.

At length this conflict and contest of claim was peacefully settled, and Mr. Nicholls was and ever since that time has acted and been recognized as governor by all the coordinate branches of the State government and the people generally, and also by the President and other authorities of the United States having occasion to recognize and communicate with the governor of that State. And what has been designated as "the Nicholls legislature" has likewise been so recognized as the lawful and only legislature, and its acts purporting to be statutes, passed since its first organization, have been regularly published and recognized as laws of that State by all departments of the State government and the people. Throughout the State the so-called "Packard legislature" has entirely disappeared, and most of its members—all those lawfully elected—have taken seats in the lawful legislature. This settlement has happily brought peace, order, and wholesome government out of fearful strife and disorder. It seems to be gratefully accepted by the great mass of the people of that State of both colors, and the few malcontents, if any, are moved by considerations of personal interest.

After the settlement referred to, "the Nicholls legislature" elected Henry M. Spofford to be a Senator in the United States Senate, "the Packard legislature" having a few

days after its pretended organization, on the —— day of January last, pending the contest, and in the midst of disorder, purported to elect Mr. Kellogg Senator. Indeed, the facts and circumstances point strongly to the conclusion that the main if not the only purpose of "the Packard legislature" organization was to elect Mr. Kellogg Senator. But be this as it may, the body that undertook to elect him had no legal existence, as will hereafter appear. He purported to be elected pending a heated contest as to its legality, and since that time it has abandoned its organization and claim, and most of its members went into and became part of "the Nicholls legislature." and voted for Mr. Spofford.

Looking to the permanent peace and well-being of the people of Louisiana, after many years of discord and strife which have agitated the people of the whole Union, as well as the strict right, the undersigned deemed it important in the highest degree that the Senate should accept that settlement, made by the authorities and accepted by the people, as a finality; and, looking to that end, Mr. Hill in committee offered a resolution in these words:

"The controversies heretofore existing in the State of Louisiana as to which of two rival bodies was the legislature of that State and as to which of two rival claimants was the governor of said State having been settled by the State itself since the last adjournment of the Senate,

"*Resolved*, That the Senate do recognize and accept said settlement as final."

This resolution was rejected by the unanimous vote of the Republicans of the committee, while it received only the votes of the undersigned. We solemnly protest against reopening political controversies in Louisiana, and sincerely deplore the occasion for doing so. Let the grave responsibility rest with those who have insisted upon doing so.

The majority of the committee having thus determined to ignore the settlement referred to, it was then deemed necessary to examine fully and fairly the real merits of the claims respectively of Messrs. Spofford and Kellogg; and with that view Mr. Merrimon in committee offered a resolution in these words:

"*Resolved*, That the committee proceed to examine and ascertain the substantial merits of the respective claims of Hon. W. P. Kellogg and Hon. H. M. Spofford to a seat in the Senate as a Senator from the State of Louisiana, and to this end to inquire particularly which, or whether either, of the two rival bodies claiming to be the legislature of said State, in January and April last, was the true and lawful legislature of said State."

This resolution was unanimously adopted after hearing the contestants at length, Mr. Kellogg being heard by his counsel, Mr. Shellabarger. The contestants were each requested to indicate what testimony he desired to produce, and after debate they were requested to confer and see what state of facts they could agree upon touching controverted material points at issue. Statements were submitted to Mr. Kellogg touching the result of the election in parishes indicated, and Mr. Kellogg made a statement in that respect in reply. These statements were received as evidence, and it was further agreed to receive the testimony, or so much thereof as may be pertinent, taken by Congressional committees commonly known as the "Howe committee," the "Morrison committee," the "Sherman committee," and the "Field committee," touching Louisiana affairs. Mr. Spofford did not object to the reception of this testimony, but he strenuously insisted on being allowed to take testimony in support of the several allegations specified by him, as follows: He offered testimony to prove—

"1. That the facts relative to the election of Tremoulet, Cressy, and Rolle, from the seventh representative district of New Orleans, were sustantially as set forth in the statement read by H. M. Spofford in his argument before this committee on the 24th October, 1877.

"2. That the composition, votes for Senator, and political proclivities of the legislature on the 24th April, 1877, when H. M. Spofford was elected Senator, were substantially as set forth in the aforesaid argument.

"3. That by the actual returns or statements as made in duplicate by the supervisors of registration (and assistant supervisors), with their appointees, the commissioners of election, and sent, one set to the clerk of the district court of each parish in the county and to the secretary of state in the city, and the other set to the returning board (so called), showed a majority of votes actually cast throughout the State of about 8,000 votes for Nicholls and Wiltz over Packard and Antoine for the offices of governor and lieutenant-governor in the election that took place in Louisiana November 7, 1876.

"4. Besides these specific violations of the constitution and of the law under which they pretended to act, I charge that the conduct of the returning officers in suppressing polls and changing the result of the constitutional returns was clandestine, collusive, tyrannical, and unjust; that the real work of conducting an election under pretext of compiling votes was proceeded with in a secret chamber by a corps of partisan clerks, while the occasional open sessions of the board were side-shows, devised to screen what was going on within; that arbitrary rules of evidence were established for pretended con-

tests, and changed so often and abruptly that no fair trial could be had or was had before the board; that illegal complaints were constantly received and illegal evidence admitted for the purpose of setting aside polls that were in the way of such candidates as the board desired to elect; and that Mr. Kellogg himself, then governor, joined in making illegal complaints and inducing the board to consider them.

"5. I am informed and so charge that the returns from Vernon Parish, after they came into possession of the returning officers, and while they were under their control, were fraudulently altered by a change of figures, tantamount to a forgery of a public record; that the board knew what the figures upon those returns were before their alteration, and yet after the alteration promulgated the results of said forgery as the true returns; that by such fraudulent alteration E. E. Smart, candidate for representative in the State assembly, who had in fact and according to the returns as they first came to the board defeated his competitor, Brown, was left behind, and Brown, the defeated candidate, falsely declared elected; and that said Brown took his seat in the Packard house, and figures on the journal as present on the 2d of January, 1877, when there was a pretended count of votes for governor and lieutenant-governor in joint assembly, and perhaps on one or two other occasions, but that he afterward abandoned that body and went home, acknowledging that he never had been elected."

We are of opinion that the testimony so proposed by Mr. Spofford is material, and ought, in justice to him and the Senate, to have been received. Besides, it cannot be truly said that the respective claims of the contestants have been decided upon their "substantial merits" when one of them is not allowed to produce material testimony which he offers and is anxious to produce. And it may be that a decision made by the Senate now, without fair opportunity to produce such testimony, may be reviewed and reversed at some future time. It is well to put an end to controversy now by allowing both the contestants the fullest and fairest opportunity to produce all material testimony. We think, therefore, that the whole matter ought to be recommitted to the committee, to the end the proposed testimony may be taken.

The following provisions of the constitution of Louisiana are material to a proper understanding of the points raised in the contest now under consideration:

"ART. 15. The legislative power of the State shall be vested in two distinct branches, the one to be styled the house of represenatives, the other the senate, and both the general assembly of the State of Louisiana.

"ART. 16. The members of the house of representatives shall continue in office for two years from the day of the closing of the general elections.

"ART. 17. Representatives shall be chosen on the first Monday in November every two years, and the election shall be completed in one day. The general assembly shall meet annually on the first Monday in January, unless a different day be appointed by law, and their sessions shall be held at the seat of government.

"ART. 19. Elections for members of the general assembly shall be held at the several election precincts established by law.

"ART. 27. The members of the Senate shall be elected for the term of four years; and when assembled the senate shall have power to choose its own officers except as hereinafter provided.

"ART. 31. At the first session of the general assembly after this constitution goes into effect the senators shall be divided equally by lot into two classes; the seats of the senators of the first class to be vacated at the expiration of the term of the first house of representatives; those of the second class at the expiration of the term of the second house of representatives, so that one-half shall be chosen every two years successively. When a district shall have elected two senators their respective terms of office shall be determined by lot between themselves.

"ART. 33. Not less than a majority of the members of each house of the general assembly shall form a quorum to transact business; but a smaller number may adjourn from day to day, and shall have full power to compel the attendance of absent members.

"ART. 34. Each house of the general assembly shall judge of the qualifications, election, and returns of its members; but a contested election shall be determined in such manner as may be prescribed by law.

"ART. 46. Returns of all elections for members of the general assembly shall be made to the secretary of state.

"ART. 48. The supreme executive power of the State shall be vested in a chief magistrate, who shall be styled the governor of the State of Louisiana. He shall hold his office during the term of four years, and, together with the lieutenant-governor, chosen for the same term, be elected as follows: The qualified electors for representatives shall vote for governor and lieutenant-governor at the time and place for voting for representatives; the returns of every election shall be sealed up and transmitted by the proper returning officer to the secretary of state, who shall deliver them to the speaker of the house of representatives on the second day of the session of the general assembly then

to be holden. The members of the general assembly shall meet in the house of representatives to examine and count the votes. The person having the greatest number of votes for governor shall be declared duly elected; but in case of a tie vote between two or more candidates one of them shall immediately be chosen governor by joint vote of the members of the general assembly. The person having the greatest number of votes polled for lieutenant-governor shall be lieutenant-governor; but in case of a tie vote between two or more candidates, one of them shall be immediately chosen lieutenant-governor by joint vote of the members of the general assembly.

"ART. 51. The governor shall enter on the discharge of his duties on the second Monday in January next ensuing his election, and shall continue in office until the Monday next succeeding the day that his successor shall be declared duly elected, and shall have taken the oath or affirmation required by the constitution.

"ART. 73. The judicial power shall be vested in a supreme court, in district courts, in parish courts, and in justices of the peace.

"ART. 94. No judicial powers, except as committing-magistrates in criminal cases, shall be conferred on any officers other than those mentioned in this title, except such as may be necessary in towns and cities; and the judicial powers of such officers shall not extend further than the cognizance of cases arising under the police regulations of towns and cities in the State. In any case where such officers shall assume jurisdiction over other matters than those which may arise under police regulations, or under their jurisdiction, as committing-magistrates, they shall be liable to an action of damages in favor of the party injured, or his heirs; and a verdict in favor of the party injured shall *ipso facto* operate a vacation of the office of said officer.

"ART. 103. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice.

"ART. 107. In all elections by the people the vote shall be taken by ballot; and in all elections by the senate and house of representatives, jointly or separately, the vote shall be given *viva vôce*.

"ART. 133. No judicial powers shall be exercised by clerks of courts."

And the following sections from the statute of that State approved November 20, 1872, commonly called the election law:

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened*, That all elections for State, parish, and judicial officers, members of the general assembly, and for members of Congress shall be held on the 1st Monday in November, and said election shall be styled the general election. They shall be held in the manner and form and subject to the regulations hereinafter prescribed, and in no other.

"SEC. 2. *Be it further enacted, &c.*, That five persons, to be elected by the senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum and have power to make the returns of all elections. In case of any vacancy by death, resignation, or otherwise, by either of the board, then the vacancy shall be filled by the residue of the board of returning officers. The returning officers shall after each election, before entering upon their duties, take and subscribe to the following oath before a judge of the supreme or any district court:

"'I, A. B., do solemnly swear (or affirm) that I will faithfully and diligently perform the duties of a returning officer as prescribed by law; that I will carefully and honestly canvass and compile the statements of the votes, and make a true and correct return of the election: So help me God.'

"Within ten days after the closing of the election said returning officers shall meet in New Orleans to canvass and compile the statement of votes made by the commissioners of election, and make returns of the election to the secretary of state. They shall continue in session until such returns have been compiled. The presiding officer shall, at such meeting, open, in the presence of the said returning officers, the statements of the commissioners of election, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate; one copy of such returns they shall file in the office of the secretary of state, and of one copy they shall make public proclamation, by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected. The return of the election thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers, until set aside after contest according to law, of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected. The governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected, who are required by law to be commissioned.

"SEC. 3. *Be it further enacted, &c.*, That in such canvass and compilation the return-

ing officers shall observe the following order: They shall compile first the statements from all polls or voting places at which there shall have been a fair, free, and peaceable registration and election. Whenever from any poll or voting place there shall be received the statement of any supervisor of registration or commissioner of election, in form as required by section 26 of this act, on affidavit of three or more citizens, of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, which prevented or tended to prevent a fair, free, and peaceable vote of all qualified electors entitled to vote at such poll or voting place, such returning officers shall not canvass, count, or compile the statement of votes from such poll or voting places until the statements from all other polls or voting places shall have been canvassed and compiled. The returning officers shall then proceed to investigate the statements of riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences at any such poll or voting place; and if from the evidence of such statement they shall be convinced that such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences did not materially interfere with the purity and freedom of the election at such poll or voting place, or did not prevent a sufficient number of qualified voters thereat from registering or voting to materially change the result of the election, then, and not otherwise, said returning officers shall canvass and compile the vote of such poll or voting place with those previously canvassed and compiled; but if said returning officers shall not be fully satisfied thereof, it shall be their duty to examine further testimony in regard thereto, and to this end they shall have power to send for persons and papers. If, after such examination, the said returning officers shall be convinced that said riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences did materially interfere with the purity and freedom of the election at such poll or voting place, or did prevent a sufficient number of the qualified electors thereat from registering and voting to materially change the result of the election, then the said returning officers shall not canvass or compile the statement of the votes of such poll or voting place, but shall exclude it from their returns: *Provided*, That any person interested in said election by reason of being a candidate for office shall be allowed a hearing before said returning officers upon making application within the time allowed for the forwarding of the returns of said election.

"SEC. 8. *Be it further enacted, &c.*, That the election at each poll or voting place shall be presided over by three commissioners of election, residents of the parish for at least twelve months next preceding the day of election, who shall be selected from different political parties, and be of good standing in the party to which they belong, and who shall, before entering upon the discharge of their duties, take and subscribe the oath prescribed for State officers. Should only one of the commissioners appointed be present at the hour for opening the poll, he shall appoint another, and both together shall appoint a third; and the commissioners so appointed shall take the oath and perform all the duties of commissioners of election in the same manner as if they had been appointed as provided for regular appointment of commissioners by this act. Any one of the commissioners shall be authorized to administer the oath to the other commissioners. The commissioners of election for the several wards in the city of New Orleans shall be appointed by the mayor and administrators of the city of New Orleans.

"SEC. 13. *Be it further enacted, &c.*, That it shall be the duty of the commissioners of election, at each poll or voting place, to keep a list of the names of the persons voting at such poll or voting place, which list shall be numbered from one to the end; and said list of voters, with their names and numbers as aforesaid, shall be signed and sworn to as correct by the commissioners, immediately on closing of the polls, and before leaving the place, and before opening the box. If no judge or justice of the peace, or other person authorized to administer such oath be present to do so, it may be administered by any voter. The votes shall be counted by the commissioners at each voting place, immediately after closing the election and without moving the boxes from the place where the votes were received, and the counting must be done in the presence of any bystander or citizen who may be present. Tally-lists shall be kept of the count, and after the count the ballots counted shall be put back into the box and preserved until after the next term of the criminal or district court, as the case may be; and in the parishes, except Orleans, the commissioners of election, or any one of them selected for that purpose, shall carry the box and deliver it to the clerk of the district court, who shall preserve the same as above required; and in the parish of Orleans the box shall be delivered to the clerk of the first district court for the parish of Orleans, and be kept by him as above directed.

"SEC. 26. *Be it further enacted, &c.*, That in any parish, precinct, ward, city, or town in which during the time of registration, or revision of registration, or on any day of election, there shall be any riot, tumult, acts of violence, intimidation, and disturbance, bribery, or corrupt influences, at any place within said parish, or at or near any poll or voting place, or place of registration or revision of registration, which riot, tumult, acts

of violence, intimidation, and disturbance, bribery, or corrupt influences shall prevent, or tend to prevent, a fair, free, peaceable, and full vote of all the qualified electors of said parish, precinct, ward, city, or town, it shall be the duty of the commissioners of election, if such riot, tumult, acts of violence, intimidation, and disturbance, bribery, or corrupt influences occur on the day of election, or of the supervision of registration of the parish, if they occur during the time of registration, or revision of registration, to make in duplicate and under oath a clear and full statement of all the facts relating thereto and of the effect produced by such riot, tumult, acts of violence, intimidation, and disturbances, bribery, or currupt influences in preventing a fair, free, peaceable, and full registration or election, and of the number of qualified voters deterred by such riots, tumult, acts of violence, intimidation, and disturbance, bribery, or corrupt influences from registering or voting, which statement shall also be corroborated under oath by three respectable citizens, qualified electors of the parish. When such statement is made by a commissioner of election or a supervisor of registration, he shall forward it in duplicate to the supervisor of registration of the parish, if in the city of New Orleans to the secretary of state, one copy of which, if made to the supervisor of registration, shall be forwarded by him to the returning officers provided for in section 2 of this act, when he makes the returns of election in his parish. His copy of said statement shall be so annexed to his returns of elections, by paste, wax, or some adhesive substance, that the same can be kept together, and the other copy the supervisor of registration shall deliver to the clerk of the court of his parish for the use of the district attorney.

"SEC. 43. *Be it further enacted, &c.*, That immediately upon the close of the polls on the day of election, the commissioners of the election at each poll or voting place shall proceed to count the votes, as provided in section 13 of this act, and after they shall have so counted the votes and made a list of the names of all the persons voted for, and the offices for which they were voted for, and the number of votes received by each, the number of ballots contained in the box, and the number rejected, and the reasons therefor, duplicates of such lists shall be made out, signed and sworn to by the commissioners of election of each poll, and such duplicate lists shall be delivered, one to the supervisor of registration of the parish, and one to the clerk of the district court of the parish, and in the parish of Orleans to the secretary of state, by one or all such commissioners in person, within twenty-four hours after the closing of the polls. It shall be the duty of the supervisors of registration, within twenty-four hours after the receipt of all the returns for the different polling places, to consolidate such returns, to be certified as correct by the clerk of the district court, and forward the consolidated returns, with the originals received by him, to the returning officers provided for in section 2 of this act, the said report and returns to be inclosed in an envelope of strong paper or cloth, securely sealed, and forwarded by mail. He shall forward a copy of any statement as to violence or disturbance, bribery or corruption, or other offenses specified in section 26 of this act, if any there be, together with all memoranda and tally-lists used in making the count, and statement of the votes.

"SEC. 44. *Be it further enacted, &c.*, That it shall be the duty of the secretary of state to transmit to the clerk of the house of representatives and the secretary of the senate of the last general assembly a list of the names of such persons as, according to the returns, shall have been elected to either branch of the general assembly; and it shall be the duty of the said clerk and secretary to place the names of the representatives and senators elect so furnished upon the roll of the house and of the senate, respectively; and those representatives and senators whose names are so placed by the clerk and secretary, respectively, in accordance with the foregoing provisions, and none other, shall be competent to organize the house of representatives or senate. Nothing in this act shall be construed to conflict with article 34 of the constitution of the State."

The senate branch of the legislature of Louisiana is composed of thirty-six senators, nineteen being a quorum; the house branch is composed of one hundred and twenty members, sixty-one being a quorum. The election for governor and members of the legislature, styled the "general election," is held biennially, on the first Monday in November.

It will be observed that section 2, set forth above, of the statute regulating the manner of holding elections, provides for five "returning officers" for all elections in the State, commonly called "the returning board." In view of the constitutional provisions above cited, this statutory provision is strange and anomalous. It suggests and imports a dishonest purpose; it savors of fraud; in the natural order of things, leaving out of view for the moment that it contravenes the constitution, it is unnecessary, illogical, and absurd, and it is not surprising that the returning board has been one of the chief instrumentalities in the hands of desperate adventurers in producing the disorders and stormy conflicts that have disgraced and cursed the State and people of Louisiana ever since it came into existence. What necessary, reasonable, or honest purpose it can serve we cannot see, and its whole history shows that it has accomplished much and lasting evil.

The statutory clause providing for "the returning board," so far as it affects elections for governor and members of the legislature, manifestly comes in direct conflict with the constitution of Louisiana in two respects:

1. The forty-sixth article provides that "returns of all elections for members of the general assembly shall be made to the secretary of state;" and it is provided in article 48: * * * "The qualified electors for representatives shall vote for governor and lieutenant-governor at the time and place for voting for representatives; the returns of every election shall be sealed up and transmitted by the proper returning officer to the secretary of state, who shall deliver them to the speaker of the house of representatives on the second day of the session of the general assembly then to be holden."

The term "returns" so used in the constitution plainly means the returns as made up by the election officers in the several parishes. If the counting, tabulating, and certifying the votes by such officers is not making up the "returns," and if such officers are not returning officers, then what is the statement of the votes, and what are such officers properly termed? What office do they perform? This is made the more manifest by the almost universal use of the term "returns" in connection with elections in the State of Louisiana before the existence of the returning board, and in most if not all the States in the Union. The constitution of Louisiana contains many provisions in reference to elections, and if it had been intended to attach such unusual meaning to the term "returns," such purpose would have been indicated by apt words. As there is no such unusual meaning indicated, the term must be taken in its ordinary acceptation when used in connection with elections. The clause of the statute providing for the returning board requires that the "returns" shall be sent by the proper returning officers to "the returning board," instead of to the secretary of state, as the constitution provides, and being so in conflict with the constitution it is null and void.

2. Article 73 of the constitution provides: "The judicial power shall be vested in a supreme court, in district courts, in parish courts, and in justices of the peace;" and article 94 provides: "No judicial powers, except as committing magistrates in criminal cases, shall be conferred on any officers other than those mentioned in this title, except such as may be necessary in towns and cities, and the judicial powers of such officers shall not extend further than the cognizance of cases arising under the police regulations of towns and cities in the State."

The title from which these extracts are taken is styled in the constitution "Judiciary department;" it provides for courts and the distribution of judicial power, but returning officers, or any like officers, are not mentioned in it, except by general terms to exclude them, and no judicial power is conferred upon them by it.

The act creating "the returning board" undertakes to confer upon it very high and important judicial powers. In section 3, above set forth, it undertakes to empower and confer jurisdiction upon "the returning board" to investigate touching riots, disturbances, &c., and to decide to what extent the same affected the election at any polling place, and how, to adjudicate that the vote of the poll or voting place shall be counted, or cast out wholly and rejected; to examine further testimony, to send for persons and papers, and to allow persons interested in such elections to come before them and assert and defend their rights. And by necessary implication, it is intended to confer all judicial power essential to determine all such questions as may come under their jurisdiction. But the constitution, as we have seen, expressly forbids that any judicial power shall be conferred upon such officers, and the statutory provision in question is therefore null and void.

It may be said that if the returning board and its acts are nullities then the election must fail absolutely. This does not follow; but if it should, this is no excuse or justification, and cannot put life into the statute when there is a plain and palpable violation of the constitution. But such consequences cannot follow. The returning officers designated by the constitution must send the returns to the secretary of state, and the legislature may be duly organized according to the ordinary rules of general parliamentary law. These are well understood, and in some States they alone prevail, and in the House of Representatives they prevailed for a long while.

But granting, for the argument, that the returning board had a constitutional existence, it plainly exceeded its powers in two material respects: 1. The statute regulating the manner of holding elections provides (see section 2, above set out), in reference to the returning board, as follows: "The presiding officer shall at such meeting open, in the presence of the said returning officers, the statements of the commissioners of election, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate; one copy of such returns they shall file in the office of the secretary of state, and of one copy they shall make public proclamation, by printing in the official journal and such other newspaper as they may deem proper, declaring the names of all persons and officers voted for, the number of votes for each person, and the names of the persons who have been duly elected. The returns of the election thus

made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers until set aside after contest according to law of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected. The governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected who are required by law to be commissioned."

Now, this provision is very material; it is not merely directory, it is mandatory and essential. "The statements of the commissioners of election" are made by the officers at the polls, who held the election and knew exactly what votes were polled and under what circumstances; and, besides, these statements are sworn by the commissioners.

The fact is, that in ascertaining the result of the election the returning board did not, from the statements of the commissioners of election, "canvass and compile the returns of the election;" but, on the contrary, they canvassed and compiled the returns from the consolidated returns made up by the supervisors, as provided in section 43 of the statute set out above. This conduct on the part of the returning board was not only unlawful, but the testimony goes to show that it was done willfully; that in repeated instances the commissioners' returns did not correspond with the supervisors' consolidated returns; that the latter had been so made up falsely, and always in favor of the Republican candidates, to the extent of some 3,500 votes.

2. Section 26, set out above, of the statute referred to, provides that in case of riot, and other offenses specified, it shall be the duty of the commissioner or supervisor, as specified, to make under oath a clear and full statement of all the facts connected with such unlawful acts, and the effect of the same upon the election, and such statement must be corroborated under oath by three respectable citizens, qualified electors of the parish; such statements must be sent to the returning board, attached by wax or some adhesive substance to the returns of election. Section 3, set out above, of said act, prescribes the duties of the returning board in cases where such affidavits shall accompany returns sent to them.

It will be seen that in one contingency they must not disturb the return, but count it; in another contingency they must reject it, and refuse to count it. Now, in plain violation of this statute in the respect last mentioned, the returning board in repeated instances, and after they had examined the returns and saw how results could be affected to suit their wishes and interests, received affidavits alleging such offenses in various parishes and voting places, which affidavits were not made by supervisors or commissioners of election, but by other persons, and such affidavits did not accompany returns as required by law; and, pretending to act upon such affidavits, the returns were suppressed—not rejected, as allowed by law in the contingency named, but suppressed in such way as to give Republican candidates majorities where they did not receive majorities in the parishes and at the voting places named.

Mr. Kellogg admits in his statement (see it) that in the twelfth, eighteenth, and twenty-second senatorial districts the Democratic candidates had the majority of the votes cast at the polls, and, as the commissioners' returns sent to the returning board showed, that in the election of ten members of the house of representatives designated the returns of commissioners showed that Democratic candidates were elected, and the returning board so changed or suppressed the returns as to show that the Republican candidates were elected. Without reference to the fraudulent purpose of the returning board in the respects just mentioned, it had no power thus to interfere with returns and alter or suppress them. If, under the constitution, it can exist at all for any purpose, it must pursue strictly the powers conferred upon it; it has not general jurisdiction, and cannot exercise powers like a court having general jurisdiction. It exceeded its powers, transcended its jurisdiction in the respects just mentioned, and such acts, apart from fraud, were null and void.

It cannot be truly said that the returning board exceeded its jurisdiction and exercised important powers which the statute creating it did not purport to confer by inadvertence. On the contrary, the evidence shows conclusively that it assumed such powers in aid of the most flagrant frauds perpetrated by it. Indeed, its whole course of conduct, in pretending to ascertain the result of the election, manifests most strikingly the real purpose had in view in creating this strange and unnatural tribunal. It ascertained results of the election, and seeing them, with deliberation and advisedly, changed them at will; made new ones, and always in favor of the Republican candidates. The returns from the parishes showed that Nicholls, the Democratic candidate for governor, had a majority over Packard, the Republican candidate for the same office, of 8,010 votes. By the exercise of the unlawful powers already pointed out, this majority was changed to a majority in favor of Packard of 3,426 votes.

The evidence shows, and it is admitted by Mr. Kellogg, that Perkins, Democrat, had a majority for senator in the twelfth senatorial district; he beat Weber, Republican, largely, but the returning board gave the latter a certificate of election. Meredith, Democrat, had a majority over Hamlet, Republican, for the senate, for the eighteenth

senatorial district; the returning board gave Hamlet the certificate. Sandiford, Democrat, beat Blunt, Republican, for the senate, in the twenty-second senatorial district; the returning board gave Blunt the certificate.

In Ouachita Parish, Breard and Taylor, Democrats, beat Barrington and Brewster, Republicans for the house of representatives, as the parish returns show; but the returning board gave the Republicans certificates of election. In East Baton Rouge Parish, Dupré, Williams, and Young, Democrats, beat Bird, Holt, and Lane, Republicans, for the house of representatives; the returning board gave the certificates of election to the Republicans. In La Fayette Parish, Marshall T. Martin, Democrat, beat Fernest Martin, Republican (these were brothers), for the house of representatives; the Republican received the certificate of election.

In West Feliciana Parish, McGee and Ryland, Democrats, beat Swazie and Early, Republicans, for the house of representatives. The Republicans, however, received certificates of election. In Morehouse Parish, Washburn and Hammond, Democrats, beat Shelton and Blair, Republicans, for the house of representatives, but the certificates of election were given to the Republicans. In De Soto Parish, Pitts and Means, Democrats, beat Long and Johnson, Republicans; the latter received certificates of election. The returning board refused to count any returns from the parishes of Grant and East Feliciana; the returns were thrown out absolutely. The parish returns show that Lyons and Porter, Democrats, were elected from East Feliciana, and Randolph, Democrat, was elected from Grant Parish.

The parish returns show that the Democrats were elected in each instance above mentioned, and Mr. Kellogg admits that they received majorities. (See his statement made to the committee on 13th of November instant.) These changes were wrought by the returning board, not in the exercise of the powers sought to be conferred upon them by statute and in the way prescribed, but by the exercise of arbitrary power, for which there was no color of legal sanction. The statute creating the board required that it should be composed of five persons to be elected from all political parties. In fact there were but four members composing it, and all of them Republicans. The statute commanded that the vacancy should be filled by those members in office; they peremptorily refused to fill the vacancy.

In changing the results of the election as above stated, the sittings of the board were irregular; their movements were clandestine and collusive; they received illegal evidence to the end they might make pretext for suppressing polls; they received suggestions from persons not allowed by law to make them; and after they and their political associates saw that it was necessary to change results in their own interests, Mr. Spofford proposed to prove that Mr. Kellogg, then governor and a candidate for the United States Senatorship which he now claims, "joined in making illegal complaints and inducing the board to consider them."

In view of the facts and circumstances developed by the testimony received by the committee we do not hesitate—we feel constrained to declare—that the returning board in Louisiana in pretending to ascertain and determine the result of the election in that State in November last not only proceeded in many material respects without the sanction or even color of law, but perpetrated the most flagrant and shameless frauds, surpassing, if possible, any ever perpetrated by that tribunal before, and by such means undertook to change the actual result of that election so as to elect the Republican candidate for governor and give the Republicans a majority in the legislature. Their action was unlawful, willful, corrupt, concerted; and we cannot escape the conviction that it was, to say the least and best, connived at and encouraged by persons occupying important stations in and out of the State of Louisiana.

On the 1st day of January, A. D. 1877, as the constitution of Louisiana directs, the legislature designated as "the Nicholls legislature" assembled in Saint Patrick's Hall in the city of New Orleans. The following extracts from the journal of the senate, found on pages 1 and 2, show the circumstances under which it met:

"The members of this senate, duly elected, proceeded at 12 m. on the 1st of January, 1877—being the first Monday of said month—to the State capitol of the State of Louisiana, to which they were refused admittance, and which they found in the possession of a large body of metropolitan police and armed men.

"They were reliably informed of the presence of five companies of United States troops in an adjoining building, and that an entrance into the State capitol, by which the troops could be readily introduced into the senate chamber, had been especially made for that purpose. As the representatives of the people, this body considered it contrary to law and the spirit of free institutions to organize a general assembly of the State of Louisiana under a military guard calculated to overawe and intimidate the members.

"For which reasons they repaired to Saint Patrick's Hall, in the city of New Orleans, where a permanent organization has been effected."—(Senate journal, 1877, page 2.)

Then follows on the next page, 3, signed by twenty senators, making a quorum:

"The undersigned holding-over senators, and senators-elect, do hereby solemnly pro-

test against the occupation of the capitol of the State by an armed body of metropolitan police and other armed retainers, supported by a large body of Federal troops in an adjacent building immediately accessible to the State-house by a passage purposely prepared with that object in view, which illegal, arbitrary, and revolutionary proceedings have been consummated by the order and under the sanction of the governor of the State, and the lieutenant-governor as presiding officer of the senate, for the purpose of overawing and controlling the deliberations of the general assembly, and preventing the access of the members duly elected, as well as the citizens of the State, to the meetings of their servants, save upon the written permission of the governor," &c.

There were in the senate at the organization on the day it assembled twenty senators. Of these, nine were "holding-over senators," and their right is not questioned; eight new senators held certificates from the returning board, and it is admitted that S. G. Perkins, senator from the twelfth district, received a majority, he beating Weber, the Republican candidate. It is likewise admitted that T. E. Meredith received a majority of the votes cast in the eighteenth senatorial district over Hamlet, the Republican candidate. And it is also admitted that J. W. Sandiford received a majority of the votes cast in the twenty-second senatorial district over Blunt, the Republican candidate. The parish returns show these facts, and they are admitted. (See Mr. Kellogg's statement, made to the committee on the 13th of November, 1877.)

It required nineteen senators to make a quorum; twenty senators were present at, and participated in, the organization.

The following extracts from the journal of the house of representatives show the circumstances attending the organization of that body (page 1):

"HOUSE OF REPRESENTATIVES,
"*New Orleans, January* 1, 1877.

"At 12 o'clock m. the clerk of the house of representatives, in accordance with the law, took his place on the stand of the speaker of the house and stated that he had found the State-house barricaded and in the possession of the police and military of the State, placed there by order of the governor, and a militia officer in charge of the hall of the house of representatives; that he had demanded that such officers should withdraw, and the obstructions to the free ingress and egress to the State-house and hall of the house of representatives be removed; that he had been refused such demand, and would not organize the house of representatives under such circumstances, but would go elsewhere and organize that body. He then repaired to Saint Patrick's Hall, where the house was called to order."

Mr. Trezevant was the clerk who organized the house; he was clerk of the "old house" and the person authorized by law to organize the new one.

There were present and participating in the organization of the house sixty-two members, sixty-one being a quorum; of these —— held certificates from the returning board. Of those present, the parish returns show, and it is admitted (see Mr. Kellogg's statement above cited), that D. A. Breard, jr., and J. G. Taylor, of Ouachita Parish, received majorities over Barrington and Brewster, Republicans; that J. Pitts and Joe T. Means, of De Soto Parish, received majorities over Long and Johnston, Republicans; that Robert H. Ryland and J. B. McGehee, of West Feliciana, received majorities over Swazie and Early, Republicans; that W. W. Washburn and J. D. Hammond, of Morehouse Parish, received majorities over Shelton and Blair, Republicans; that James T. Williams, H. C. Young, and J. W. Dupré, of East Baton Rouge Parish, received majorities over Bird, Holt, and Lane, Republicans; that Marshall T. Martin, of La Fayette Parish, received a majority over Fernest Martin, Republican; that W. W. Carlos, of Webster Parish, received a majority over Heath, Republican; that W. B. Porter and T. B. Lyons, of East Feliciana, received all the votes cast; had no opponent; this vote the returning board threw out; that E. G. Randolph, of Grant Parish, received a majority of all the votes cast; the vote of this parish the returning board threw out.

It thus appears that "the Nicholls legislature," on the first day it assembled, had a quorum, and more than a quorum, of members who had been elected at the polls, and in fact had the right to sit. But for the unlawful and fraudulent action of the returning board, there could be no pretense for suggestion that the organization thus made was not strictly legal in all respects. Indeed, the organization was made in pursuance of the actual result of the election.

It is said, however, that whatever may have been the result of the election at the polling places throughout the State in the parishes, the legislature must be organized by those persons, and only those, who hold certificates of election from the returning board, and that without reference to the conduct of that board, whether dishonest, fraudulent, or otherwise. In reply to this view we have endeavored to show, first, that the returning board had no constitutional sanction as returning officers of the election for governor and members of the legislature, and its acts are therefore void; second, that granting for

argument's sake that it had a legal existence, it transcended its powers and jurisdiction, first, in failing to "canvass and compile" the returns of the commissioners of election, instead of the consolidated returns sent to it by the supervisors of election; and second, in that it received suggestions after seeing the returns and knowing the result as to violence, disorders, &c., otherwise than as the law allowed. And the testimony makes the dishonest purpose and fraudulent conduct of the returning board in changing results manifest.

There is, however, another answer. The Senate, in Spencer's case, after much debate, decided that when there are two rival bodies of men in a State, each claiming to be the lawful legislature, it is competent to look behind the certificate of election and see who was in fact elected at the polls. This is a recent decision, and it was sanctioned by the vote of every Republican Senator who voted on the question. We do not stop here to question the soundness of this decision; it was made by a Republican Senate and in favor of a Republican Senator. We cite the following extract from the report of the Committee on Privileges and Elections in this case. The committee say:

"When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means were the Senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

"The persons in the two bodies claiming to be the senate and house of representatives who voted for Spencer constituted a quorum of both houses of the members actually elected; the persons in the State-house legislature who voted for Sykes did not constitute a quorum of the two houses duly elected, but a quorum of persons certified to have been elected to the two houses."

The legislature, so organized, on the 2d day of January, 1876, canvassed the returns for governor, and declared Francis T. Nicholls elected, and on the 8th day of the same month he took the oath of office prescribed by law, and has ever since that time exercised the office of governor.

On the 24th day of April, 1877, the legislature elected the contestant, Mr. Spofford, to be a Senator in the United States Senate for six years from the 4th of March, 1877, having voted in joint assembly at least once each legislative day since the 10th of January, 1877. Each house took a vote on the 9th. The whole number of votes cast in that election was 153. Mr. Spofford received 140 votes. There were but three members of the legislature absent at the time. Of the members thus voting, 51 had been in "the Packard legislature" at the time Mr. Kellogg claims to have been elected, and voted for him. At the time Mr. Spofford was elected there was only "the Nicholls legislature" in the State, and there was no opposing or rival body.

All the acts passed by this legislature are duly published and recognized as the statutes of Louisiana. They are recognized by all the co-ordinate branches of the State government and by the whole people, and by the courts of the United States sitting in that State. The first act passed by this legislature was approved by Governor Nicholls on the 8th of January, 1877, the day he went into office.

The body of men which claimed to be the legislature of Louisiana, and commonly called "the Packard legislature," assembled in the State-house, in New Orleans, on the 1st day of January, 1877. The house was barricaded and surrounded by bodies of metropolitan police, and several companies of United States troops were kept in readiness for action in the neighborhood of the State-house. There were in the senate branch of this legislature eight "holding-over" senators and eleven persons claiming to be senators holding certificates of election from the returning board. These persons were Messrs. Blunt, Bryant, Case, Demas, Hamlet, Hooper, Sutton, Stamps, Wakefield, Wheeler, and Weber—eleven in all. These altogether make nineteen, a quorum, if they had all been elected, but Blunt, Hamlet, and Weber were defeated candidates; this the parish returns show and the fact is admitted. So that, in fact, there were in this senate but sixteen senators entitled to sit in a lawful legislature. One of these (Hamlet) having departed, left them without even a nominal quorum. Then Mr. Steven, a "holding over" senator, sitting in "the Nicholls legislature," happened to be in the State-house on business, and the sergeant-at-arms of the Packard legislature seized and took him into the senate chamber to try and restore their nominal quorum. He was taken by force, and against his will and protest, and he did not participate in anything done. The seizure of Mr. Steven was a disgraceful proceeding, and the object had in view was to make a nominal quorum in order to admit as senators, upon a feigned contest, Baker and Kelso, two candidates who were defeated at the polls, and who did not even hold certificates of election from the returning board. Steven did not vote, refused to participate, and without him there was no quorum present when Kelso and Baker were admitted.

Mr. Steven gives the following account of his seizure. He says:

"On January 1, 1877, I was one of the holding-over senators who formed the senate

of the State of Louisiana convened on that day in Saint Patrick's Hall, in the city of New Orleans.

"I was one of the committee of three appointed by the chair to inform Governor Kellogg that the senate was duly organized, and ready to receive any communication he might have to make, &c., &c. The other members of the committee were Mr. Garland, of Saint Landry, and Mr. Boatner, of Catahoula, both of whom were elected in 1876. The committee proceeded to the Saint Louis Hotel, were admitted to Governor Kellogg's office, and delivered to him in person the message with which they were charged. Upon leaving Governor Kellogg's office, I was stopped by two or three persons, who stated that they were sergeants-at-arms of the senate, and that I must accompany them to the senate chamber. I stated that the senate of the State had met in Saint Patrick's Hall on that day and had adjourned until the following day; therefore I refused to accompany them, and refused to submit to arrest.

"I was thereupon seized by two or more of these parties and pushed and dragged in the direction of the senate chamber, I resisting at every step. In this manner we reached the outside bar of the senate, where, by getting my feet against the railing, I was enabled for a few moments to make a more effectual resistance. I was finally forced to the bar of the senate. I addressed myself to the president (Lieutenant-Governor Antoine), who was in the chair, stating the circumstances which led to my arrest, protesting against the arrest, and demanding that I be permitted to withdraw. The president stated that I could only be permitted to withdraw by unanimous consent of the senate, which was refused. At this juncture Governor Kellogg came in through a door immediately in the rear of the president's desk. I appealed to him as commander-in-chief of the forces occupying the building to release me, as I considered my arrest as equivalent to a violation of a flag of truce.

"He stated he was very sorry, &c., but as the senate had me in custody he could not interfere. I then made an attempt to go out, but was seized by several persons and forced back. I took a chair and sat down with my back to the president, at the end of the center aisle. The roll was called, my name repeated probably a dozen or more times; I made no response nor gave recognition in any way, shape, or manner whatever. When the roll was called on the seating of Baker and Kelso I made no answer, nor gave sign or motion of any kind whatever.

"WILL STEVEN."

There was not at any time a lawful senate.

In the Packard house of representatives there were at no time more than sixty-eight persons present claiming to be members. Eleven of these, including Brown, of Vernon Parish, as has already appeared, were defeated at the polls, so the parish returns show, and Mr. Kellogg admits that their Democratic opponents had majorities of the votes cast. This leaves the house without a quorum of members actually elected. Mr. Kellogg, therefore, did not receive a majority of the members elected to the legislature.

The evidence shows that but for the presence of the United States troops the so-called "Packard legislature" would never have assembled, and never would have set up any claim to be a legislature; but for the presence of troops it would not have continued to exist for one hour; it never for one moment existed as a free legislative body; it was the creature of fraud and force, and as soon as the latter disappeared it fled from the face of men; it felt and realized that it had no rightful existence, and hence its friends and foes alike repudiated it. From the beginning it was a sham, a pretense, and a fraud; it passed no act, it did nothing that is recognized as law by any of the authorities in Louisiana; it did no act for which any authority claims validity, except the pretended election of the contestant, Mr. Kellogg. This is the only act it did that claims recognition, and it remains to be seen if the Senate of the United States alone will recognize and accept this single fraudulent act of a pretended legislature which the State and people of Louisiana utterly repudiate.

Treachery and fraud mark every lineament of the so-called "Packard legislature" from its incipiency, and the Senate cannot escape seeing this. But apart from fraud, where there are two rival bodies of men in a State, each claiming in good faith to be the lawful legislature, and each contests the right of the other from the beginning of their existence, and such contest is continued without intermission until one prevails and absorbs the other, so that the latter completely disappears, and all the co-ordinate branches, and all the authorities, and the great mass of the people of the State, and the President and courts of the United States, recognize the prevailing body as the lawful legislature, and all its acts passed from its beginning as laws of the State, and recognize no single act of the body so absorbed and totally disappearing, can the Senate of the United States, many months after it has so completely disappeared, recognize the body thus disappearing as the legislature of the State by admitting to the Senate as a Senator a person who claims to have been elected by such a body of men?

The statement of the proposition irresistibly suggests the answer—it cannot. The Senate may have the physical power to do so—it has not the right to do so—it can only do so by the arbitrary exercise of lawless, despotic power. Such an act on the part of the Senate could only be regarded as a defiance of the authority, right, and will of the State and an insult to its dignity; it would shock the moral sense of the American people, and afford cause for profound distrust and alarm for the safety of our system of government.

The misrule and public disorders which have afflicted the State and people of Louisiana seem to have passed away. The settlement of differences and a new administration of government resulting upon the election in November last restored peace, good order, and a wholesome government.

That State and that people have settled their political contests and strifes which have annoyed and distressed the whole country. The Senate ought not, we trust it will not, disturb that settlement and revive bitter controversies. On the contrary, we trust it will, as in law and right it must do, accept and ratify that settlement by admitting the contestant, Mr. Spofford. His credentials, in all respects, comply with requirements of law, and he is well entitled to sit as Senator.

ELI SAULSBURY.
A. S. MERRIMON.
BENJ. H. HILL.

WEDNESDAY, *November* 28, 1877.

Mr. Wadleigh rose to a question of privilege and moved that the Senate proceed to the consideration of the resolution yesterday reported by the Committee on Privileges and Elections to admit William P. Kellogg to a seat in the Senate as a Senator from the State of Louisiana.

* * * * * * *

The Senate proceeded to the consideration of the said resolution.

On motion by Mr. Thurman to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

"That M. C. Butler be now sworn as a Senator from the State of South Carolina,"

After debate,

On the question to agree thereto, the yeas were 30 and the nays were 30.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Rollins, Sargent, Saunders, Spencer, Teller, and Wadleigh.

The vote of the Senate being equally divided,

The Vice-President voted in the negative.

So the amendment was not agreed to.

Upon the announcement of the result of the vote on the amendment,

Mr. Thurman rose to a question of order, and submitted that the provision of the Constitution that the Vice-President shall have no vote unless where the Senate is equally divided does not apply to the case of seating a member; but that questions of seating a member should be left to the Senators themselves, under the provision that each House shall be the judge of the elections, qualifications, and returns of its own members; and,

After debate,

Mr. Thurman withdrew the question of order.

The question recurring on agreeing to the resolution,

Pending debate, a message was received from the House of Representatives.

* * * * * * *

The Senate resumed the consideration of the resolution to admit William Pitt Kellogg to a seat in the Senate; and,

On motion by Mr. Patterson (at 6 o'clock and 10 minutes p. m.) that the Senate adjourn, it was determined in the affirmative—yeas 29, nays 27.

* * * * * * *

[The debate is found on pages 730–749 of the Congressional Record, vol. vi.]

THURSDAY, *November* 29, 1877.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to admit William Pitt Kellogg to a seat in the Senate as a Senator from the State of Louisiana; and,

Pending debate,

On motion by Mr. Conover (at 4 o'clock and 5 minutes p. m.), the Senate proceeded to the consideration of executive business.

[The debate is found on pages 749–764 of the Congressional Record, vol. vi.]

FRIDAY, *November* 30, 1877.

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to admit William Pitt Kellogg to a seat in the Senate as a Senator from the State of Louisiana; and,

The question being on the amendment proposed by Mr. Saulsbury to amend the resolution so as to read as follows, viz:

"Whereas it appears by the report of the minority of the Committee on Privileges and Elections that Henry M. Spofford, one of the contestants to a seat in the Senate from the State of Louisiana, did ask and demand the authority of the committee to produce testimony on the five following points at issue between the contestants, to wit:

"1. That the facts relative to the election of Tremoulet, Cressy, and Rolle, from the seventh representative district of New Orleans, were substantially as set forth in the statement read by H. M. Spofford in his argument before this committee on the 24th October, 1877.

"2. That the composition, votes for Senator, and political proclivities of the legislature on the 24th April, 1877, when H. M. Spofford was elected Senator, were substantially as set forth in the aforesaid argument.

"3. That by the actual returns or statements as made in duplicate by the supervisors of registration (and assistant supervisors), with their appointees, the commissioners of election, and sent one set to the clerk of the district court of each parish in the county and to the secretary of state in the city, and the other set to the returning board (so called), showed a majority of votes actually cast throughout the State of about 8,000 votes for Nicholls and Wiltz over Packard and Antoine for the offices of governor and lieutenant-governor in the election that took place in Louisiana November 7, 1876.

"4. Besides these specific violations of the constitution and of the law under which they pretended to act, I charge that the conduct of the returning officers in suppressing polls and changing the result of the constitutional returns was clandestine, collusive, tyrannical, and unjust; that the real work of conducting an election under pretext of compiling votes was proceeded with in a secret chamber by a corps of partisan clerks, while the occasional open sessions of the board were side-shows devised to screen what was going on within; that arbitrary rules of evidence were established for pretended contests and changed so often and abruptly that no fair trial could be had or was had before the board; that illegal complaints were constantly received and illegal evidence admitted for the purpose of setting aside polls that were in the way of such candidates as the board desired to elect; and that Mr. Kellogg himself, then governor, joined in making illegal complaints and inducing the board to consider them.

"5. I am informed, and so charged, that the returns from Vernon Parish, after they came into possession of the returning officers, and while they were under their control, were fraudulently altered by a change of figures, tantamount to a forgery of a public record; that the board knew what the figures upon those returns were before their alteration, and yet after the alteration promulgated the results of said forgery as the true returns; that by such fraudulent alteration E. E. Smart, candidate for representative in the State assembly, who had in fact and according to the returns as they first came to the board defeated his competitor, Brown, was left behind and Brown, the defeated candidate, falsely declared elected; and that said Brown took his seat in the Packard house and figures on the journal as present on the 2d of January, 1877, when there was a pretended count of votes for governor and lieutenant-governor in joint assembly, and perhaps on one or two other occasions, but that he afterward abandoned that body and went home, acknowledging that he never had been elected.

"And which request was refused by a majority of said committee: Therefore,

"*Resolved*, That the credentials of William Pitt Kellogg and of Henry M. Spofford, the contestants for the seat in the Senate from the State of Louisiana, be recommitted to the Committee on Privileges and Elections, with all the papers relating to said contest, with instructions to said committee to take testimony on the issues above mentioned."

The question being first put by the Chair on agreeing to the amendment of Mr. Sauls-

bury to the resolution reported by the committee, viz: Strike out all after the word "resolved" and in lieu thereof insert:

"That the credentials of William Pitt Kellogg and of Henry M. Spofford, the contestants for the seat in the Senate from the State of Louisiana, be recommitted to the Committee on Privileges and Elections, with all the papers relating to said contest, with instructions to said committee to take testimony on the issues above mentioned,"

It was determined in the negative—yeas 29, nays 29.

On motion by Mr. Bayard, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Paddock, Rollins, Sargent, Saunders, Spencer, Teller, and Wadleigh.

So the amendment was not agreed to.

The question recurring on agreeing to the resolution,

On motion by Mr. Thurman that the Senate proceed to the consideration of executive business, it was determined in the negative—yeas 21, nay 31.

* * * * * * *

The Senate resumed the consideration of the resolution reported by the Committee on Privileges and Elections to admit William Pitt Kellogg to a seat in the Senate as a Senator from the State of Louisiana; and,

After debate,

On motion by Mr. Hill to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

"That Henry M. Spofford be admitted as a Senator from the State of Louisiana on a *prima facie* title, and subject to the right of William Pitt Kellogg to contest his seat,"

It was determined in the negative—yeas 27, nays 29.

On motion by Mr. Allison, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Beck, Bayard, Cockrell, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, McCreery, McDonald, McPherson, Merrimon, Morgan, Randolph, Saulsbury, Thurman, Voorhees, Wallace, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Hoar, Howe, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Patterson, Rollins, Saunders, Spencer, Teller, and Wadleigh.

So the amendment was not agreed to.

The question recurring on agreeing to the resolution in the following words:

"*Resolved*, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath;

"*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States,"

It was determined in the affirmative—yeas 30, nays 28.

The yeas and nays having been heretofore ordered,

Those who voted in the affirmative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Patterson, Rollins, Saunders, Spencer, Teller, and Wadleigh.

Those who voted in the negative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Randolph, Saulsbury, Thurman, Voorhees, Wallace, and Withers.

So the resolution was agreed to.

* * * * * * *

Mr. William Pitt Kellogg then appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[The debate is found on pages 767–797 of the Congressional Record, vol. vi.]

[First session of the Forty-sixth Congress.]

FRIDAY, *March* 21, 1879.

Mr. Jonas presented a memorial of Henry M. Spofford, of Louisiana, praying an investigation into his claim to a seat in the Senate as Senator from that State; which was referred to the Committee on Privileges and Elections.

WEDNESDAY, *April* 16, 1879.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, reported the following resolution:

"*Resolved*, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such evidence, papers, and documents relative to the case as it may deem proper."

The Senate proceeded, by unanimous consent, to consider the said resolution; and having been amended on the motion of Mr. Hoar, the resolution, as amended, was agreed to, as follows:

"*Resolved*, That the Committee on Privileges and Elections be authorized to have printed for its use the arguments before it in the case of Spofford against Kellogg relative to a seat in the Senate from the State of Louisiana, with such other proceedings in relation to the case as it may deem proper."

[The debate is found on pages 468, 469 of the Congressional Record, vol. ix, part 1.]

THURSDAY, *May* 1, 1879.

Mr. Saulsbury, from the Committee on Privileges and Elections, reported the following resolution; which was ordered to be printed:

"*Resolved*, That the Committee on Privileges and Elections, to which was referred the memorial of Henry M. Spofford, praying permission to produce evidence relating to the right of Hon. William Pitt Kellogg to the seat in the Senate held by him from the State of Louisiana, and in support of the claim of said petitioner thereto, be, and said committee is hereby, instructed to inquire into the matters alleged in said petition, and for that purpose said committee is authorized and empowered to send for persons and papers, administer oaths, and do all such other acts as are necessary and proper for a full and fair investigation in the premises. Said committee may, in its discretion, appoint a subcommittee of its own members to make such investigation in whole or in part; which subcommittee shall have authority to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers, and may make such investigation either in Washington or in the State of Louisiana; and said committee or its subcommittee may sit in vacation."

FRIDAY, *May* 2, 1879.

The Senate proceeded to consider the resolution yesterday reported by Mr. Saulsbury, from the Committee on Privileges and Elections, instructing said committee to inquire into the matters alleged in the petition of Henry M. Spofford, relating to the right of Hon. William Pitt Kellogg to a seat in the Senate; and

On motion by Mr. Hoar to amend the resolution by striking out all of said resolution and inserting in lieu thereof the following:

"Whereas on the 25th day of October, 1877, the Senate unanimously adopted the following resolution:

"'*Resolved*, That the Committee on Privileges and Elections on the contested cases of William Pitt Kellogg and Henry M. Spofford, claiming seats as Senators from the State of Louisiana, and whose credentials have been referred to such committee, be authorized to send for persons and papers, and administer oaths, with a view of enabling said committee to determine and report upon the title, respectively, on the merits of each of said contestants to a seat in the Senate;'

"And whereas on the 26th day of November, 1877, said committee reported the following resolutions:

"'*Resolved*, That William Pitt Kellogg is, upon the merits of the case, entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, 1877, and that he be admitted thereto upon taking the proper oath;

"'*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States;'

"And on the 30th day of November, 1877, the Senate adopted said resolution, and

thereafter on the same day said Kellogg was duly admitted to take the oath and took his seat as a Senator from said State for said term:

"*Resolved*, That said proceedings are final and conclusive upon the right of said Kellogg and the claim of said Spofford to said seat for said term."

Pending debate,

The President *pro tempore* announced that the morning hour had expired, and called up the unfinished business of the Senate at its adjournment yesterday.

[The debate is found on pages 1022–1024 of the Congressional Record, vol. ix, part 1.]

TUESDAY, *May* 6, 1879.

The Senate resumed the consideration of the resolution reported by Mr. Saulsbury from the Committee on Privileges and Elections, May 1, 1879, instructing said committee to inquire into the matters alleged in the petition of Henry M. Spofford, relating to the right of Hon. William Pitt Kellogg to a seat in the Senate; and,

The question being on the amendment proposed by Mr. Hoar,

Pending debate,

The Presiding Officer announced that the morning hour had expired.

[The debate is found on pages 1071–1087 of the Congressional Record, vol. ix, part 1.]

WEDNESDAY, *May* 7, 1879.

The Senate resumed the consideration of the resolution reported by Mr. Saulsbury from the Committee on Privileges and Elections, May 1, 1879, instructing said committee to inquire into the matters alleged in the petition of Henry M. Spofford, relating to the right of Hon. William Pitt Kellogg to a seat in the Senate; and,

The question being on the amendment proposed by Mr. Hoar,

After debate,

On motion by Mr. Edmunds to amend the resolution by inserting after the word "petition," in line 6, the following: "So far only as relates to any charge in said petition of personal misconduct on the part of said Kellogg which may render him liable to expulsion or censure," it was determined in the negative—yeas 20, nays 27.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Booth, Bruce, Burnside, Cameron of Wisconsin, Conkling, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, Teller, and Windom.

Those who voted in the negative are Messrs. Bailey, Beck, Call, Coke, Davis of West Virginia, Garland, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, McDonald, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Withers.

So the amendment was not agreed to.

On motion by Mr. Conkling to amend the resolution by adding at the end thereof the following:

"*Provided*, That the inquiry hereby authorized shall be confined to the matters alleged in the memorial of Mr. Spofford to be new and different from those covered by the previous inquiry,"

It was determined in the negative—yeas 20, nays 27.

On motion by Mr. Saulsbury, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Booth, Bruce, Burnside, Cameron of Wisconsin, Conkling, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, Teller, and Windom.

Those who voted in the negative are Messrs. Bailey, Beck, Call, Coke, Davis of West Virginia, Garland, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, McDonald, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Withers.

So the amendment was not agreed to.

The resolution having been amended on the motion of Mr. Hoar,

On motion by Mr. Edmunds to further amend the resolution by inserting after the word "that," in line 1, the following: "recognizing the validity and finality of the previous action of the Senate in the premises," it was determined in the negative—yeas 20, nays 27.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Booth, Bruce, Burnside,

Cameron of Wisconsin, Conkling, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, Teller, and Windom.

Those who voted in the negative are Messrs. Bailey, Beck, Call, Coke, Davis of West Virginia, Garland, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, McDonald, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Withers.

So the amendment was not agreed to.

On motion by Mr. Conkling to further amend the resolution by adding at the end thereof the following:

"*Provided*, That such questions in said case as were fully considered and adjudged in the former investigation shall not be opened under this resolution,"

It was determined in the negative—yeas 20, nays 27.

On motion by Mr. Conkling, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Booth, Bruce, Burnside, Cameron of Wisconsin, Conkling, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, Teller, and Windom.

Those who voted in the negative are Messrs. Bailey, Beck, Call, Cockrell, Coke, Davis of West Virginia, Garland, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, McDonald, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Withers.

So the amendment was not agreed to.

On motion by Mr. Logan to further amend the resolution by adding at the end thereof the following:

"*Provided*, That said committee be further empowered and directed to make inquiry and take testimony upon the matter as to whether any unlawful or corrupt means were employed to disorganize the body by which William Pitt Kellogg claims to have been elected to the Senate, or to organize that by which the memorialist claims to have been elected or to secure the alleged election of the memorialist,"

During the debate,

Mr. Morgan, while addressing the Senate on the proposed amendment, having used the following language:

"Has the Senator from Louisiana (Mr. Kellogg) any objection to the Committee on Privileges and Elections investigating the question whether or not he bribed the members of the legislature that elected him?"

Mr. Edmunds raised a question of order, that it was not in order, where another Senator is personally concerned and a resolution is offered affecting his character, to propound such a question.

The President *pro tempore* decided that, in the opinion of the Chair, the language used by the Senator from Alabama contained no imputation upon the Senator from Louisiana, and was in order.

After further debate,

On the question to agree to the amendment proposed by Mr. Logan, it was determined in the negative—yeas 19, nays 28.

On motion by Mr. Logan, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Booth, Bruce, Burnside, Cameron of Wisconsin, Dawes, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, and Windom.

Those who voted in the negative are Messrs. Bailey, Beck, Call, Coke, Davis of West Virginia, Garland, Groome, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, Williams, and Withers.

So the amendment was not agreed to.

The question recurring on agreeing to the amendment proposed by Mr. Hoar, viz: Strike out all of said resolution, and in lieu thereof insert the following:

"Whereas on the 25th day of October, 1877, the Senate unanimously adopted the following resolution:

"'*Resolved*, That the Committee on Privileges and Elections on the contested cases of William Pitt Kellogg and Henry M. Spofford, claiming seats as Senators from the State of Louisiana, and whose credentials have been referred to such committee, be authorized to send for persons and papers, and administer oaths, with a view of enabling said committee to determine and report upon the title, respectively, on the merits, of each of said contestants to a seat in the Senate;'

"And whereas on the 26th day of November, 1877, said committee reported the following resolutions:

"'*Resolved*, That William Pitt Kellogg is, upon the merits of the case, entitled to a

seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th of March, 1877, and that he be admitted thereto upon taking the proper oath;

"'*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States;'

"And on the 30th day of November, 1877, the Senate adopted said resolutions; and thereafter, on the same day, said Kellogg was duly admitted to take the oath, and took his seat as a Senator from said State for said term: Therefore,

"*Resolved*, That said proceedings are final and conclusive upon the right of said Kellogg and the claim of said Spofford to such seat for said term,"

It was determined in the negative—yeas 17, nays 26.

On motion by Mr. Hoar, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Bell, Bruce, Cameron of Wisconsin, Dawes, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, and Windom.

Those who voted in the negative are Messrs. Bailey, Call, Coke, Davis of West Virginia, Garland, Groome, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Williams.

So the amendment was not agreed to.

On the question to agree to the resolution as amended, it was determined in the affirmative—yeas 26, nays 17.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Call, Coke, Davis of West Virginia, Garland, Groome, Hampton, Harris, Hill of Georgia, Houston, Jonas, Jones of Florida, Kernan, Lamar, Maxey, Morgan, Pendleton, Randolph, Ransom, Saulsbury, Slater, Vance, Vest, Voorhees, Walker, and Williams.

Those who voted in the negative are Messrs. Allison, Bell, Bruce, Cameron of Wisconsin, Dawes, Edmunds, Ferry, Hill of Colorado, Hoar, Ingalls, Logan, McMillan, Morrill, Platt, Rollins, Saunders, and Windom.

So the resolution as amended was agreed to, and is as follows:

"*Resolved*, That the Committee on Privileges and Elections, to which was referred the memorial of Henry M. Spofford, praying permission to produce evidence relating to the right of Hon. William Pitt Kellogg to the seat in the Senate held by him from the State of Louisiana, and in support of the claim of said petitioner thereto, be, and said committee is hereby, instructed to inquire into the matters alleged in said petition; and for that purpose said committee is authorized and empowered to send for persons and papers, administer oaths, and do all such other acts as are necessary and proper for a full and fair investigation in the premises. Said committee may, in its discretion, appoint a subcommittee of its own members to make such investigation in whole or in part; which subcommittee shall have authority to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers, and may make such investigation either in Washington or in the State of Louisiana, and said committee or its subcommittee may sit in vacation; and said committee are further instructed to inquire and report whether bribery or other corrupt or unlawful means were resorted to to secure the alleged election of the memorialist."

[The debate is found on pages 1099–1123 of the Congressional Record, vol. ix, part 1.]

SATURDAY, *June* 21, 1879.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections, or a subcommittee of the same, be, and are hereby, authorized to sit during the recess of the Senate for the purpose of continuing the investigation in the Spofford-Kellogg contest."

[Second session of the Forty-sixth Congress.]

MONDAY, *February* 9, 1880.

The Vice-President laid before the Senate a resolution* of the legislature of Louisiana relative to the election of William Pitt Kellogg to the Senate of the United States from that State; which was referred to the Committee on Privileges and Elections, and ordered to be printed.

* Found in Senate Miscellaneous, 46th Cong., 2d sess., vol. 1, No. 37.

THURSDAY, *February* 12, 1880.

The Vice-President laid before the Senate the memorial of Republican members of the legislature of Louisiana, relative to the election of William Pitt Kellogg to the Senate of the United States from that State; which was referred to the Committee on Privileges and Elections, and ordered to be printed.

[A copy of the memorial is found on pages 833–835 of the Congressional Record, vol. x, part 1.]

TUESDAY, *February* 17, 1880.

Mr. Jonas presented a memorial of the Union Soldiers' Association of New Orleans, La., relative to the election of William Pitt Kellogg to the Senate of the United States, praying that his right to a seat therein be declared null and void; which was referred to the Committee on Privileges and Elections.

MONDAY, *March* 22, 1880.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, to whom was referred the memorial of Henry M. Spofford, claiming to be entitled to a seat in the Senate as a Senator from the State of Louisiana, submitted a report (No. 338) thereon, accompanied by the following resolutions for consideration; which were ordered to be printed:

"1. *Resolved*, That, according to the evidence now known to the Senate, William P. Kellogg was not chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th day of March, 1877, and is not entitled to sit in the same.

"2. *Resolved*, That Henry M. Spofford was chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th of March, 1877, and that he be admitted to the same on taking the oath prescribed by law."

Mr. Hoar asked and obtained leave to submit the views of a minority of the Committee on Privileges and Elections on the foregoing subject; which were ordered to be printed, to accompany the report No. 388.

On motion by Mr. Hill, of Georgia, that the testimony taken by the Committee on Privileges and Elections in the investigation of the claim of Henry M. Spofford to a seat in the Senate be printed,

After debate, it was determined in the affirmative.

[The debate is found on pages 1758–1768 of the Congressional Record, vol. x, part 2.]

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Saulsbury (chairman), Hill of Georgia, Kernan Bailey, Pryor, Vance, Cameron of Wisconsin, Hoar, and Logan.]

IN THE SENATE OF THE UNITED STATES.

MARCH 22, 1880.—Ordered to be printed.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the memorial of Henry M. Spofford, claiming to be entitled to the seat in the Senate from the State of Louisiana now occupied by William P. Kellogg, ask leave to submit the following report:

On the 7th day of November, 1876, an election was held in the State of Louisiana for a governor and members of the legislature. In March, 1877, William P. Kellogg presented credentials signed by Stephen B. Packard, claiming to be governor, and certifying that said Kellogg had been duly elected to the seat in the Senate for the term beginning on the 4th of March, 1877, by the legislature chosen at said election. In October, 1877, Henry M. Spofford presented credentials, signed by Francis T. Nicholls, claiming to be governor, and certifying that said Spofford had been duly elected to the same seat by the legislature chosen at said election. These several credentials were referred by the Senate to the Committee on Privileges and Elections. On the 26th of November, 1877, a majority of the committee reported that the committee had investigated the issue, and that Kellogg, on the merits, was entitled to the seat. A minority of the committee reported that the committee had not fully investigated the issue, but had refused to do so, and asked that the credentials of both contestants be recommitted, with instructions to complete the investigation. The Senate refused to recommit, adopted the majority report, and Kellogg was admitted to the seat on the 28th of November, 1877.

* Taken from Senate Reports 46th Cong., 2d sess., vol. 4, No. 388. The accompanying testimony is here omitted.

On the 21st day of March, 1879, Henry M. Spofford presented his memorial to the Senate, complaining that he was denied the privilege of producing important testimony on the former hearing, alleging that much evidence of bribery and corruption by said Kellogg in procuring his pretended election had been since discovered, and asking that the case "be re-examined, to the end that justice may be done."

This memorial was referred to this committee, and the Senate, subsequently to that reference, ordered and authorized the committee to take testimony by the whole committee or by subcommittee, with full power to send for persons and papers, and to do all things necessary and usual in such cases.

The committee have faithfully executed this order of the Senate.

The memorialist and the sitting member appeared before the committee in person and by counsel. On the 5th of June, 1879, the full committee commenced the examination of witnesses in this city. The examination was continued in November and December by a subcommittee in the city of New Orleans, and was again resumed by the full committee in this city, and was continued until both parties announced they had no further testimony to offer. Nearly one hundred and fifty witnesses have been examined, and over 1,200 printed pages of testimony have been taken and are herewith reported to the Senate, with the conclusions of law and fact at which the committee have arrived.

In the opinion of your committee, the evidence, now for the first time fully taken, clearly and abundantly establishes the following facts:

I. That said William Pitt Kellogg, then holding the office of governor of the State of Louisiana, and pending the canvass in said election of 1876, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to prevent a fair, free, and legal election in said State, to the end that he might procure from the commissioners of election the return of a legislature a majority of whose members should be of the Republican party and presumed to be favorable to his election to the Senate.

II. That, having failed in this, the said William Pitt Kellogg, still holding the office of governor, did conspire with divers persons, and in aid of such conspiracy did fraudulently use the influence and power of his office of governor, to change the result as returned by the commissioners of election, to the end that he might procure, through false certificates of election, the organization of a pretended legislature a majority of whose members should be of the Republican party, and supposed to be favorable to his election to the Senate.

III. That said William Pitt Kellogg did conspire with divers others to prevent, and by force, through the metropolitan police, aided by the Army of the United States, did prevent the lawfully elected members of the legislature, and especially those of the Democratic party, from assembling in the halls of the senate and house of representatives in the State-house of the said State of Louisiana; and did, by threats, by the use of money, by the promise of offices, and by other corrupt practices, compel and induce to assemble in said halls, respectively, a mob of his co-conspirators, against the will of the people of Louisiana, many of whom had not been elected, and some of whom had been neither elected nor certified, to the end that he might procure a pretended legislature for the inauguration of Stephen B. Packard as governor, who, he well knew, had not been elected, and from which mob he might procure the form of his own election to the Senate, and which pretended election he knew such pretended governor would certify.

IV. That said William Pitt Kellogg having thus corruptly procured the assembling of a body of persons pretending to be a legislature, in which were included persons not elected, and from which had been forcibly excluded persons who had been elected and certified as members, did, by bribery, by the use of money and the promise of offices, and by other corrupt practices, induce said body of persons to go through the form of choosing him to a seat in the Senate of the United States.

V. That said William Pitt Kellogg, well knowing that the facts now proven to exist did exist, did falsely represent that no such facts existed or could be proven, seeking thereby to induce a majority of the committee, without taking the evidence which has now been taken, to make a report declaring his title to the seat, and with intent to induce a majority of the Senate to admit him to the seat so fraudulently claimed.

VI. That, to prevent the discovery of the briberies, frauds, and corruptions now proven to exist, the said William Pitt Kellogg did procure a large number of the persons composing said pretended legislature to be appointed to public offices of profit in the custom-house at New Orleans and elsewhere, as inducement not to disclose the truth. That, after other persons, officers and members of said pretended legislature had freely and voluntarily admitted, under oath, their knowledge of said briberies and corruptions, and had been summoned to appear as witnesses before your committee, and were under the protection of the Senate, said William Pitt Kellogg did, by bribery and corrupt practices, induce such witnesses to testify falsely that they had not made such admissions, or that, if they had made them, they were not true.

The committee realize the severity of these conclusions, but they are more than justified by the evidence. In view of their severe character, however, the committee are unwilling to confine this report to a simple announcement of their findings, but will incorporate in the report itself a portion of the abundant evidence which establishes their correctness.

As illustrative of the evidence in support of the first conclusion before stated, your committee will here refer to the following facts:

1. In 1876 F. J. Stokes was parish judge of Grant Parish, appointed by Kellogg. One Ward was the supervisor of registration for said parish, also appointed by Kellogg. Before the registration was completed Ward hid his books, and came to New Orleans and represented to Kellogg that he "was bulldozed and driven from the parish." Kellogg asked Stokes how the parish was. Stokes replied that "whenever the people of the parish was voting the Democrats carried the parish." Kellogg said, "If the people there don't want an election, we will throw the parish out."

Stokes testified most positively that the bulldozing pretext was false, and that the whole thing was fixed up to throw the parish out because it was Democratic. He says "there was no bulldozing there at all."

In answer to the direct question, "Was there any real danger to him (Ward) in staying there (in the parish)?" Stokes said, "Not a solitary particle. There was no danger to any man in the parish if he staid there and behaved himself. They treated him (Ward) very quietly and nicely as long as he staid in the hill country, and they paid his bills up there in the hill country." The hill country was the strong Democratic portion of the parish.

Evidently to make a case of apparent fairness for the sitting member, Jewett testified that "Kellogg handed him a letter directing Ward to return to the parish." This letter he gave to Ward "about the 1st of November." In reply to this Judge Stokes testified that "he (Ward) never started back. It was no calculation to have him start. In the first place, to have started on the 1st of November, he could not have gotten there. He told Kellogg at the time that the only way to the mouth of Red River was to take a stage." "He (Ward) actually did not go back." One fact puts the truth of this evidence of Stokes beyond possible doubt. Ward was allowed to remain in New Orleans until after the time for completing the registration under the law had expired, and then the pretended order to return was given him.

Thus defrauded, the people of the parish held an election without registration, and the Democrats carried the parish, but it "was thrown out."

2. By the election laws of Louisiana the registration of voters was required to be completed nine days before the election. The law also required that when the registration was closed the books of registration from the several parishes should be sent to the chief registrar's office in New Orleans.

In this election of 1876, the books of registration, at least of the several wards in the city of New Orleans, were sent to the custom-house instead of to the office of the chief registrar. Peter Williams was the chief clerk and acting registrar of voters in 1876. Without his knowledge or consent, an order by telegraph was sent out to the supervisors of registration in his name, ordering the books to be sent to the custom-house. To this order the name of Williams was forged by Blanchard, Kellogg's clerk. Williams adds:

"In the morning, when I came to the office I expected to find the books there, but I did not, and I went down then to the custom-house and found the books there, and found them erasing names from them.

"Question. Who were erasing the names?—Answer. The supervisors and their clerks.

"Q. That was at the custom-house?—A. At the custom-house, sir."

There is no denial by any one of this bold and shameless fraud and forgery. It is shown by various witnesses that the "supervisors and their clerks" were erasing names from these registration books during the night, and that a large number was erased, chiefly of Democrats. One of the Republican candidates for the legislature from the seventh ward of New Orleans (Moore) himself struck off "a large number of registered Democratic voters."

As illustrative of the evidence which shows the correctness of the second conclusion announced above, the following facts are cited:

1. Henry Houser was a member of the metropolitan police force, and was stationed as the night watch at Governor Kellogg's house A few days after the election he saw Blanchard, Jewett, Anderson, and Packard frequently at Kellogg's house at night. They often entered from the rear way. Witness frequently saw Blanchard and Jewett writing in one of the rooms upstairs. They would come about 7 or 8 o'clock, and remain from 11 to 12. They had papers which looked like election papers. He heard Kellogg concede that the election for the house of representatives had gone Democratic, and Blanchard told witness they were working on the election returns, and his understanding

from them was that they were seeking, by throwing out parishes and working on the returns to change the result, and make it Republican. They were thus engaged until after Packard's inauguration. This witness is strongly corroborated in several particulars, not only by conceded facts, but also by the witnesses called to rebut his testimony.

2. There can now be no reasonable doubt that the scheme to reverse the verdict of the ballot-box was hatched at these clandestine night meetings at Kellogg's own house, and the plan for carrying out the scheme under the false pretexts of violence and intimidation was here begun by those conspirators, of whom Kellogg was the chief. The frauds resorted to to change the result of the election in the seventh ward of New Orleans are now for the first time fully disclosed. This result, changing 3 votes from the Democrats to the Republicans in the house, must be added to the many heretofore known and admitted.

"The returns from the parishes showed that Nicholls, the Democratic candidate for governor, had a majority over Packard, the Republican candidate for the same office, of 8,010 votes. By the exercise of the unlawful powers already pointed out, and by the frauds now proven, this majority was changed to a majority in favor of Packard of 3,426 votes.

"The evidence shows, and it is admitted by Mr. Kellogg, that Perkins, Democrat, had a majority for senator in the twelfth senatorial district; he beat Weber, Republican, largely, but the returning board gave the latter a certificate of election. Meredith, Democrat, had a majority over Hamlet, Republican, for the senate for the eighteenth senatorial district; the returning board gave Hamlet the certificate. Sandiford, Democrat, beat Blunt, Republican, for the senate in the twenty-second senatorial district; the returning board gave Blunt the certificate.

"In Ouachita Parish Breard and Taylor, Democrats, beat Barrington and Brewster, Republicans, for the house of representatives, as the parish returns show; but the returning board gave the Republicans certificates of election. In East Baton Rouge Parish Dupré, Williams, and Young, Democrats, beat Bird, Holt, and Lane, Republicans, for the house of representatives; the returning board gave the certificates of election to the Republicans. In La Fayette Parish Marshall T. Martin, Democrat, beat Fernest Martin, Republican (these were brothers), for the house of representatives; the Republican received the certificate of election.

"In West Feliciana Parish McGee and Ryland, Democrats, beat Swazie and Early, Republicans, for the house of representatives. The Republicans, however, received certificates of election. In Morehouse Parish Washburn and Hammond, Democrats, beat Shelton and Blair, Republicans, for the house of representatives, but the certificates of election were given to the Republicans. In De Soto Parish Pitts and Means, Democrats, beat Long and Johnson, Republicans; the latter received certificates of election. The returning board refused to count any returns from the parishes of Grant and East Feliciana; the returns were thrown out absolutely. The parish returns show that Lyons and Porter, Democrats, were elected from East Feliciana, and Randolph, Democrat, was elected from Grant Parish.

"The parish returns show that the Democrats were elected in each instance above mentioned, and Mr. Kellogg admits that they received majorities." (See his statement made to the committee on 13th of November, 1877.)

Of the eighty-three persons who were said to be in the joint convention which elected Kellogg, nineteen are positively shown not to have been elected, but were fraudulently given certificates. Seventy-nine were necessary to make a quorum. The "work on the election returns" at Kellogg's house was evidently effective, and bore fruit through the returning board, one and sometimes two of whose members attended these clandestine night meetings.

Mr. Steven, a member of the Nicholls senate, was seized and held by force, and was counted as present against his protest, to enable this Packard senate to go through the farce of a contest, and to seat two outsiders named Baker and Kelso, who were not elected by the people.

The evidence in support of the third conclusion is furnished by the witnesses of both contestants. It is easy to understand that such a body of men so fraudulently assembled could not be kept together by a sense of duty or other legitimate means. Accordingly the State-house, which they seized, and in which they were gathered, was barricaded and surrounded with troops, and the members were kept in their halls day and night. Orders were given by the pretended officers of the legislature, and especially on the day of election, to keep members present by force. Some who were absent in spite of these precautions were fraudulently personated as present, and others were allowed to record their votes the next day. But many of the members were impecunious. "They needed money to meet their necessities, they had to live, and wanted to be helped from time to time as their money gave out." Louis J. Souer, who figures prominently in all these frauds in behalf of Kellogg, and who was a member of the lower house, advanced "out

of his own money" about $3,000, much of which he admits was never returned. John A. Walsh and other accommodating witnesses and friends of Kellogg also advanced money. These advances were called loans, made on warrants or vouchers. It is impossible to mistake the meaning of such testimony. What Souer calls loans are spoken of by other witnesses very differently, who say these advances were bribes, but they were to be called loans if any question should arise about their character. The testimony given by the witnesses introduced by Kellogg himself is overwhelmingly convincing that force, fraud, and bribery were all needed to keep this motley crowd of conspirators against the people of Louisiana in their barricaded den of iniquity.

In support of the fourth conclusion the evidence is equally convincing, for after all these frauds to cheat the voters, to change the returns, and to force an assemblage, Kellogg was in danger of losing the prize. Warmoth testifies: "There was a bitter fight for the Senatorship, not so much on my part, although I was spoken of, but between Kellogg and Pinchback." The witness himself "was a dark horse," thinking, may be, neither could be elected, and the honors would fall on him. "My eyes," he adds, "were not altogether blind to that contingency." Even after Kellogg was nominated he thought it was absolutely necessary for him to get all the votes in order to be admitted to the seat.

Thus, both to secure the nomination and the election, the field for bribery and other corrupt practices was enlarged. Kellogg now added threats also. He declared if he was not elected he would disband the concern and turn them all over to the Nicholls government.

Quite a number of witnesses have testified directly and positively that they saw Kellogg pay money to different members to vote for him for Senator.

A large number are shown to have admitted that they received money for voting for Kellogg, and many of these admissions were made under oaths and taken voluntarily and without inducement.

The evidence establishing direct bribery with money of a large number of the members is simply crushing. If a tithe of this evidence is credible there can be no escape from the conclusion that Kellogg secured his election by direct and unblushing bribery. Offices under the Federal administration were also promised to secure the same result, and how faithfully these promises were fulfilled is unmistakably disclosed in the evidence.

The evidence referred to in support of the four first conclusions before announced can leave no doubt in any rational mind of the correctness of the fifth conclusion as to the reasons which urged the sitting member so earnestly to oppose a full investigation on the former hearing of this case. If such investigation had been made, as it was once ordered by the Senate and resolved by the committee, and the evidence now before us had been taken, it would be doing violence to all possible respect for the United States Senate to suppose the sitting member could have been declared entitled "on the merits" to take a seat in this body. It was indispensably necessary to conceal the facts to discover any merit in his title.

In support of the sixth conclusion the evidence is, if possible, still more convincing.

On the 5th day of May last the Senate directed this committee to investigate the charges made by the memorialist. It is significant that this order was adopted by the Senate only after the most earnest and persistent opposition from the sitting member himself.

The passage of this order by the Senate to take testimony dates the beginning of efforts by the sitting member and his assistants to suppress evidence, which your committee believe were never exceeded in energy and varied devices.

The following special dispatches from Washington City appeared in the Times newspaper of New Orleans on the 13th and 16th days of May, respectively:

WASHINGTON, *May* 12, 1879.

In view of the interest the leading Republicans and the Administration take in the result of the contest for Kellogg's seat, it is certain that any Republican who can be shown to have worked against him at home will stand a slim chance of any recognition from Hayes or the next administration if it be Republican. Kellogg is playing his hand for all it is worth, and don't intend to have any fire in the rear if he can help it.

W. H. R.

WASHINGTON, *May* 15, 1879.

Everything is not lovely in Republican circles in Louisiana; in fact, quite the reverse. There are said to be some people in the party who are not helping the Hon. William Pitt Kellogg as they ought, and one of them holds a high position in the custom-house.

The party and the President are both rallying to the assistance of the Hon. W. P. Kellogg with some solidity, and the Republican in Louisiana who refuses to actively aid in

this contest may make up his mind to go to the rear if Kellogg wins or the next administration is Republican.

The Hon. John Sherman and Attorney-General Devens have signified their willingness to aid Kellogg in this contest all they can, and some of the custom-house rolls are very likely to be revised pretty soon.

W. H. R.

There can be no doubt as to the intent of this notice, and the evidence discloses with striking clearness the effect. It should be remembered in this connection that the frauds which were to be investigated could only, in their nature, be proven by those who were either members or officers of the pretended Packard legislature, and by those who were permitted to have free access to it, and by others who were in Kellogg's confidence at the time the frauds were committed. All others were excluded by bayonets from this barricaded mock legislature, thus conspiring to defraud the people its members pretended to represent. They were plainly notified of the consequences which they must expect, both from this Administration and the next, who would dare reveal what they knew of these frauds, or who failed actively to prevent such revelation.

The rewards were as unstinted as the threats were positive. The examination by this committee began the 5th of June. During this month of June there were thirty-nine of the members of this Packard mob of Kellogg conspirators holding Federal offices, nearly all in the custom-house at New Orleans, which constituted about one-half the number claimed to be present at the time of Kellogg's election. Thirty-nine so employed appear by the testimony before your committee. Other statements have been made to the public increasing the number of said Packard legislators so employed to fifty-six. The object of these appointments is not left by the evidence to conjecture. The evidence is direct, positive, unimpeached, and undisputed that the object was to prevent revelations against Kellogg.

H. T. Brown testified that Morris Marks (revenue collector, and who was one of Kellogg's most active supporters) said to witness in June or July, "I cannot take care of any of my friends now while this fight is going on about Kellogg. I have to appoint a set of G—d d—d curs and hounds to keep them from squealing on Kellogg." Morris Marks was present during the investigation by the subcommittee in New Orleans; was actively at work for Kellogg; was himself a witness in behalf of Kellogg; and did not deny this statement of Mr. Brown.

Similar statements and allusions frequently occur in the evidence, and they are overwhelmingly corroborated by many facts. Witnesses were appointed to offices immediately before they were to testify, and were also appointed promptly after they had testified satisfactorily to Kellogg. Witnesses who were clearly convicted of perjury and false swearing before this committee were appointed to places, plainly as rewards for such perjury and false swearing. Witnesses who were proven to have made admissions that they knew Kellogg was not elected, or that his election was corrupt, and threatened to reveal what they knew if they were not given offices, promptly received the offices and as promptly testified that Kellogg was elected, and by the fairest means possible!

The instances of this use of the public offices to hush witnesses, to procure witnesses, and to reward witnesses are as numerous as they are disgraceful. Your committee do not believe such shameful civil service degradation can be found in the annals of any civilized people. It is pregnant evidence of all the charges of fraud and corruption against the sitting member. It cannot be supposed that such means were employed to maintain a title which was good "on the merits." It cannot be doubted that such means were employed only to maintain a title which was secured by fraud, and which could only be retained by perjury. Your committee are not authorized to say and will not say that the President and certain of his Cabinet were willing parties to this corrupt use of the public offices; but they feel constrained to say that if they had been willing parties they could not have been more accommodating and compliant to the sitting member.

The evidence clearly reveals another very striking and unusual method of using the public offices. Those who held the offices were not only themselves faithful to their chief and his title "on the merits" in their own testimony, but they were active and vigilant to make others so. They ceased not to travel and labor in behalf of the sitting member to the utter neglect of their public duties, and without any cessation of their pay from the public treasury.

Several members and officers of the body which pretended to elect Kellogg admitted, as the evidence shows, voluntarily, that there was no quorum present, that absent members were falsely personated, that the roll as made up was false, and that Kellogg had used bribery and corrupt means to secure his election. The memorialist, knowing the character of all these people who were parties to this enormous fraud, resorted to the natural precaution to have their statements reduced to writing and sworn to before venturing to summon them as witnesses. That such affidavits had been made, and that a number of those who made them had been or would be summoned to Washington as

witnesses in behalf of the memorialist, became known to the sitting member's vigilant sentinels in the custom-house. One employé of the custom-house came on to Washington in advance of the witnesses, among other things "to arrange with Kellogg" for certain of the witnesses. A notorious detective also came on in advance and registered in this city under an assumed name. This detective testified that he was sent by an officer in the custom-house to watch the counsel of the memorialist and to aid Kellogg. Your committee do not rely on the character of this witness to establish his credit. His very service for Kellogg was discrediting. Like most of the witnesses in this case, he is only entitled to credit as his statements are corroborated, and many of his statements are most strikingly corroborated, and much that he said is shown by others to be true. The officer in the custom-house who is charged to have employed this detective was known to be very influential with the witnesses. He took the same train with the witnesses on their departure from New Orleans for this city. He traveled with them the entire distance; he exhorted the witnesses on the way to stand by their party; he telegraphed notice to Kellogg of the time they would arrive in Washington, and he remained with them, ate with them, and slept with them until the examination here closed. It is shown, too, that from the time this investigation was ordered by the Senate until its close in this city an active telegraphic correspondence was going on between the sitting member and his assistants here and the collector of customs himself in New Orleans. The telegrams are in cipher, and are herewith reported to the Senate. They most clearly relate to the witnesses, and are pregnant with all the *indicia* of fraud, collusion, and corruption.

The witnesses arrived in Washington about 10 o'clock p. m. on the 4th of June, and their examination by this committee was to commence the next morning. Whatever arrangements, therefore, were necessary to be made with or ratified by the sitting member to induce them to deny the affidavits they had made in New Orleans had to be completed during that night and before the meeting of this committee the ensuing morning. Accordingly the employés of the custom-house and the detective who came in advance from New Orleans and several others already in Washington in the Government's employ and Kellogg's service met the witnesses at the depot on their arrival. The detective swears that five of the witnesses were conducted by him, under previous arrangement, to Kellogg's office after midnight. He says the witnesses were afraid of prosecution if they denied their sworn statements made in New Orleans, and that to relieve this fear some law was read to them to the effect that they could not be indicted for such denial. Being satisfied on this point, the witnesses were willing to contract, and the detective says did receive and accept from Kellogg money and promises of offices during his Senatorial term, and in consideration thereof did pledge themselves to disappoint the memorialist, who had called them as witnesses on the faith of their sworn statements, and to testify in all respects in favor of the sitting member. Thomas Murray did not attend this night conclave. He only of the witnesses was faithful to his statement made in New Orleans. He refused to accept the bribes offered him to do so. He and the detective both testified that such bribes were repeatedly urged upon him in increasing amounts. Refusing persistently to accept all offers to testify falsely, he was then offered money not to testify at all. He was urged to disobey the summons of this committee and escape into Canada, where he was to be well maintained until the investigation was closed, and he should receive a telegram in the words, "The Union forever," by which he was to understand he could safely return. All these offers he refused, and did appear and testify, under the frowns of his comrades, to the truth of his previous statements.

Another witness, Milton Jones, accepted the bribe but hesitated to commit the perjury. In his stress he begged the counsel of the memorialist not to require him to testify, because he would be compelled to swear falsely under the influence of "big money." Because of this earnest appeal he was not sworn by the memorialist. This witness was asked by Kellogg, through his faithful detective, to return the money, the price of the perjury he had thus avoided committing, but he refused to return it. Subsequently he was called by the sitting member before the subcommittee in New Orleans and made to execute his criminal bargain. Other devices were employed by the sitting member to suppress truth and establish falsehood. Those who refused to swear falsely were assailed as untrue to their party and social ostracism itself was visited upon them. Schemes were contrived to entrap them into inconsistent admissions. Witnesses who admitted they thought it legitimate to make and to swear to false statements were called to impeach the credibility of those who refused to imitate their example. Detectives were actively engaged under friendly professions in efforts to involve the memorialist in like briberies and frauds with those so abundantly proven upon the sitting member, all of which your committee cheerfully report not only failed but recoiled heavily on the sitting member. Witnesses were diligently trained to believe that the ejection of Kellogg from the Senate would be the defeat of the Republican party in the nation and in Louisiana; that such defeat would render it impossible for any Republican to live in the State, and that perjury was a virtue when committed for the success of the Republican

party. All these facts and very many more of like kind will be found in the testimony herewith reported to the Senate.

That such is the testimony was not denied before your committee either by the sitting member or his able counsel. Indeed, it could not be denied without denying the plain language of very many witnesses. But it was earnestly insisted before your committee by both the sitting member and his counsel that this testimony would not justify the conclusion that the sitting member was not entitled to the seat in the Senate for two reasons, and first because they alleged the witnesses ought not to be believed.

Two grounds are urged for disbelieving the witnesses: (1) because they were contradicted, and (2) because they were impeached as not entitled to credit on account of bad character.

The contradictions were almost exclusively by witnesses who were parties to the crimes proven. To illustrate: If a witness testified positively that he saw money paid to a member for his vote, the implicated member was called to contradict this by testifying he did not receive money for his vote. Under this rule few criminals would be found guilty. It frequently happened, too, that the implicated member had previously and frequently admitted, and often under oath, that he did receive money for his vote. So he contradicted himself as well as the witnesses. It will be seen from the evidence, too, that these contradicting witnesses had often been provided with offices or other consideration after they made the admissions they were called to contradict, and others were promptly appointed to offices in the ever-accommodating custom-house after they had faithfully made the contradictions.

Your committee attach little if any weight to such contradictions. In our view they are often strongly confirmatory of the witnesses-in-chief.

Besides many of the material frauds proven are not disputed at all, and some are even admitted, because they were of a character which did not admit of contradiction. This is especially true of the frauds resorted to to prevent a fair election by the people; to change the result as returned by the commissioners of election, and the force and frauds employed to assemble and keep together the pretended Packard legislature.

Let us then proceed to consider the allegation that the testimony should not be believed because the witnesses were impeached on account of general bad character.

Some few of the witnesses were not so impeached at all, and why they were not impeached your committee do not understand, since the impeaching resources of the sitting member seemed to be exhaustless. As it is, however, the testimony which is unimpeached and uncontradicted is ample not only to justify but to require the adoption of the resolution herewith submitted. But your committee do not find it necessary to rest their conclusions solely on this unimpeached and uncontradicted evidence.

We admit that a great number of the witnesses called on both sides were of very bad character, not only for truth, but for every other virtue, and if their credibility depended solely upon character they ought not to be believed. But the rules of law furnish safe guides in weighing this evidence.

The accomplice of a criminal is necessarily of bad character, for he is a criminal himself. If he is not to be believed because he is an accomplice, and therefore of bad character, then an accomplice in no case ought to be allowed to testify. But in spite of bad character they are often the only accessible witnesses, and their evidence is often most satisfactory. Were it otherwise, those criminals would often be safest whose crimes were greatest.

In the case before us nearly all the witnesses examined were the accomplices of Kellogg in the crimes and frauds which resulted in his pretended election to the Senate. They were all conspirators against the people of Louisiana. The very fact that they were associates and accomplices in this conspiracy furnished the most conclusive proof of bad character. No other proof was needed to establish such bad character. The conspirators were surrounded with troops by order of their chief, Kellogg himself, by his power as governor, and the Army was employed to protect them day and night from intrusion by people worthy of credit by reason of good character. Being faithless in their very assembling to all good people, the chief chance of redress for good people was in the natural hope they would become faithless to each other, and reveal the frauds, briberies, and corruptions which cemented them for evil. Their revelations appear in the evidence, and your committee do not doubt would far more abundantly appear if the Federal Administration would withdraw the patronage which has purchased the silence and perjury of so many of the gang.

All the facts and circumstances of corroboration required by the rules of evidence to accompany the testimony of accomplices abundantly and most remarkably sustain the witnesses who testified to the frauds, briberies, and corrupt practices upon which we have based our conclusions, and the impeaching witnesses are themselves most strikingly discredited by such facts and circumstances. Indeed, your committee do not hesitate to affirm that much of the evidence must be believed, because the corroborations which accompany and surround it make it impossible that it can be false.

The sitting member insisted upon conducting much of the examination in his own behalf, and this privilege was accorded him. In the style of his questions and the conduct of his cause he often exhibited most striking corroboration of the witnesses who were testifying of his guilt. The corroborations brought out by himself not only occurred in his cross-examinations of the witnesses called by the memorialist, but also in his examinations of witnesses called by himself to impeach or contradict the witnesses of the memorialist.

Your committee are unable to see how an impartial legal mind can read the evidence taken and doubt the guilt of the sitting member upon every charge which has been made against him, notwithstanding so many of the witnesses must be admitted to be disreputable.

But the sitting member, through his very able counsel, also insisted, with great earnestness and skill before your committee, that the Senate at a former session having, "after and upon evidence going to the merits of the case," declared that Kellogg was "upon the merits of the case entitled to the seat," this decision is final and conclusive, and cannot now be re-examined and reversed. This was the first and chief position on which the title of the sitting member was made to rest. Your committee have fully considered the question thus presented, and cannot doubt the correctness of the conclusions at which they have arrived.

Stated in the light of the facts now known and herewith reported to the Senate, this position would read thus: That though the sitting member was not, in fact, chosen by the legislature of Louisiana; and though the body of men alleged to have elected him was assembled through fraud, was held together by force, and was controlled by bribery and corruption, and all this was accomplished by a conspiracy to defraud the State and people of Louisiana, of which conspiracy the sitting member was himself the chief, yet, the Senate having decided in ignorance and by the suppression of these facts that the sitting member was entitled on the merits to the seat, the Senate is compelled to allow him to retain the seat after full knowledge that every fact which was assumed to exist when he was admitted is and was false and untrue. The reply to such a position is sufficiently furnished in the statement of the position itself. But your committee will not rest the argument here, and will consider it in the light of precedent and law. Counsel for the sitting member says:

"If, therefore, this committee and the Senate shall set aside this judgment on the merits, it will present to the country and the world a spectacle not seen before in the century of our national existence just closed."

We might justly reply to this that this case, in the facts now proven, already presents to the country and the world a spectacle not before seen in this century or any previous century of this or any other nation. We trust such a spectacle will never again be presented, and that it may not be it ought to be now condemned by all men and especially by this Senate. If it shall be understood that seats once procured in this body by any means however false and fraudulent which bad men may employ cannot be taken away, this Senate may soon be largely composed of members not chosen by the legislatures of the States. Successful frauds will displace the positive requisition of the Constitution in the elections of Senators. A case without precedent cannot be decided by precedent. Fraud has certainly become a powerful agent in our politics, but we are not willing to admit it has yet become the supreme law above review and beyond remedy.

But while no case like this was ever before presented for decision, yet principles have been announced in other cases which will furnish some guide to a proper determination of this question.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the rehearing asked was refused because "all the facts and questions of law involved were as fully known and presented to the Senate on the former hearing as they were then presented in the memorial of the legislature asking a rehearing." It was held that in such a case the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

In the Butler and Corbin case, in the Forty-fifth Congress, the report of the minority of the Committee on Privileges and Elections correctly stated that no allegation was made "that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony had been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same; the facts are the same, and the questions of law are the same." The report further said: "If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not, in justice

and right, to be gravely heard and considered on the merits." The Senate adoped these views, though it is a significant fact that a large and intelligent minority of the Senate voted to unseat Mr. Butler and to admit Mr. Corbin, when not a single new fact or question of law had been presented or offered.

Your committee freely admit that a decision rendered on the merits ought not to be afterwards reviewed and reversed on light or even doubtful grounds. In the courts the familiar rule is that new evidence to authorize a reversal "ought to be material and such as would probably produce a different result." In this case your committee are willing to apply a much stronger test, though there is no reason why a stronger should be required. Let us adopt and apply the rule so strongly and forcibly expounded by a distinguished member of this Senate in the following language:

"The Senate would do manifest injustice were it hastily and without the most plain and most manifest reason to reverse a decision that had been made seating a Senator on this floor. The case must be extremely strong that would justify such a proceeding. All that I am free to admit, but to say that the technical rule of *res adjudicata* that applies to courts of justice applies in this chamber on a question of this kind is to confound all distinctions and to disregard all the laws of this body." (Congressional Record of May 7, page 24.)

Let us now apply this rigid rule to the present case:

1. On the former hearing not a single witness was examined. Some admissions were made by the parties, and some reports of investigations by Congressional committees not on the issues involved in this contest "were agreed to be considered in evidence as far as they were pertinent." This was done only to narrow the field of investigation.

On this hearing nearly one hundred and fifty witnesses have been examined, making over 1,200 printed pages of testimony of the most material and controlling character.

2. On the former hearing the memorialist begged and pleaded for the privilege of having witnesses called and examined on five points not covered by the admissions and reports above referred to, and by which witnesses he alleged he could prove, among other things, the direct personal complicity of the sitting member in glaring frauds in the pretended legislature which elected him. All these appeals were refused by the majority of the committee, although an investigation had been previously ordered by the Senate and resolved upon by the committee, and the investigation was suddenly closed against the protest of the memorialist and a minority of the committee.

On the present hearing the witnesses have been examined, and the complicity of the sitting member in the frauds alleged has been most convincingly established.

3. On the former hearing there was no evidence and no opportunity to produce evidence showing conspiracies, briberies, and other corruptions by the sitting member to procure a fraudulent legislature, and to control the members thereof in his own election to the Senate.

On the present hearing such conspiracies, briberies, and corruptions of the most startling, unblushing, and unparalleled character have been positively testified to by numerous witnesses, and these briberies and corruptions have been shown to extend to the witnesses in the case in the very face of the Senate.

Your committee could multiply the features of contrast between the former and the present hearing in this case, but we forbear. Under the most technical rule of *res adjudicata* there is not a court in civilized Christendom which would hesitate to review and reverse a judgment so utterly unauthorized and unjust; and surely it cannot be contended that the Senate can have less power than a court to annul such a decision.

Conceding then, for the argument, that the Senate in passing upon contests for seats in this body acts as a court, and that the technical rule of *res adjudicata* applies to decisions rendered in such cases, do courts not re-examine, review, and reverse their decisions? Are not appeals, writs of error, motions for new trials, and bills of review familiar to us all? The Senate, in considering such cases in the first instance, is not bound by the forms of proceedings in the courts. We have no declarations, no complaints, no bills in chancery, nor pleas, demurrers, answers, and joinders of issue in the Senate. If the Senate proceeds to original judgment without the pleading known to the courts, may not the Senate also proceed to review, re-examine, and reverse such judgments when good cause is shown, without resorting to the processes which in such cases are known to the courts? If the Senate is a court, then if the facts in a given case are such as would require the vacation of a judgment if rendered by a court, surely the Senate would also be authorized to vacate such judgment. The exclusion by the court of material testimony on the first hearing, the discovery of new and material evidence since the hearing, the existence of frauds, forgeries, briberies, and perjuries in procuring the first judgment are all well-known grounds on either one of which courts, by some of the methods of proceeding, will review and reverse such judgments. All these grounds are shown by the evidence and the records of this Senate to exist in extraordinary clearness, force, and repeated abundance in the case we are now considering. Is the Senate, by being likened to a court, to be bound by decisions which a court would rigorously vacate and annul?

But the attempt to apply to the Senate the technical rule of *res adjudicata* as it obtains in the courts is a palpable sophistry and not an argument. In the correct and forcible language of Senator Thurman, before quoted, "it confounds all distinctions and disregards all the rules of this body."

In cases where the contestants claim to represent the same State government, and the issue between them is one of informality or irregularity, or non-compliance with statutory provisions, there would be some show of reason for the application of this doctrine. In such cases there ought to be an end of litigation in the Senate as well as in the courts. A wise policy would certainly require in such cases the principle if not the rule of *res adjudicata*. It is to such cases the authorities cited by the eminent counsel for the sitting member were intended to apply.

But the questions involved in the present case rise immeasurably above such issues. They are not questions of regularity, but of authority. They are not questions of discretion, but of duty. They exist more between the State of Louisiana and this Senate than between the contestants. In their nature these questions are not merely judicial, but political in the highest sense.

The Constitution says:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof."

Can a man sit as a member of this Senate who was not chosen by the legislature of his State? But suppose, in ignorance of the fact that he was not so chosen, the Senate is induced to declare him entitled to the seat "on the merits," after investigation; does such erroneous decision supplant the Constitution and give him a title after the mistake becomes known?

Let us suppose an impossible case: Suppose a majority of this Senate should for any purpose, partisan or otherwise, seat a man in this body who they knew was not chosen by the legislature of his State, would any future Senate be compelled to continue such person in the seat? Would not such continuance be as criminal as the original admission? Will any man pretend that a plain constitutional provision can be superseded by a mistaken decision of this Senate? If the sitting member was not chosen by the legislature of Louisiana, every hour he sits on this floor after that fact is known is a violation of the Constitution. It is a question of obedience to the Constitution. Can any person estop this Senate, can the Senate estop itself, from obeying the Constitution? Can the Senate estop itself from inquiring *toties quoties* whether he was chosen by the legislature? Can it be so estopped by its own erroneous decision on a former hearing?

In cases like the one now before us, your committee do not hesitate to adopt the language employed by those eminent constitutional lawyers, Mr. Collamer, of Vermont, and Mr. Trumbull, of Illinois, in the Fitch and Bright case in 1859. They said:

"The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of re-examination and correction of error and mistake, incident to all judicial tribunals and proceedings, remains with the Senate in this respect, as well to do justice to itself as to the States represented or to the persons claiming or holding seats. Such an abiding power must exist to purge the body from intruders, otherwise any one might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud or falsehood, or even by papers forged or fabricated."

In the light of the evidence now before the Senate the sitting member was admitted by a wrongly procured decision of the Senate in his favor by means quite as criminal as those stated in the last paragraph quoted, since the means employed by him to secure his pretended election included conspiracies, briberies, and perjuries often repeated, and the knowledge of which was vigorously suppressed on the former hearing. He was not chosen by the legislature of Louisiana. He was chosen by a body of men who conspired with him to defeat the will of the State, and who excluded by force the members elected by the people in order that the conspirators might be enabled to accomplish their work.

The primary authority to determine what is the legislature of a State is and must be the State herself. When the State determines that question for herself it is determined for all the world. In case there are two governments, or two bodies each claiming to be the true government or the true legislature of the State, and the State has not determined the controversy, the duty may devolve upon others, and in this case upon this Senate to adjudge that question *pro hac vice*.

In January, 1877, a portion of the members elected by the people united with others not elected and seized the State house by co-operation with the sitting member, who was then acting as governor, were barricaded in the building, which was surrounded with troops, and refused to permit other elected members to be admitted into the building. The barricaded persons called themselves the legislature, and the excluded members met in St. Patrick's Hall and called themselves the legislature. This was the condition of things when the sitting member presented his credentials to this Senate and asked to be ad-

mitted to his seat on this floor. He was not admitted, but his credentials were referred to the Committee on Privileges and Elections. Before the committee took any action whatever the issue thus raised between these two rival bodies was settled by the State. It was decided that the body which assembled and organized in St. Patrick's Hall was the true legislature of the State. This decision was accepted by all the people of Louisiana and by all the departments of her government, by the President and House of Representatives, and by the circuit and district courts of the United States, and finally by all the persons who composed the body which seized the State-house. The latter, which had been known as the Packard legislature, disbanded, leaving not a resolution, or act, or other thing which has ever been recognized as authoritative, or which has been claimed to be valid, save only the pretended election of the sitting member to this Senate; and this single act has been recognized only by this Senate. The former body, which had been known as the Nicholls legislature, performed all the functions of a legislature from the beginning, passed laws which are obeyed by all the people and enforced by all the courts. All the persons who had been elected left the pretended Packard legislature and took their seats in the Nicholls legislature, and those who had not been elected admitted they were not elected, without even a contest, and went home or into the custom-house or some other Federal office.

The regular legislature thus organized, composed of all the members elected by the people, chose the memorialist to the seat he is now claiming. The election was free, regular, legal, and without taint of corruption of any kind, and his credentials are in due form. Of a legislature which was composed, when full, senate and house, of one hundred and fifty-six members, the memorialist received over 140 votes.

Since the former hearing in this case, the supreme court of Louisiana has also decided that the officers of the Packard government had, in January, 1877, no official status, and that no acts performed by them at that time, though purporting to be performed *virtute officii*, could have the force and effect of official acts.—(State *ex rel.* Lipo *vs.* Peck, 30 Annual Reports, 280.)

And in addition to all this, the evidence now taken shows that the Packard legislature, which pretended to elect the sitting member, was, in fact as well as in law, not a legislature, but was a body of men assembled by fraud, held together by force and controlled by bribery; with the aid and in the interest of the sitting member.

Thus, the facts, the law, the integrity of this Senate, and the voice of a too long defrauded State of this Union unite in demanding the passage of the following resolutions which your committee now submit for adoption by the Senate, to wit:

1. *Resolved*, That according to the evidence now known to the Senate, William Pitt Kellogg was not chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th day of March, 1877, and is not entitled to sit in the same.

2. *Resolved*, That Henry M. Spofford was chosen by the legislature of Louisiana to the seat in the Senate for the term beginning on the 4th day of March, 1877, and that he be admitted to the same on taking the oath prescribed by law.

VIEWS OF THE MINORITY.

The undersigned, a minority of the Committee of Privileges and Elections, to whom was referred the memorial of Henry M. Spofford, claiming the seat now occupied by William Pitt Kellogg, submit the following as their views:

On the 30th day of November, 1877, the Senate passed the following resolutions:

"*Resolved*, That William Pitt Kellogg is, upon the merits of the case, entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th of March, 1877, and that he be admitted thereto on taking the proper oath.

"*Resolved*, That Henry M. Spofford is not entitled to a seat in the Senate of the United States."

The party majority in the Senate has changed since Mr. Kellogg took the oath of office in pursuance of the above resolution. Nothing else has changed. The facts which the Senate considered and determined were in existence then as now. It is sought, by mere superiority of numbers, for the first time to thrust a Senator from the seat which he holds by virtue of the express and deliberate final judgment of the Senate.

The act which is demanded of this party majority would be, in our judgment, a great public crime. It will be, if consummated, one of the great political crimes in American history, to be classed with the rebellion, with the attempt to take possession by fraud of the State government in Maine, and with the overthrow of State governments in the South, of which it is the fitting sequence. Political parties have too often been led by partisan zeal into measures which a sober judgment might disapprove, but they have ever respected the constitution of the Senate.

The men whose professions of returning loyalty to the Constitution have been trusted

by the generous confidence of the American people are now to give evidence of the sincerity of their vows. The people will thoroughly understand this matter, and will not be likely to be deceived again.

We do not think proper to enter here upon a discussion of the evidence by which the claimant of Mr. Kellogg's seat seeks to establish charges affecting the integrity of that Senator. Such evidence can be found in abundance in the slums of great cities. It is not fit to be trusted in cases affecting the smallest amount of property, much less the honor of an eminent citizen, or the title to an object of so much desire as a seat in the Senate. This evidence is not only unworthy of respect or credit, but it is in many instances wholly irreconcilable with undisputed facts, and Mr. Kellogg has met and overthrown it at every point.

GEORGE F. HOAR.
ANGUS CAMERON.
JOHN A. LOGAN.

WEDNESDAY, *March* 31, 1880.

On motion by Mr. Logan,

Ordered, That the evidence taken by the Committee on Privileges and Elections in the investigation of the allegations set forth in the memorial of Henry M. Spofford, claiming to be Senator from the State of Louisiana, be recommitted to said committee for the purpose of revising and correcting said evidence.

On motion by Mr. Logan,

Ordered, That the report of the evidence already printed be withdrawn from further distribution.

[The debate is found on pages 1985–1988 of the Congressional Record, vol. x, part 2.]

THURSDAY, *April* 22, 1880.

On motion by Mr. Saulsbury, the Senate proceeded to consider the resolutions reported by Mr. Hill, of Georgia, March 22, 1880, from the Committee on Privileges and Elections, declaring that William Pitt Kellogg was not elected, and that Henry M. Spofford was elected, a Senator of the United States from the State of Louisiana for the term beginning March 4, 1877.

FRIDAY, *April* 23, 1880.

The Senate resumed, &c.

[The debate is found on pages 2676–2683 of the Congressional Record, vol. x, part 3.]

MONDAY, *April* 26, 1880.

The Senate resumed, &c.

[The debate is found on pages 2735–2754 of the Congressional Record, vol. x, part 3.]

TUESDAY, *April* 27, 1880.

Mr. Hoar submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the proceedings* of the Committee on Privileges and Elections in the contested-election case of Spofford *vs.* Kellogg, in the months of October and November, 1877, be printed for the use of the Senate."

FRIDAY, *April* 30, 1880.

The Senate resumed, &c.

[The debate is found on pages 2909–2911 of the Congressional Record, vol. x, part 3.]

MONDAY, *May* 3, 1880.

The Senate resumed, &c.

[The debate is found on pages 2952–2960 of the Congressional Record, vol. x, part 3.]

TUESDAY, *May* 4, 1880.

The Senate resumed, &c.

[The debate is found on pages 2972–2982 of the Congressional Record, vol. x, part 3.]

FRIDAY, *May* 7, 1880.

The President *pro tempore* announced that the morning hour had expired, and called up the unfinished business of the Senate at its adjournment yesterday, viz, the resolutions reported by Mr. Hill, of Georgia, from the Committee on Privileges and Elections, March 22, 1880, declaring that William P. Kellogg was not elected, and that Henry M.

* Printed with Report No. 388, Senate Reports, 2d sess. 46th Cong., vol. 4.

Spofford was elected, a Senator of the United States from the State of Louisiana for the term beginning March 4, 1877; and the Senate resumed the consideration of the said resolutions.

After debate,

On motion by Mr. Hoar to amend the resolutions as follows, viz: Strike out all after the word "resolved" where it first appears, and insert the following:

"That in the judgment of the Senate the matters reported by the Committee on Privileges and Elections at the present session respecting the right to the seat in this body now held by William Pitt Kellogg and claimed by Henry M. Spofford are not sufficient to justify the reopening of the decision of the Senate, pronounced in its resolution adopted on the 30th day of November, A. D. 1877, that said Kellogg was, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States from the State of Louisiana for the term of six years commencing on the 4th day of March, A. D. 1877, and that said Spofford was not entitled to a seat in the Senate of the United States,"

On motion by Mr. Conkling (at 5 o'clock and 10 minutes p. m.), the Senate adjourned.

[The debate is found on pages 3108–3116 of the Congressional Record, vol. x, part 4.]

MONDAY, *May* 10, 1880.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar,

After debate,

Ordered, That the further consideration thereof be postponed to to-morrow.

[The debate is found on pages 3161–3166 of the Congressional Record, vol. x, part 4.]

TUESDAY, *May* 11, 1880.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar,

Pending debate,

On motion by Mr. Eaton, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 3232–3240 of the Congressional Record, vol. x, part 4.]

WEDNESDAY, *May* 12, 1880.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3270–3277 of the Congressional Record, vol. x, part 4.]

THURSDAY, *May* 13, 1880.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3313–3322 of the Congressional Record, vol. x, part 4.]

FRIDAY, *May* 14, 1880.

The Senate proceeded, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3362–3367 of the Congressional Record, vol. x, part 4.]

TUESDAY, *May* 18, 1880.

The Senate proceeded, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3456–3462 of the Congressional Record, vol. x, part 4.]

WEDNESDAY, *May* 19, 1880.

The Senate proceeded, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3511–3515 of the Congressional Record, vol. x, part 4.]

THURSDAY, *May* 20, 1880.

The Senate resumed, &c.

The question being on the amendment proposed by Mr. Hoar.

[The debate is found on pages 3551–3565 of the Congressional Record, vol. x, part 4.]

SATURDAY, *June* 5, 1880.

The Senate resumed, &c.

[There was no debate.]

MONDAY, *June* 7, 1880.

The Senate resumed, &c.
The question being on the amendment proposed by Mr. Hoar.
[The debate is found on pages 4238–4244 of the Congressional Record, vol. x, part 5.]

FRIDAY, *June* 11, 1880.

The Senate resumed, &c.
The question being on the amendment proposed by Mr. Hoar,
After debate,
Ordered, That the further consideration of the resolutions be postponed to to-morrow.
On motion by Mr. Williams to postpone the present and all prior orders, it was determined in the affirmative—yeas 28, nays 16.
[The debate is found on pages 4414–4431 of the Congressional Record, vol. x, part 5.]

[Third session of the Forty-sixth Congress.]

CREDENTIALS OF THOMAS C. MANNING.

TUESDAY, *December* 7, 1880.

Mr. Jonas presented the credentials of Thomas Courtland Manning, appointed a Senator by the governor of Louisiana to fill the vacancy occasioned by the death of Henry M. Spofford, who claimed to be elected Senator from that State; which were referred to the Committee on Privileges and Elections.

COMPENSATION TO MR. SPOFFORD'S REPRESENTATIVES.

TUESDAY, *February* 22, 1881.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, reported the following resolution:
"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay out of the 'miscellaneous items' of the contingent fund of the Senate, to the legal representatives of the estate of the late Henry M. Spofford, contestant of a seat in the Senate from the State of Louisiana, a sum equal to the compensation, without mileage, of a Senator from the 4th day of March, 1877, to the 20th day of August, 1880, inclusive."
The Senate proceeded by unanimous consent to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.
Ordered, That it be engrossed and read a third time.
The said resolution was read the third times, by unanimous consent.
Resolved, That the Senate agree thereto.
[The debate is found on pages 1911, 1912 of the Congressional Record, vol. xi, part 3.]

[First session of the Forty-seventh Congress.]

REIMBURSEMENT OF MR. KELLOGG'S EXPENSES.

FRIDAY, *March* 17, 1882.

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times, by unanimous consent:
"*Resolved*, That there be paid out of the contingent fund of the Senate the sum of $9,550 to William Pitt Kellogg, a Senator from the State of Louisiana, in reimbursement of expenses necessarily incurred by him in defense of his title to his seat."

MONDAY, *March* 20, 1882.

On motion by Mr. Hoar, the Senate proceeded to consider, as in Committee of the Whole, the resolution reported by him from the Committee on Privileges and Elections on the 17th instant, to pay W. P. Kellogg the expenses incurred by him in defending his title to a seat in the Senate; and no amendment being made, it was reported to the Senate.
Ordered, That it be engrossed and read a third time.
The said resolution was read the third time.
Resolved, That the Senate agree thereto.

COMPENSATION OF MR. MANNING.

WEDNESDAY, *July* 19, 1882.

Mr. Vance, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times, by unanimous consent:

"*Resolved*, That there be paid out of the contingent fund of the Senate to Hon. Thomas C. Manning, who was appointed United States Senator from Louisiana by the governor thereof to fill the vacancy caused by the death of H. M. Spofford, the sum of $1,000, in full compensation of all expenses incurred in endeavoring to obtain the seat to which his credentials accredited him."

MONDAY, *August* 7, 1882.

On motion by Mr. Kellogg, the Senate proceeded to consider, as in Committee of the Whole, the resolution reported by Mr. Vance July 19, 1882, to pay to Thomas C. Manning, appointed a Senator from the State of Louisiana to fill the vacancy caused by the death of H. M. Spofford, the sum of $1,000; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time.

Resolved, That the Senate agree thereto.

[Special session of Senate, March, 1873.]

LEWIS V. BOGY,

Senator from Missouri from March 4, 1873, till his death, September 20, 1877.

March 4, 1873, Mr. Bogy took his seat, having been elected for the term of six years from that date. March 17, the Vice-President laid before the Senate a memorial of members of the legislature, accompanied by a report of a select committee of the legislature appointed to investigate charges of bribery and corruption in the Senatorial election, praying for an investigation by the Senate of said charges. The memorial was referred to the Committee on Privileges and Elections. March 25, the committee reported that the memorial set forth that the investigation by the committee of the legislature was imperfect, and that if it had been full and fair, evidence would have been produced showing that there was corruption in Mr. Bogy's election; that the memorial did not state the character of the new evidence that could be produced, and that the Senate would not be justified in instituting an examination; that such a proceeding was of a grave character and should not be set on foot without such a statement of the evidence that could probably be produced as would appear to make it the duty of the Senate to proceed to an investigation. The committee reported a resolution that it be discharged from the further consideration of the memorial; which was agreed to.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 3d sess. 42d Cong. (special session, March, 1873), and the report of the committee from Senate Reports, 3d sess. 42d Cong. (No. 1, special session, March, 1873).

There were no debates.

TUESDAY, *February* 25, 1873.

Mr. Schurz presented the credentials of Lewis V. Bogy, elected a Senator in Congress by the legislature of the State of Missouri for the term of six years commencing on the 4th day of March, 1873; which were read.

Ordered, That they lie on the table.

FRIDAY, *February* 28, 1873.

The Vice-President laid before the Senate a resolution of the legislature of Missouri exonerating Hon. Lewis V. Bogy, Senator-elect from that State, from any suspicion of having used corrupt means to secure his election to the United States Senate.

Ordered, That it lie on the table and be printed.

TUESDAY, *March* 4, 1873.

The credentials of Lewis V. Bogy having been heretofore presented to the Senate, the oaths prescribed by law were administered to him by the Vice-President and he took his seat in the Senate.

MONDAY, *March* 17, 1873.

The Vice-President laid before the Senate the memorial of members of the legislature of the State of Missouri, accompanied by a report of a select committee of said legislature appointed to investigate charges of bribery and corruption in the recent Senatorial election in that State, and the views of a minority of the committee therewith, praying that certain charges of bribery and corruption against Lewis V. Bogy, recently elected a Senator from the State of Missouri, may be promptly and fully investigated by the Senate.

Ordered, That it be referred to the Committee on Privileges and Elections.

TUESDAY, *March* 25, 1873.

Mr. Morton, from the Committee on Privileges and Elections, to whom was referred the memorial of members of the legislature of the State of Missouri, praying that an investigation be made by the Senate of certain charges of bribery and corruption against Lewis V. Bogy in his recent election as Senator from that State, submitted a report (No. 1) accompanied by the following resolution:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of members of the legislature of the State of Missouri, together with the evidence accompanying the same, touching the allegations of bribery and corruption in the election of Lewis V. Bogy to the Senate of the United States."

The Senate proceeded to consider the said resolution; and the resolution was agreed to.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Morton (chairman), Carpenter, Logan, Alcorn, Anthony, Mitchell, Bayard, and Hamilton of Maryland.]

IN THE SENATE OF THE UNITED STATES.

MARCH 25, 1873.—Ordered to be printed.

Mr. Morton, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the memorial of thirty-seven members of the legislature of Missouri in regard to the election of Lewis V. Bogy to the Senate of the United States from that State, have had the same under consideration and submit the following report:

The memorial sets forth that the recent examination by a committee appointed by the house of representatives of the legislature of Missouri, touching the currupt use of money in the election of Mr. Bogy, was imperfect; that it was not full and fair, and in the opinion of the memorialists, if the investigation had been conducted with more vigor and with a purpose of revealing the real facts of the case, other and more important evidence would have been produced showing that there was corruption in Mr. Bogy's election.

The memorial, however, does not state what additional facts can be proven, nor indicate with any certainty the character of the new evidence that may be produced.

The committee understand that the only duty which they have upon this reference is to report to the Senate whether the memorial presents such facts as would justify the Senate in instituting an examination in regard to the election of Mr. Bogy, and are of the opinion that it does not. Such a proceeding is of a grave character, and should not be set on foot without such a statement of the evidence that could probably be produced as would appear to make it the duty of the Senate to proceed to an investigation.

The evidence taken by the committee of the legislature of Missouri also accompanies the memorial, and has been examined by the committee. It is not the province of the committee upon this reference to inquire whether the judgment pronounced by the house of representatives of the Missouri legislature upon this evidence was correct; but they express the opinion that the evidence is not of a character to require of the Senate an investigation.

The committee therefore ask to be discharged from the further consideration of the memorial and the evidence touching the election of Lewis V. Bogy to the Senate of the United States.

[Special session of Senate, March, 1873; and first sessions of the Forty-third and Forty-fourth Congresses.]

FRANCIS W. SYKES vs. GEORGE E. SPENCER; AND GEORGE E. SPENCER,

of Alabama.

December 13, 1872, the credentials of Mr. Spencer, elected for the term beginning March 4, 1873, were presented, and February 28, 1873, a memorial of Mr. Sykes claiming to have been elected for the same term was presented. Mr. Spencer was admitted, after debate, March 7. December 8, the memorial of Mr. Sykes was referred to the Committee on Privileges and Elections. April 20, 1874, the committee reported that at the time of the elections there were in Alabama two bodies, each claiming to be the legislature, one known as the court-house legislature, which had elected Mr. Spencer, December 3, 1872, the other known as the State-house legislature, which had chosen Mr. Sykes, December 10, 1872; that at the time of the election of Mr. Spencer there were eight or nine members of the State-house legislature having regular certificates of election, but "who are conceded not to have been elected"; that persons claiming the seats of these eight or nine members, but having no certificates of election, were in the court-house legislature; that the question to be decided was whether that legislature composed of a quorum of the persons actually elected should be regarded as the legislature of the State, or whether that legislature the quorum of which depended upon members not actually elected, but having regular certificates of election, should be regarded as the legal legislature; that the State-house legislature was the legislature in form, and the court-house legislature the legislature in fact; that it would not be competent for the Senate to inquire as to the right of individual members to sit in a legislature that is conceded to have a quorum in both houses of legally elected members; but that the Senate must in this case inquire into the rights to hold seats of the eight or nine members whose rights to seats were disputed, in order to determine which of the two bodies was the legal legislature; and that in such inquiry the Senate should not look merely to the evidence of the fact, but go back to the fact itself and determine who of those claiming seats were in fact elected; that the persons claiming to be the legislature who voted for Mr. Spencer constituted a quorum of the members actually elected. The committee asked to be discharged from the further consideration of the subject. There was a minority report. May 28, the Senate resolved that the committee be discharged from further consideration of the subject. A favorable report was made by the committee on a resolution to allow Mr. Sykes compensation and mileage, but no further action was taken by the Senate.

December 16, 1875, Mr. Spencer submitted a resolution that the committee be instructed to inquire whether in the election of Mr. Spencer corrupt means were used to secure his election. A report of a joint committee of the Alabama legislature on the election, and a memorial of the legislature that the seat held by Mr. Spencer be declared vacant, were also referred to the committee. May 20, 1876, the committee reported that the question whether Mr. Spencer was elected by the lawful legislature, raised in the memorial referred to, must be treated as *res adjudicata;* that upon the question whether Mr. Spencer or his friends had been guilty of bribery or corruption, the committee had made diligent inquiry, and had found that the charges were not proven; that no witness testified that Mr. Spencer or his friends had given or offered to give money or anything of value in consideration of votes; that only hearsay evidence to this effect was offered, which had been rejected by the committee. The committee reported the testimony taken and asked to be discharged from the further consideration of the subject. No further action was taken by the Senate. March 3, 1885, the Senate resolved that there be paid to Mr. Spencer the amount actually and necessarily expended by him in maintaining his title to his seat.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 3d sess. 42d Cong., and 1st sess. 43d and 44th Congs., and the reports of the committee, references to which are given in foot-notes.

Special references to the debates of each day are inserted below.

FRIDAY, *December* 13, 1872.

Mr. Morton presented the credentials of George E. Spencer, elected a Senator by the legislature of Alabama for the term of six years commencing March 4, 1873; which were read.

Ordered, That they lie on the table.

FRIDAY, *February* 28, 1873.

Mr. Goldthwaite presented a memorial* of Francis W. Sykes, claiming a seat in the Senate as Senator from the State of Alabama for the term of six years commencing March 4, 1873.

Ordered, That it lie on the table and be printed.

[Special session of Senate, March, 1873.]

THURSDAY, *March* 6, 1873.

Mr. George E. Spencer, whose credentials had been heretofore presented to the Senate

*Found in Senate Miscellaneous, 3d sess. 42d Cong., No. 94.

as a Senator from the State of Alabama, advanced to the Vice-President's chair to take the oath of office,

When

Mr. Bayard rose and objected to the oaths being administered to Mr. Spencer; and,

On the question, Shall the oaths be administered to Mr. Spencer?

After debate,

On motion by Mr. Bayard that the further consideration thereof be postponed to to-morrow,

After further debate,

On motion by Mr. Hamlin, the Senate adjourned.

[The debate is found on pages 3–19 of the Congressional Record, vol. i.]

FRIDAY, *March* 7, 1873.

The Senate resumed the consideration of the question of administering the oaths of office to George E. Spencer as a Senator from the State of Alabama; and

The question being on the motion submitted by Mr. Bayard that the further consideration thereof be postponed to to-morrow,

After debate,

It was determined in the negative—yeas 24, nays 32.

After further debate,

On motion by Mr. Bayard to refer the credentials of Mr. Spencer, and the memorial of Francis W. Sykes, claiming the seat in question, to a select committee of five Senators, it was determined in the negative—yeas, 20, nays 38.

On motion of Mr. Bayard, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Bogy, Casserly, Cooper, Davis, Dennis, Fenton, Goldthwaite, Hamilton of Maryland, Hamilton of Texas, Kelly, McCreery, Merrimon, Norwood, Ransom, Saulsbury, Stevenson, Stockton, Thurman, and Tipton.

Those who voted in the negative are Messrs. Alcorn, Allison, Ames, Boreman, Brownlow, Buckingham, Caldwell, Cameron, Chandler, Clayton, Conkling, Conover, Cragin, Dorsey, Ferry of Connecticut, Ferry of Michigan, Flanagan, Gilbert, Hamlin, Hitchcock, Howe, Ingalls, Jones, Lewis, Logan, Mitchell, Morrill of Vermont, Morton, Oglesby, Patterson, Pratt, Ramsey, Sargent, Stewart, Wadleigh, West, Windom, and Wright.

So the motion was not agreed to.

On motion by Mr. Thurman that the further consideration of the question be postponed until the committees of the Senate are organized, it was determined in the negative.

After further debate,

On the question, Shall the oaths of office be administered to Mr. Spencer? it was determined in the affirmative.

Whereupon

Mr. Spencer advanced to the chair, and the oaths of office having been administered to him by the Vice-President, he took his seat in the Senate.

[The debate is found on pages 20–29 of the Congressional Record, vol. i.]

[First session of the Forty-third Congress.]

MONDAY, *December* 8, 1873.

Mr. Gordon submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the memorial of Francis W. Sykes, claiming to be a Senator-elect from the State of Alabama, with accompanying documents, be referred to the Committee on Privileges and Elections, with power to send for persons and papers."

MONDAY, *April* 20, 1874.

Mr. Carpenter, from the Committee on Privileges and Elections, to whom was referred the memorial of Francis W. Sykes, claiming a seat in the Senate as Senator from the State of Alabama, submitted a report (No. 291), with a recommendation that the committee be discharged from the further consideration of the memorial.

Mr. Saulsbury asked and obtained leave to submit the views of the minority of the Committee on Privileges and Elections on the foregoing memorial; which were ordered to be printed to accompany the report of the committee.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Morton (chairman), Carpenter, Logan, Alcorn, Anthony, Mitchell, Wadleigh, Hamilton of Maryland, and Saulsbury.]

IN THE SENATE OF THE UNITED STATES.

APRIL 20, 1874.—Ordered to be printed.

Mr. Carpenter submitted the following report:

The Committee on Privileges and Elections, to whom was referred the memorial of Francis W. Sykes, claiming to be Senator-elect from the State of Alabama, together with accompanying documents, respectfully submit the following report:

Mr. Sykes claims the seat now held by Hon. George E. Spencer as Senator from the State of Alabama; and his claim is based upon the assertion that the body claiming to be the legislature of the State of Alabama which elected the said Spencer was not the rightful legislature of that State, but that another body of men was such legislature; and that the latter body, on the 10th day of December, A. D. 1872, duly elected the said Sykes to be the Senator of the United States for that State for the term of six years commencing on the 4th day of March, A. D. 1873.

It is a fact that for some time after the day fixed by law for the organization of the legislature of that State, in 1872, there were two bodies, each claiming to be the legislature of that State—one known as the State-house legislature, which pretended to elect Mr. Sykes, and the other known as the court-house legislature, which pretended to elect Mr. Spencer; and the question is, which of these two bodies ought to be considered the rightful legislature at that time? On the 3d day of December, 1872, the court-house legislature, so called, pretended to elect Mr. Spencer. The governor of the State certified that Mr. Spencer had been duly elected on that day by the legislature of the State; and the Senate, upon that certificate, seated Mr. Spencer as a Senator for the term in question. The first question is, therefore, whether the body of men which pretended to elect Mr. Spencer can properly be regarded as the legislature of the State at the time of such pretended election. If so, Mr. Spencer's election was valid, and, of course, if that be so, Mr. Sykes can have no right to the same seat during the same term.

The general election in that State was held on the 5th day of November, 1872. The time fixed for the meeting of the legislature thereafter was on the 18th of November, 1872. The constitution of the State provides, section 6, Article IV: "The house of representatives, when assembled, shall choose a speaker and its other officers, and the senate shall choose a president, in the absence of the lieutenant-governor, and its other officers; each house shall judge of the qualifications, elections, and returns of its own members, but a contested election shall be determined in such manner as shall be directed by law. The president of the senate and the speaker of the house of representatives shall remain in office until their successors are elected and qualified."

By Article VIII of the constitution of Alabama, the house of representatives is declared to consist of one hundred members, apportioned among, and elected from, the counties of the State as directed in said article. The senate consists of thirty-three members, elected by the voters from the senatorial districts, as directed in said article, and these two bodies constitute the general assembly of the State, and in them, by section 1, Article I of the constitution, is vested the legislative power of the State.

By section 38 of the revised code of Alabama, which was re-enacted and continued in force by an act approved July 29, 1868, the general assembly is required to convene in the city of Montgomery.

It is provided by the act to regulate elections in Alabama as follows:

"SEC. 33. *Be it further enacted*, That one of the inspectors must number each ballot with the same number as the name of the voter on the poll-list, and the ballot must then, without being opened or examined, be deposited in the proper ballot-box.

"SEC. 34. *Be it further enacted*, That there shall be no challenging of electors appearing to vote at any election hereafter held in this State, and any registered voter appearing to vote at any election in this State shall be allowed to do so without question, challenge, or objection by any person; and any person who questions, challenges, or objects, or who unlawfully hinders or delays any person offering to vote, shall be guilty of a misdemeanor, and, on conviction, shall be fined five hundred dollars, and, on failure to pay the same, shall be imprisoned in the county jail for six months.

"SEC. 35. *Be it further enacted*, That it shall be the duty of the inspectors of all elections in the election precincts, immediately on the closing of the polls, to count out the votes that have been polled, and, after so doing, to promptly certify the poll-list, seal up the boxes containing the ballots and poll-list, and deliver them to the returning officer, who shall deliver such sealed boxes to the judge of probate within forty-eight hours

after they may be delivered to him, and take a receipt from the judge of probate for such sealed ballot-boxes.

"SEC. 36. *Be it further enacted*, That judges of probate, sheriffs, and clerks of the circuit court, or any two of them, of the several counties are hereby constituted a board of supervisors of elections in and for their respective counties; and it shall be the duty of said board of supervisors to open, compare, and count the ballots cast at all elections.

"SEC. 37. *Be it further enacted*, That it shall be the duty of the board of supervisors of elections, upon good and sufficient evidence that fraud has been perpetrated, or unlawful or wrongful means resorted to to prevent electors from freely and fearlessly casting their ballots, to reject such illegal or fraudulent votes cast at any of such polling places, which rejection, so made as aforesaid, shall be final, unless appeal is taken within ten days to the probate court; and in case of a tie for any county officer, the board of supervisors shall decide.

"SEC. 38. *Be it further enacted*, That it shall be the duty of the board of supervisors, within five days from the date of receiving the sealed boxes and certificates of the number of votes cast at each polling place from the inspectors, to make certificates, on blanks furnished by the secretary of state, of the exact number of votes cast in their county for each person, stating the office such person is voted for, and forward them, excepting for governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general, to the secretary of state, who shall, after such returns have been duly examined by the secretary of state, be filed as other public papers required to be kept in his office, and shall be subject to the inspection of any elector of this State.

"SEC. 39. *Be it further enacted*, That the board of supervisors shall forward a certified return of election for governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general to the presiding officer of the senate at least thirty days before the time fixed for the meeting of the next general assembly.

"SEC. 40. *Be it further enacted*, That it shall be the duty of the presiding officer of the senate, within five days after the assembling of the general assembly, in the presence of a majority of the members of the general assembly, to open the returns and proclaim the result of such election, after which they shall be filed in the office of secretary of state, as required by section thirty-seven of this act.

"SEC. 41. *Be it further enacted*, That it shall be the duty of the secretary of state to furnish, from time to time, the board of county supervisors with all necessary blanks upon which to make election returns.

"SEC. 42. *Be it further enacted*, That it shall be the duty of the secretary of state to forward certificates of election to such persons as may be ascertained to be elected to any office in this State, addressed to the board of supervisors, at the court-house of the county in which such person returned as elected may reside, within ten days after receiving such returns of election from the supervising board of the county; and it shall be the duty of said board of supervisors to forward said election certificates to the persons entitled thereto."

Section 7 of Article IV of the constitution provides as follows:

"A majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide."

On the 18th day of November, 1872, the day fixed by law for the assembling of the legislature, eighteen persons holding the required certificates of election as senators, issued to them by the secretary of state, appeared in the senate chamber in the capitol at Montgomery, and at 12 o'clock noon were called to order by the holding-over lieutenant-governor, Moren. They exhibited their certificates of election issued to them by the secretary of state, enrolled their names as senators, took the oath of office in due form, and proceeded to the election of officers *pro tempore*, viz, secretary, assistant secretary, and other officers. On the next day another senator presented his certificate, enrolled himself, and took the oath of office, in pursuance of section 48 of the revised code of Alabama. All of said senators took the oath prescribed by Article XIV of the constitution before the Hon. J. Q. Smith, one of the circuit judges of the State of Alabama. On the next day the senate, so constituted, proceeded to elect its permanent officers, all its proceedings being under the presidency of the Hon. E. H. Moren, lieutenant-governor of the State. Said proceedings were had by a majority of the whole number required by the constitution to constitute a senate.

On the 18th day of November, 1872, at the hour of 12 o'clock noon, the Hon. John P. Hubbard, speaker of the previous house of representatives, took his seat at the speaker's desk in the hall of the house of representatives in the capitol in Montgomery, and called the house to order. Less than one-half of the hundred persons who constitute a full house appeared in their places. These persons exhibited certificates of election to the house of representatives issued to them by the secretary of state, as required by the act before quoted, enrolled themselves as members of the house, and adjourned until the next day.

Pursuant to adjournment, the house met the next day in the same hall, but still less than one-half of the whole number of members appeared, though some additional members appeared and presented their certificates of election, issued to them by the secretary of state, and enrolled themselves as members of the house. An adjournment was then had to the next day.

On Wednesday, the 20th of November, 1872, the house was again called to order, when fifty-three members appeared. Those who had not been previously enrolled presented their certificates of election, issued to them by the secretary of state, and were enrolled. All of said persons so appearing and presenting their certificates of election took the oath of office required by the constitution, the same oath being administered to them as was administered to the members of the senate by the Hon. J. Q. Smith. The house of representatives thus assembled then proceeded to the election of a speaker, and Hon. Lewis M. Stone, holding a certificate of election issued to him by the secretary of state as a member of said house from the county of Pickens, was chosen speaker of said house of representatives. All of these proceedings of said house were taken by it under the presidency of Hon. John P. Hubbard, the speaker of the previous house of representatives, who, until the election of his successor, occupied the chair. Mr. Hubbard, upon the election of the new speaker, retired and Mr. Stone assumed the duties of speaker of the house. The house then proceeded to the election of subordinate officers, and so fully organized itself, as the senate had previously, under the authority of Article IV, section 6 of the constitution of Alabama.

These two bodies of men constituted what is known as the State-house legislature, which pretended to elect Mr. Sykes as Senator. This legislature was recognized by the Hon. Robert B. Lindsay, who, under the constitution, remained governor of the State until the canvass of votes subsequently made by the State-house legislature, when it was ascertained and declared by them that Hon. David P. Lewis had been elected governor; and thereupon the said Lewis took the oath of office and entered upon the discharge of its duties.

On the same 18th day of November, two other bodies of men assembled at the court-house, one claiming to be the senate and the other the house of representatives—the legislature of said State. After Governor Lewis was inaugurated he recognized the court-house legislature as the proper and legal legislature of the State.

The contest between these two legislatures depends upon this: In the State-house legislature were eight or nine members who had received regular certificates of election, but who are conceded not to have been elected. There were of this class a sufficient number, together with unquestioned members, to make a quorum in both houses of the State-house legislature. In the court-house legislature, persons claiming the seats of this class of members of the State-house legislature assembled with others who were undoubtedly members-elect to the senate and house of representatives, and thereby constituted in numbers a quorum of the two houses at the court-house. And the question is, whether at the time the election of Spencer took place by the court-house legislature that legislature, composed of a quorum of the persons actually elected, should be regarded as the legislature of the State; or whether the State-house legislature, a quorum in both houses being made by this class of persons who in fact were not elected, but had the regular certificates of election, should be regarded as the legal legislature. And this again depends upon another question: whether for the time being, and until some decision by the two houses could be arrived at, the eight or nine persons holding certificates without the election or the eight or nine persons elected but having no certificates are to be considered as entitled to act and form part of the legislature of the State.

It is provided by the law of the State, passed in pursuance of section 6, Article IV of the Constitution, among other things, as follows:

"SEC. 45. That the election of persons declared elected to any office, whether State, county, Representatives in Congress, or to any office which is filled by a vote of the people, may be contested by any qualified elector of this State for any one or more of the following causes: First. Malconduct, fraud, or corruption on the part of any inspector, clerk, returning officer, or board of supervisors. Second. When the persons whose election to such office is contested was not eligible thereto at the time of such election. Third. On account of illegal votes. Fourth. Any intimidation, threats to discharge from employment, offer to bribe or bribery, violence, abuse, or any other misconduct calculated to prevent a fair, free, and full exercise of the elective franchise. But no person can contest the election of any person to any office on account of race, color, or previous condition.

"SEC. 46. That no testimony must be received of any illegal votes or other grounds of contest unless the party contesting has given to the adverse party notice in writing of the cause or causes which he expects to name on the trial, which notice must be served personally at least ten days before the trial.

"SEC. 47. That whenever any elector chooses to contest any election to any office em-

braced in this act he must make a statement in writing setting forth specifically, first, the names of the party contesting, and that he was a qualified voter at the time the election was held; second, the office which said election was held to fill, and the time of holding the same; third, the particular ground or grounds of such contest; which statement must be verified by the oath of the contesting party, or some one for such party to the effect that he believes the same to be true.

"SEC. 48. That it shall be the duty of the probate judge to deliver to either party, on his application, copies of the poll-lists on being paid his legal fees therefor, and on the trial of the contest the judge of probate shall be required by a *subpœna duces tecum* to produce the original poll-lists and ballots, filed in his office for enumeration, which shall be received as conclusive evidence of the fact that the person named in the poll-lists voted, and for whom he voted.

* * * * * * *

"SEC. 51. That any elector contesting the election of any senator or representative to the general assembly, he must first give security for the costs of such contest, which must be acknowledged before and approved by the clerk of the circuit court of any county of the senatorial district, if such contest be for the election of a senator; or if for the election of a representative, by the clerk of the circuit court of the county in which such election was held.

"SEC. 52. That the contesting party must next give notice to the person whose election is contested, by having served on him, or left at his usual place of residence, by the sheriff or some constable, a copy of the grounds of contestation and affidavit, as required by the provision of section 45 of this act.

"SEC. 53. That the security for costs must be given, and the person whose election is contested notified in the mode prescribed in the preceding section, within twenty days after he is declared elected.

"SEC. 54. That the original statement of the grounds of contest and affidavit must, after such service, be returned to the office of the clerk of the circuit court in which security for the costs has been given, with the return of the officer indorsed, which is presumptive evidence of the service.

* * * * * * *

"SEC. 61. That testimony taken in contests of election under this act must be certified, indorsed, and sealed up, as is required in taking depositions at suits at law. And if the contest is of the election of a senator or member of the house of representatives of the general assembly, the depositions must be directed to the presiding officer of that branch of the general assembly before which such contest is to be tried, at the seat of government, and deposited in the nearest post-office.

"SEC. 62. That on the determination of such contest, the secretary of the senate or clerk of the house, as the case may be, must tax the costs due to the commissioner, witnesses, the sheriff and other officers, for serving notices and subpœnas as for similar service in courts of law, and certify the amount of each separate item, the name of the person entitled thereto, and the result of such contest, to the clerk of the circuit court, in which security for costs is required to be given by the provisions of this act. And the clerk of such court must thereupon issue execution in favor of the successful party for the amount of such costs, specifying the items, the amount of each, and the persons entitled thereto, in the bill of costs, which execution must be made returnable to the term of the circuit court of such county next after its issue, and may be issued as often as may be necessary, and must, when collected, be paid by the officer collecting on demand to the parties entitled thereto."

It is not pretended that the persons who were elected, but had not received certificates of election, took the steps required by this statute to contest the seats of the persons who held the certificates, but had not been elected. It is claimed, and with great force, that, until a contest, in the manner provided by law, the members who had received the certificates of election, although those certificates had been erroneously delivered and they were not in fact elected, were entitled to sit as members of the legislature. It is undoubtedly true that had all the persons claiming to be members of the legislature met in the State-house, and the two houses had proceeded there to organize, the persons holding the certificate, without the election, would have been entitled to their seats until the persons who had been elected, but had received no certificates, should make contests for their seats and their claim should be determined by the houses themselves.

The matter, then, comes to this: The State-house legislature was the legislature in form, and the court-house legislature was the legislature in fact. While these two pretended legislatures were in existence, each claiming to possess the legislative power of the State, Spencer was elected to the Senate by the court-house legislature, and Sykes was elected by the State-house legislature. Spencer was first elected, and on the day of his election the court-house legislature was recognized by the governor as the legal legis-

lature of the State. Therefore, in determining as to the right of Spencer or Sykes to this seat, the Senate is compelled to choose between the body in fact elected, organized, acting, and recognized by the executive department as the legislature, and another body, organized in form, but without the election and without a recognition on the part of the executive of the State at the time they pretended to elect Sykes. When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which in fact they have been elected, it would be sacrificing the end to the means were the Senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

The persons in the two bodies claiming to be the senate and house of representatives who voted for Spencer constituted a quorum of both houses of the members actually elected; the persons in the State-house legislature who voted for Sykes did not constitute a quorum of the two houses duly elected, but a quorum of persons certified to have been elected to the two houses. Were the Senate to hold Sykes's election to be valid, it would follow that erroneous certificates, delivered to men conceded not to be elected, had enabled persons who in fact ought not to vote for a Senator to elect a Senator to misrepresent the State for six years. On the other hand, if we treat the court-house legislature as the legal legislature of the State, it is conceded that we give effect to the will of the people as evidenced by the election. So that, to state the proposition in other words, we are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election of a Senator, in the opinion of your committee the Senate would not be justified in overriding the will of the people, as expressed at the ballot-box, out of deference to certificates issued erroneously to persons who were not elected.

In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But undoubtedly the Senate must always inquire whether the body which pretended to elect a Senator was the legislature of the State or not; because a Senator can only be elected by the legislature of a State. In this case, Spencer having been seated by the Senate, and being *prima facie* entitled to hold the seat, the Senate cannot oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the court-house and at the State-house. We cannot oust Spencer from his seat without inquiring and determining that the eight or nine individuals who were elected were not entitled to sit in the legislature of the State because they lacked the certificates. But if the Senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It cannot be maintained that when the Senate has been compelled to enter upon such an examination it is estopped by mere *prima facie* evidence of the fact, and the certificate is conceded to be nothing more than *prima facie* evidence. But the Senate must go back of that to the fact itself, and determine whether the persons claiming to hold seats were in fact elected. When we do this we come to the conceded fact that these persons lacking the certificate had in fact been elected, and that the persons who claimed to be the quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses.

So that, in any view of the matter which your committee can take, we are of opinion that Mr. Sykes makes no case entitling him to the seat now occupied by Mr. Spencer, and your committee ask to be discharged from the further consideration of the memorial of Mr. Sykes.

VIEWS OF THE MINORITY.

In the case presented by the memorial of Francis W. Sykes, contesting the election of Hon. George E. Spencer as a Senator from the State of Alabama, the undersigned respectfully submit the following minority report:

By a law of the State of Alabama, the third Monday in November in each year is fixed as the day for the annual meeting of the general assembly of said State, and on the 18th day of November, A. D. 1872, being the third Monday of said month, two separate bodies of men, each claiming to be the legislature of Alabama, assembled at different places in the city of Montgomery and proceeded to organize as such legislature.

One of these bodies, which met in the capitol, or State-house, in said city, on the 10th day of December, 1872, elected the Hon. Francis W. Sykes a Senator in Congress from the said State for the constitutional term commencing on the 4th day of March, 1873; and on the 3d day of the same month the other body, which met at the United States court-rooms, also claiming to be the legislature of the State, elected the Hon. George E. Spencer a Senator in Congress from said State for the said term.

The two bodies subsequently became merged into one general assembly, under an ar-

rangement proposed by the Attorney-General of the United States. The organization of the fusion legislature took place after the election of both Mr. Sykes and Mr. Spencer, and the right of neither the one nor the other depends upon the action of that legislature or anything connected with its history.

Whatever claim either of the persons named may have to a seat in the Senate as a Senator from the State of Alabama rests entirely upon the question whether the body that elected him at the time of such election was in fact the legislature of the State, and not upon anything that took place in the legislative history of the State subsequent to the time of his election. It is admitted that there could be but one lawful general assembly in Alabama, and in order to determine whether Mr. Sykes or Mr Spencer is entitled to a seat in the Senate, it is necessary to decide which of the two bodies, if either, claiming to have been the general assembly of the State, was in fact the legal legislature and competent to elect a Senator. If either of the bodies, known as the capitol legislature and the court-house legislature, assembled in accordance with the provisions of the constitution and laws of Alabama, it cannot be doubted that such body so assembled in conformity with law was vested exclusively with the legislative power of the State, and was alone competent to elect a Senator to represent the State in Congress. On the other hand, it cannot be maintained, if either of said bodies assembled in violation of law or without authority of law, that such body so meeting, by whatever name it chose to style itself, was clothed with any legislative authority, or had any rightful claim to be regarded, for any purpose, as the general assembly.

These propositions are self-evident, and cannot be questioned or denied. They are too clear to admit of argument, or to need illustration or enforcement. As isolated truths, unconnected with other questions, they would receive the ready assent of not only every member of the Senate but of every man in the country at all familiar with the constitution and laws of Alabama. The undersigned, therefore, deem it proper to refer to such provisions of the constitution and laws of the State of Alabama as bear upon the election of members of the senate and house of representatives—and their organization as legislative bodies—composing the general assembly of the State. The following are some of the provisions of the constitution and laws of said State. Article V, sections 2, 3, and 16, of the constitution:

"SEC. 2. The governor, lieutenant-governor, secretary of state, treasurer, and attorney-general shall hold their office for the term of two years, and the auditor for the term of four years.

"SEC. 3. The returns of every election for the officers named in the preceding section shall be sealed up and transmitted to the seat of government by the returning officers, directed to the presiding officer of the senate, who, during the first week of the session, shall open and publish the same in the presence of a majority of the members of the general assembly; the parson having the highest number of votes shall be declared duly elected; but if two or more shall be highest and equal in votes for the same office, one of them shall be chosen by the joint vote of both houses. Contested elections for executive officers shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

"SEC. 16. The lieutenant-governor shall be president of the senate, but shall vote only when the senate is equally divided, and in case of his absence or impeachment, or when he shall exercise the office of governor, the senate shall choose a president *pro tempore*."

By section 6, Article IV of the constitution of Alabama, the president of the senate and the speaker of the house of representatives remain in office until their successors are elected and qualified, as follows:

"SEC. 6. The house of representatives, when assembled, shall choose a speaker and its other officers; and the senate shall choose a president, in the absence of the lieutenant-governor, and its other officers; each house shall judge of the qualifications, elections, and returns of its own members, but a contested election shall be determined in such manner as shall be directed by law. The president of the senate and the speaker of the house of representatives shall remain in office until their successors are elected and qualified."

By Article VIII of the constitution of Alabama, the house of representatives is declared to consist of one hundred members, apportioned among, and elected from, the counties of the State as directed in said article.

The senate consists of thirty-three members, elected by the voters from the senatorial districts, as directed in said article; and these two bodies constitute the general assembly of the State, and therein, by section 1 of Article IV of the constitution, is vested the legislative power of the State, as follows:

"SEC. 1. The legislative power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives."

By act of the general assemby of Alabama, approved 31st December, 1868, entitled

"An act to fix the time of the annual session of the general assembly," the third Monday of November in each year is declared to be the day for the annual assembling of the general assembly.

By section 38 of the revised code of Alabama, which was re-enacted and continued in force by an act approved July 29, 1868, the general assembly is required to convene in the city of Montgomery, as follows:

"The members of the general assembly shall convene in the city of Montgomery on the first day of November in each year, unless that day be Sunday, and if that day be Sunday, then on the next day afterward."

This provision of the law was amended so as to require the general assembly to meet on the third Monday of November, as before stated.

By the act of the general assembly of Alabama, approved 13th February, 1850, entitled "An act supplemental to an act making appropriations to establish the State-house at Montgomery," and by the original act approved 11th February, 1850, the State of Alabama provided for the erection of the present capitol, or State-house, at Montgomery, and construction therein of a hall of the house of representatives and the senate chamber, for the use of the general assembly of this State, and from the time of the removal of the seat of government from Tuscaloosa to Montgomery the two branches of the general assembly have been accustomed to use, for the purposes of their legislative sessions, the hall and chamber provided for them in the capitol now in use, and in that previously standing on the same site; and no other hall or chamber in Montgomery or elsewhere, except for a short period in 1849–'50, during a session of the legislature, when, in consequence of the destruction of the State-house by fire, the general assembly, by the concurrent action of the two houses, held their sessions in another building in Montgomery.

By act of the general assembly of Alabama, approved October 8, 1868, entitled "An act to regulate elections in this State," it is provided (section 7) that the State senators shall be elected on the first Tuesday after the first Monday of November, 1872, and every four years thereafter; in section 6, that representatives in the general assembly shall be elected on the first Tuesday after the first Monday in November, 1870, and every two years thereafter.

This act further provides as follows:

"SEC. 33. *Be it further enacted*, That one of the inspectors must number each ballot with the same number as the name of the voter on the poll-list, and the ballot must then, without being opened or examined, be deposited in the proper ballot-box.

"SEC. 34. *Be it further enacted*, That there shall be no challenging of electors appearing to vote at any election hereafter held in this State, and any registered voter appearing to vote at any election in this State shall be allowed to do so without question, challenge, or objection by any person; and any person who questions, challenges, or objects, or who unlawfully hinders or delays any person offering to vote, shall be guilty of a misdemeanor, and, on conviction, shall be fined five hundred dollars, and, on failure to pay the same, shall be imprisoned in the county jail for six months.

"SEC. 35. *Be it further enacted*, That it shall be the duty of the inspectors of all elections in the election precincts, immediately on the closing of the polls, to count out the votes that have been polled, and, after so doing, to promptly certify the poll-list, seal up the boxes containing the ballots and poll-list, and deliver them to the returning officer, who shall deliver such sealed boxes to the judge of probate within forty-eight hours after they may be delivered to him, and take a receipt from the judge of probate for such sealed ballot-boxes.

"SEC. 36. *Be it further enacted*, That judges of probate, sheriffs, and clerks of the circuit court, or any two of them, of the several counties, are hereby constituted a board of supervisors of elections in and for their respective counties; and it shall be the duty of said board of supervisors to open, compare, and count the ballots cast at all elections.

"SEC. 37. *Be it further enacted*, That it shall be the duty of the board of supervisors of elections, upon good and sufficent evidence that fraud had been perpetrated, or unlawful or wrongful means resorted to to prevent electors from freely and fearlessly casting their ballots, to reject such illegal or fraudulent votes cast at any of such polling places, which rejection, so made as aforesaid, shall be final, unless appeal is taken within ten days to the probate court; and in case of a tie for any county officer, the board of supervisors shall decide.

"SEC. 38. *Be it further enacted*, That it shall be the duty of the board of supervisors, within five days from the date of receiving the sealed boxes and certificates of the number of votes cast at each polling place from the inspectors, to make certificates, on blanks furnished by the secretary of state, of the exact number of votes cast in their county for each person, stating the office such person is voted for, and forward them, excepting for governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general, to the secretary of state, who shall, after such returns have been duly examined by

the secretary of state, be filed as other public papers required to be kept in his office, and shall be subject to the inspection of any elector of this State.

"SEC. 39. *Be it further enacted*, That the board of supervisors shall forward a certified return of election for governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general to the presiding officer of the senate at least thirty days before the time fixed for the meeting of the next general assembly.

"SEC. 40. *Be it further enacted*, That it shall be the duty of the presiding officer of the senate, within five days after the assembling of the general assembly, in the presence of a majority of the members of the general assembly, to open the returns and proclaim the result of such election, after which they shall be filed in the office of secretary of state, as required by section 37 of this act.

"SEC. 41. *Be it further enacted*, That it shall be the duty of the secretary of state to furnish from time to time the board of county supervisors with all necessary blanks upon which to make election returns.

"SEC. 42. *Be it further enacted*, That it shall be the duty of the secretary of state to forward certificates of election to such persons as may be ascertained to be elected to any office in this State, addressed to the board of supervisors, at the court-house of the county in which such person returned as elected may reside, within ten days after receiving such returns of election from the supervising board of the county; and it shall be the duty of said board of supervisors to forward said election certificates to the persons entitled thereto."

Applying these provisions of the constitution and laws of Alabama to the respective organizations known as the capitol and court-house legislatures, we are not left in doubt as to which of the two bodies was the lawful general assembly.

The undersigned have no hesitation in declaring it as their opinion that the senate and house of representatives which met at the capitol and elected Mr. Sykes a Senator from the State of Alabama were organized in strict compliance with the provisions of the constitution and laws of the State, and, thus organized, constituted the general assembly, and were vested exclusively with legislative power. To sustain the opinion, we need only to refer to facts which were admitted before the committee or shown by record evidence to be true.

In pursuance of the act of the general assembly of Alabama, approved October 8, 1868, hereinbefore referred to, an election for governor, lieutenant-governor, secretary of state, treasurer, attorney-general, and other State officers, and also for senators and representatives in the general assembly was held on the first Tuesday after the first Monday in November, 1872, in all the counties in the State. The returns of said election, certified as by law required, were made by the boards of supervisors of election to the secretary of state, and were by him filed in his office. Certificates of election were then issued by the secretary of state to the persons shown by said returns to have been elected to the general assembly, namely, to thirty-three senators and one hundred representatives. The duty of the secretary of state in this regard is prescribed by the forty-second section of the said act of October 8, 1868, as follows:

"SEC. 42. *Be it further enacted*, That it shall be the duty of the secretary of state to forward certificates of election to such persons as may be ascertained to be elected to any office in this State, addressed to the board of supervisors, at the court-house of the county in which such person returned as elected may reside, within ten days after receiving such returns of election from the supervising board of the county; and it shall be the duty of said board of supervisors to forward said election certificates to the persons entitled thereto."

It is not denied that the election had been held in strict compliance with the provisions of law, or that the persons to whom certificates of election were issued had been voted for at said election for the offices to which they were respectively certified to have been elected. Nor will it be denied that the board of supervisors of elections in the several counties of the State had made returns as required by section 38 of the act aforesaid to the secretary of state, showing that the persons to whom certificates of election were subsequently issued had been elected to the State senate and house of representatives.

Over these returns the secretary of state had no control other than their custody. He was required to receive them and file them in his office, and within ten days to issue certificates to the persons shown thereby to have been elected. His duty was purely ministerial, and enforced by penalties prescribed by law.

The suggestion has been made that the secretary of state, in issuing and causing to be delivered certificates of election to the members of the capitol legislature from Barber County, acted in bad faith, but no evidence was offered to sustain such suggestion, and, in fact, the imputation was not pressed in argument before the committee.

In the absence of any proof to the contrary, public officers must be presumed to act in good faith in the performance of official duty, and the undersigned know of no reason for denying to this officer the vindication arising from such presumption. He sought the ad-

vice of eminent counsel of both political bodies in reference to his duty in the matter, and acted in accordance with their written instructions in issuing the certificates referred to.

The constitution of Alabama provides, Article IV, section 21, as follows: "The general assembly shall meet annually on such day as may be by law prescribed, and shall not remain in session longer than thirty days, except by vote of two-thirds of each house."

The act of the general assembly of the State hereinbefore referred to, approved December 31, 1868, fixes the time for the annual meeting of the general assembly on the third Monday of November in each year.

Before proceeding to recite the facts connected with the organization of the two houses of the capitol legislature, it may be proper to refer to the following provisions of the constitution of Alabama, showing, among other things, the part to be taken by the lieutenant-governor and the speaker of the last house of representatives in the organization of the two houses of the general assembly of the State, and also that a majority of each house shall constitute a quorum to do business, and that each house "shall judge of the qualifications, elections, and returns of its members."

Article IV, sections 6 and 7, are as follows:

"SEC. 6. The house of representatives, when assembled, shall choose a speaker and its other officers; and the senate shall choose a president, in the absence of the lieutenant-governor, and its other officers; each house shall judge of the qualifications, elections, and returns of its own members, but a contested election shall be determined in such manner as shall be directed by law. The president of the senate and speaker of the house of representatives shall remain in office until their successors are elected and qualified.

"SEC. 7. A majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide."

Article V, section 16, of the constitution also provides:

"SEC. 16. The lieutenant-governor shall be president of the senate, but shall vote only when the senate is equally divided; and in case of his absence or impeachment, or when he shall exercise the office of governor, the senate shall choose a president *pro tempore*."

Bearing in mind these provisions of the constitution and laws of the State in reference to the meeting and organization of the two houses of the general assembly, let us inquire whether the senate and house of representatives known as the capitol legislature met and organized in conformity therewith.

The journals of the two houses of the capitol legislature, published by authority, show the following facts in common with the organization of the two houses. These facts were not disputed in the argument before the committee.

On the 18th day of November, 1872, being the third Monday of said month, the time prescribed by law for the annual meeting of the general assembly, eighteen persons holding certificates of their election as senators from the secretary of state appeared in the senate chamber in the capitol at Montgomery, and at the hour of 12 o'clock of the day were called to order by Lieutenant-Governor Moren, who was present in conformity with the requirement of the constitution for the purpose of organizing the senate and presiding over its deliberations. The eighteen members present, constituting a quorum of the whole number of senators, exhibited the certificates of their election issued by the secretary of state, enrolled their names, and took the oaths of office administered in due form and proceeded to elect officers, namely, secretary, assistant secretary, and other officers. On the following day another senator appeared in the senate chamber, was qualified, and took his seat in the senate. The oaths of office prescribed by the constitution of Alabama were taken by these nineteen senators before the Hon. J. Q. Smith, one of the judges of the circuit court of the State, and all the proceedings were conducted under the presidency of the lieutenant-governor, who is made the presiding officer of the senate by the constitution. These are the facts connected with the meeting and organization of the senate; let us now inquire into the organization of the house of representatives.

It appears from the journal of the proceedings, and is not disputed, that on the 18th day of November, 1872, being the third Monday of said month, the day fixed by law for the meeting of the legislature, forty-five persons holding the certificates of their election as members of the house of representatives convened in the hall of the house in the capitol at the city of Montgomery, and at the hour of 12 o'clock on that day the house was called to order by John P. Hubbard, speaker of the last house of representatives. A temporary clerk and doorkeeper were appointed, and a call of the house made, when forty-five persons enrolled their names, and, having been duly sworn, took their seats as members of the house. The number present being less than a quorum, an adjournment took place until 12 o'clock the next day, when the house again met. The speaker being in the chair, five additional members having certificates of election appeared, enrolled their names, were duly sworn, and took their seats as members of the house. The whole number of members then present being fifty, one less than a quorum, the house adjourned until 11 o'clock the following day. Pursuant to adjournment, the house again met on

the 20th November, when three other members having certificates as aforesaid appeared and qualified by taking the oaths prescribed by the constitution, and took their seats as members of the body.

Fifty-three members of the house were present on that day, and, being a quorum of the whole number of representatives, proceeded to the election of a speaker and other officers.

Mr. Stone, a member from Pickens, received 51 votes for speaker, and was declared duly and constitutionally elected speaker of the house of representatives by the presiding officer. Mr. Stone then qualified as speaker and entered upon the discharge of the duties of the office. Other officers of the house were elected on the same day, some of them receiving as many as 53 votes, and the house, on the said 20th day of November, thus became fully organized.

After the organization of the house, to wit, on the 25th of November, another member appeared and also qualified and took his seat.

All the proceedings in the organization of the two houses appear to have been orderly, regular, and in strict conformity with the requirements of the constitution and laws of the State. Both houses assembled on the day prescribed by law for the meeting of the general assembly in their respective chambers in the State capitol, set apart and appropriated by the State of Alabama for the use of the respective houses of the general assembly.

The senate was presided over by the lieutenant-governor, and the house of representatives by the speaker of the last house during the whole time of the organization of the respective bodies, and a quorum of members holding certificates of election issued by the secretary of state as required by law were present in each house and duly qualified, and participated in such organization and in the further proceedings of the two bodies.

Both houses of the capitol legislature having organized notified the governor that they were ready to receive any communication he might have to make to the general assembly. The constitution of Alabama, Article V, section 7, makes it the duty of the governor to "communicate at every session by message to the general assembly the condition of the State, and recommend such measures as he shall deem expedient." In performance of this duty, Robert B. Lindsay, then governor of the State, on the 22d day of November, 1872, sent his annual message in writing to the capitol legislature, a copy of which was delivered to each house.

This action of the governor in the performance of a duty imposed by the constitution was an unequivocal recognition by the executive department of the State of the capitol legislature as the lawful general assembly of Alabama, and is entitled to weight in the consideration of the question referred to the committee.

After the organization of the two houses of the capitol legislature, further proceedings were had by those houses to which it may be proper here to advert.

The constitution of the State provides, in Article V, sections 2 and 3, as follows:

"SEC. 2. The governor, lieutenant-governor, secretary of state, treasurer, and attorney-general shall hold their offices for the term of two years, and the auditor for the term of four years.

"SEC. 3. The returns of every election for the offices named in the preceding section shall be sealed up and transmitted to the seat of government by the returning officers, directed to the presiding officer of the senate, who, during the first week of the session, shall open and publish the same in the presence of a majority of the members of the general assembly; the person having the highest number of votes shall be declared duly elected, but if two or more shall be highest and equal in votes for the same office, one of them shall be chosen by the joint vote of both houses. Contested elections for executive officers shall be determined by both houses of the general assembly in such manner as shall be prescribed by law."

For the purpose of complying with these provisions of the constitution, the two houses of the capitol legislature, on the 22d day of November, 1872, under a resolution previously passed, met in the hall of the house of representatives to witness the opening and counting of the returns of the election of the officers named in section 2 above cited. Lieutenant-Governor Moren, the then lieutenant-governor of the State and the presiding officer of the senate, to whom said returns had been directed by the returning officers, in the presence of a majority of the members of the two houses proceeded to open and count the said returns; and on the following day, the opening and counting thereof having been completed, the lieutenant-governor, as presiding officer of the senate, published the result of the election as shown by the count of the returns; and thereupon the Hon. David P. Lewis was declared elected governor and Alexander McKinstry lieutenant-governor of the State, who were duly notified thereof and afterward took the oaths prescribed, and entered upon the discharge of the duties of their respective offices. The election of the other State officers was also duly declared, and said officers afterward entered upon the discharge of the duties of their several offices.

These proceedings of the two houses of the capitol legislature were had in fulfillment of duties imposed by the constitution of Alabama on the general assembly of the State—duties essential to the regular and orderly transmission of the executive offices from the possession of incumbents whose terms have expired to their legally elected successors in office. This is one of the most important functions devolved upon the legislature, and its honest performance secures the existence of legitimate executive government in the State.

No suggestion has been made from any quarter that in counting the returns and declaring the election of the governor, lieutenant-governor, and other State officers the capitol legislature exceeded its authority or did not act fairly and impartially.

The said legislature during its existence enacted at least one statute, which is still a law of the State, and the validity of which has never been called in question, and, at the time and in the manner prescribed by the act of Congress, proceeded to elect a Senator from the State of Alabama to the Congress of the United States, and on the 10th day of December, 1872, Francis W. Sykes, as hereinbefore stated, was elected such Senator, in conformity with the provisions of the act of Congress aforesaid relating to the election of Senators.

In the opinion of the undersigned, no element was wanting essential to the validity of the election of the contestant, Mr. Sykes, or the legal existence of the legislature that elected him; they therefore declare it as their judgment, based upon a thorough and careful investigation of every question of law or fact that could arise in the case, that Francis W. Sykes, on the said 10th day of December, 1872, was legally elected a Senator from the State of Alabama for the constitutional term commencing on the 4th day of March, 1873, and is entitled to the seat now held by the Hon. George E. Spencer.

The lawfulness of the capitol legislature cannot be denied or the validity of its acts questioned, because a minority of the persons holding certificates of election from the secretary of state, and entitled to seats therein, chose factiously or otherwise to absent themselves and to assemble at a different place.

The senate chamber and the hall of the house of representatives in the capitol, erected at the public expense and dedicated to the use of the senate and house, and used exclusively by the two houses respectively during the sessions of preceding legislatures, were the proper, usual, and fitting places for the assembling of the two houses of the general assembly. No justification or excuse can be found for the action of the persons entitled to seats therein as members in absenting themselves from the hall dedicated to the use of the bodies in which they were entitled to be seated. No violence, threats, or intimidation is alleged to have prevented them from so doing.

The lieutenant-governor was present at the senate chamber, and the speaker of the last house of representatives was in the hall of the house on the day prescribed by law for the annual meeting of the general assembly, for the purpose of assisting in the organization of the respective houses in obedience to the requirements of the constitution of the State. In these halls the people of Alabama expected all persons entitled to seats as members in either house to be present and qualify as legislators. By clear implication of law it was their duty to do so, and their failure to perform that duty cannot derogate from the rightful authority of the legislature there assembled, or impair the validity of any act done in pursuance of the legislative power with which it was clothed. The absence of any number of persons entitled to seats in a legislative body, or their refusal to act with the body, from whatever cause such absence or refusal might occur, could not prevent the organization of the body or render its action illegal, provided a quorum was present, and the organization took place in accordance with the requirements of the constitution and the laws of the State.

If this is not true, then it follows that a factious minority may, by the mere refusal to qualify and participate in the organization of the legislature, destroy or suspend the action of the law-making department of the government at its pleasure. Such a position carried to its logical conclusion would place it in the power of one member-elect of the legislature to defeat the organization of the body to which he was elected by refusing to participate therein, and thus overthrow good government in the State. Absurd as such a proposition may seem, it could be sustained by the same arguments that deny to the capitol legislature the character of being the general assembly of the State of Alabama.

Nor can the fact that some of the persons holding the certificates of election, issued by the secretary of state, and seated thereon in the capitol legislature may not have been elected to such places by the votes cast at the election, impair the validity of the organization of the senate and house of representatives constituting the capitol legislature.

Every member who took his seat in either house presented the only evidence of his right to a seat required by the laws of the State, and such evidence entitled him to a seat in the house to which he was accredited until it should be made to appear by a contest that his right was not good.

For contesting the seat of any member of either house of the general assembly the laws of Alabama fully provide, and every person claiming a seat in either house may, if entitled thereto, obtain the same upon a contest made in accordance with law. But until such contest is successfully made the person seated as a member upon the certificate of election issued by the secretary of state has all the constitutional and legal rights of a member of the legislature. His acts and the acts of the body of which he is a member are as valid and binding as though he had been elected by the unanimous vote of the electors of his county or district.

It is not alleged or insinuated that any member of either house of the capitol legislature holds the certificate upon which he was admitted to a seat by reason of any fraud, artifice, or contrivance of his own; but if such had been the fact, or if any member of the said legislature seated on such certificate had not in fact been elected, it was a matter over which the said legislature had exclusive cognizance, and into which the Senate cannot properly inquire.

Each house of the general assembly of Alabama is the exclusive judge of "the election returns and qualification of its members," and any inquiry into such question by the Senate of the United States would be as unwarranted by precedent as it would prove dangerous in practice.

In a contest like the one now under consideration, between two persons elected to the Senate by different bodies, each claiming to be the legislature of the State, the Senate may look into the constitution and laws of the State to ascertain which of the two bodies, if either, has been organized in conformity with their provisions, but it cannot rightfully inquire into the election returns and qualifications of the members of either body.

If the Senate could enter upon such inquiry, where would be the limitation upon its prerogatives? Could it not just as legitimately inquire into the manner in which any election officer had performed the duties of his office, and even into the qualification of the electors who had voted for members of the State legislature?

The undersigned would not restrict the Senate in its constitutional right to judge of the election returns and qualifications of its own members, but would regret its assumption of powers belonging exclusively to the two houses of the State legislature.

It may be true that persons will sometimes be returned members of the legislature through the failure of election officers to make the proper returns, but the person deprived of his seat in the legislature by reason of such failure has his remedy in a contest before the body to which he may have been elected. Such contests are neither unusual nor improper. It is the mode pointed out in the laws of every State for the correction of such errors, and in none more fully than in the laws of Alabama. The failure of any person or number of persons, deprived of their seats in the legislature by the default of election officers to make such contests, would not justify an inquiry into the matter by the Senate of the United States. The person so returned would have all the rights, and could properly perform all the duties, of any other member until deprived of his seat in the mode pointed out by law. A contrary doctrine has never received the assent of any respectable court or any legislative body in this land.

If we should go further, and, for the sake of argument, admit it to be true, as alleged, that the members from Marengo and Barber Counties seated in the capitol legislature upon certificates issued by the secretary of state were not in fact elected to the legislature by the votes actually cast at the election, still we confidently assert that the returns of election made by the supervisors of election, who are made judges of the facts by the laws of Alabama, and the certificate of their election, entitled them to be seated as members, and to hold their seats until displaced upon a contest, and that, as such, every act they performed was as valid as though they had received every vote cast at the election.

Let us now look at the facts connected with the organization and history of the assemblage of persons who met at the United States district court-rooms, and known as the court-house legislature. It met on the day fixed by law for the meeting of the general assembly. No public notice, through the papers or otherwise, was given of an intention on the part of any persons claiming to have been elected to the legislature to meet at that place, and no information was given to the lieutenant-governor, speaker of the last house of representatives, or any of the members-elect, other than those there assembled, of such purpose. No previous legislature had ever held its sessions at the court-rooms, which belonged to the United States and not to the State of Alabama, and no person holding a certificate as a member of either house other than those who there assembled could possibly have deemed it a proper and appropriate place for the meeting of the legislature.

The senate of the court-house legislature consisted of fourteen persons holding certificates of election as senators, issued by the secretary of state, and of five other persons (enough to constitute a quorum of a full senate) who held no such certificates. Their deliberations were presided over by one of their number, chosen as temporary president during the organization, and until after the lieutenant-governor-elect had been inducted

into office. This body never had more than fourteen members (less than a quorum) holding certificates of election issued by the secretary of state in pursuance of law, and at no time had a quorum of the persons actually elected to the State senate.

The house of representatives at the court-rooms consisted of forty-six persons, to whom certificates of election as members of the house of representatives had been issued by the secretary of state, in pursuance of law, and of a sufficient number of other persons, holding no such certificates, to constitute a quorum of a full house of representatives. Some of the persons seated as members in this body had not been elected members of the legislature, and made no claim as such to seats in the fusion legislature, afterward organized under the plan proposed by the Attorney-General of the United States.

Immediately after the organization of the two houses of the court-house legislature, a joint committee was appointed to wait upon Governor Lindsay, and inform him of their readiness to receive any communication from him. The governor rightfully declined to recognize them as the general assembly, and sent his annual message, as before stated, to the capitol legislature.

Governor Lewis, after being legally inducted into office by the proceedings hereinbefore stated in the capitol legislature, co-operated with the assemblage of persons at the court-rooms, and professed to regard them as a *de facto* legislature.

The ground upon which Mr. Spencer, who was elected by this court-house body, predicates its claim to recognition by the Senate as the rightful legislature of Alabama, is not that it existed in conformity with the provisions of the constitution and laws of the State, but upon the unsustained allegation that a majority of the members, both of the senate and house, some of whom held no certificates of election, were elected by a majority of the votes cast in their respective counties and districts.

If the truth of such allegation was a legitimate subject of inquiry in this body; if the Senate of the United States could properly judge of the election of members of a State legislature (which the undersigned most emphatically deny), it would not be difficult to demonstrate that the court-house senate at no time had a quorum of members elected by the voters of the senatorial districts in which they reside.

Those who assert that the members at the court-house legislature were elected by the votes cast rely on the fact that persons holding no certificates of election, and who were members of the court-rooms, were afterward admitted to seats in the fusion legislature. It will be remembered that the fusion of the capitol and court-house legislatures took place upon an arbitrary plan proposed by the Attorney-General of the United States, leaving to persons claiming seats the right to make a contest for the same.

Without going into the history of its proceedings it is sufficient to state that Mr. Miller, who was a member of the court-house senate, holding no certificate of election, and whose presence was necessary to constitute a quorum, and who voted for Mr. Spencer, was, by proceedings the most arbitrary, illegal, and tyrannical, admitted to a seat in the fusion legislature as a senator from the senatorial district composed of Butler and Conecuh and part of Escambia Counties over Mr. Martin, who held the certificate of election, and who has received a large majority of the votes cast for senator at the election. This arbitrary and tyrannical proceeding to seat Mr. Miller in the fusion senate was doubtless deemed necessary to give color to his participation in the senate at the court-rooms, which, without his presence, had no quorum of members claiming to have been elected.

The legality of the court-house legislature and the validity of its proceedings depend not upon what took place in the fusion legislature, but must rest upon its own conformity to the provisions of the constitution and laws of the State. Tested by these requirements, it can claim no higher character than that of a revolutionary body organized in contempt of the constitution and laws of Alabama and in disregard of good order and legitimate government in the State.

An argument was made before the committee in favor of the legality of the court-house legislature drawn from the fact that a joint resolution was passed in the fusion house of representatives declaring in substance that the court-house legislature was the lawful general assembly of the State.

This resolution, which did not pass the senate, was voted for in the house only by members of the court-house body seated in the fusion legislature, and was an abortive attempt to justify and render valid their own illegal proceedings. It is submitted that no subsequent declaration, by one or both of the two houses of the fusion legislature, could have had the effect to render that legal which was before illegal. Much less could an attempt on the part of one house to do so have that effect. At best it was but the vain effort of persons whose previous action was irregular and revolutionary to condone their own contempt and disregard of the constitution and laws of the State. This argument, feeble as the cause it is intended to sustain, is unworthy of consideration, and we pass it without further notice.

It was alleged in argument before the committee that the observance of the provision of the constitution requiring the lieutenant-governor to preside in the senate, and the

presidency of the speaker of the last house of representatives in the house, the meeting of the general assembly in the State capitol, and the issuing of certificates of election to members of the legislature by the secretary of state, based upon returns made to him by the supervisors of election, was not necessary to constitute a valid legislature, but that these provisions are mere matters of form which may be dispensed with at pleasure.

The undersigned cannot concur in views so narrow of constitutional and legal requirements, and while admitting that in the presence of overwhelming and absolute necessity matters of form, even when prescribed by law, may be dispensed with, yet in the absence of any such necessity what might otherwise be treated as matters of form, if prescribed by the constitution and laws of the State, become matters of substance not to be disregarded, but must be strictly observed. In the present case no such necessity can be pleaded. Party exigency alone prompted and is brought forward to sustain the utter disregard by the court-house legislature of requisites prescribed by the constitution and laws of Alabama and designed to perpetuate legitimate government in the State.

Are these requisites, deemed of sufficient importance to be incorporated into the constitution and laws of the State, to be degraded to mere matters of form, the observance of which may be disregarded at the suggestion of party interest? It might with the same truth be contended that the taking of the prescribed oaths of office by members of the legislature may be dispensed with, or that the execution of bonds required to be given by a public officer before entering upon his office are mere matters of form.

Let us turn to the law of Alabama relating to the issuing by the secretary of state of certificates of election to members of the legislature, to see whether it is only matter of form, to which no importance is attached.

Section 35 of the law of October 8, 1868, hereinbefore referred to, makes it the duty of inspectors of elections to count the votes polled and certify the poll-list, seal up the boxes containing the ballots and poll-list, and deliver them to a returning officer to be delivered to the judge of probate for the county.

Section 36 of said law constitutes the judges of probate, sheriffs, and clerks of the circuit court boards of supervisors of election, and makes it their duty to open, compare, and count the ballots cast at the election; and the next succeeding section confers upon them power and makes it their duty to reject illegal and fraudulent votes.

Section 38 makes it the duty of the board of supervisors, within five days after receiving the said boxes containing the ballots and poll-lists, to certify the number of votes cast in the county for each person, stating the office he is voted for, and to forward such certificate (except for certain named officers) to the secretary of state to be filed in his office. These are the steps to be taken preliminary to the issuing of certificates by the secretary of state.

Section 42 of the said law, hereinbefore recited, makes it the duty of the secretary, within ten days after receiving the returns and certificates of the supervisors of election, to issue certificates of election to the person shown by said returns to have been elected.

Is this all matter of form? Is there no meaning to be attached to these provisions of law for ascertaining who has been elected to the general assembly? Why, then, the provisions of law imposing penalties upon the election officers and the secretary of state for neglecting the performance of the duty imposed?

We admit that the legislature of the State, upon a contest for a seat in either house, may go behind the certificates and inquire into the facts of the case, but that is a right conferred by the constitutional provision making each house "the judge of the elections, returns, and qualifications of its members."

The right of any number of the members-elect to the legislature to disregard these provisions of the law and treat them as nullities cannot be conceded. The same board of supervisors of election that certified to the secretary of state the election of members of the general assembly also certified under provision of law the vote for governor, lieutenant-governor, treasurer, and other State officers to the presiding officer of the senate, who opened and published the result, as before mentioned.

What would be thought of the opposing candidates for these offices who would attempt to disregard the certificates of the supervisors and the ascertainment of the result of the election in the manner prescribed by law, claiming that they were mere matters of form, and attempt to seize the offices for which they had been candidates on the allegation that they had been elected by the votes of the electors?

No one would sustain such revolutionary action, even if it was certain that the allegation was true. Their remedy would be by contests for the offices, under the provisions of law. And until that remedy had been tried, no one would justify a resort to other means, even to correct an admitted wrong. Such revolutionary action, however, would not be less indefensible than the conduct of the court-house assemblage. Indeed, they stand on precisely the same ground, and any mode of argumentation that can justify the one might be employed to sustain the other.

It is only by construing the constitutional and legal provisions relating to the organi-

zation of the general assembly as mere matters of form that the supporters of the court-house legislature can attempt to justify its action or claim for it the recognition of the Senate; yet no position could be more untenable, unsound, or irrational. Every provision of the constitution and laws of Alabama relating to the election of members of the legislature might with the same propriety be treated as mere form; the registration of voters, the appointment of inspectors and other officers to conduct the election—the voting by ballot, the keeping of poll-lists, the counting of the votes, in short, everything required by the constitution and laws of Alabama for guarding the election and ascertaining the result might be dispensed with as matters of form, for the same reasons that you can dispense with the returns and certificates required to be made by the inspectors and boards of supervisors of election, and the certificates in conformity therewith required to be issued by the secretary of state.

The fact that provision is made by law for contesting the seats of members of the legislature seated upon the returns and certificates referred to by persons claiming to have been elected, is a conclusive argument against the position that said returns and certificates are matters of form only, and may be disregarded at pleasure. The law attaches to said certificates such importance that a contest is required to show that they are not correct. This is the effect given to such returns and certificates by the laws of Alabama.

While, however, these provisions of law for contesting the right of members of the legislature admitted to seats upon the evidence of such returns and certificates demonstrate that they are not matters of form merely, they furnished the remedy, and the only legal remedy, for opposing candidates who claimed to have been elected to the general assembly.

So far as the court-house members who held certificates of election were concerned, there was no necessity for a contest; they had the right, and would have been admitted to seats in the capitol legislature upon the presentation of such certificates; and, had there been a majority of Republican members who had certificates of election, they doubtless would have been present at the capitol and taken their seats as members. The fact that they were in a minority could not release them from the obligation of obeying law or justify their contempt of its provisions. Every sentiment of patriotism and every consideration arising from citizenship, no less than the duty imposed by the position to which they had been elected, united in demanding their obedience to the laws of their State. In refusing that obedience, and disobeying the fundamental and statute laws of Alabama, they assumed the attitude of revolutionists, and put in jeopardy the peace and good order of society.

No party exigency can excuse such perfidy or condone its criminality. It was an utter disregard of law which this Senate cannot properly indorse by recognizing the court-house assemblage as the legislature of the State.

Such proceedings would have met with stern rebuke in the earlier days of the Republic, and can only now find countenance and sympathy from that toleration of lawlessness which looks with indifference, if not approval, upon the overthrow of legitimate government and the substitution of a despotism supported by Federal power in one of the States of this Union.

The refusal to give to Mr. Sykes the seat which he claims in this body would be a declaration on the part of the Senate that the legislature that elected him was not the lawful general assembly of the State; that the constitutional provision requiring the lieutenant-governor to preside in the senate has no meaning; that no importance attaches to the returns made by the supervisors of elections as required by law, or to the certificates of election issued to members by the secretary of state in conformity with such returns; that the legal ascertainment of who constitute the members of the respective houses of the legislature and every requirement of law for such ascertainment were unnecessary and might be dispensed with in the organization of the two houses; that no significance attaches to the provisions of law for the erection of a State capitol and the appropriation of halls therein for the senate and house of representatives; in short, that the observance of constitutional and legal requirements is wholly unnecessary and not essential to the legal existence of legislative bodies in the State of Alabama. Mr. Sykes was elected by a legislature met in pursuance of every requirement of law. No one disputes that the lieutenant-governor presided in the senate and the speaker of the last house of representatives in the house at the capitol. No one denies that the members of the two houses assembled at the proper time and in the halls set apart for the use of the respective houses of the legislature. No one denies that every member of each house produced the certificate of his election, issued by the secretary of state in conformity with the returns made to him by the supervisor of elections. No one denies that a quorum admitted to seats upon such certificates were present in both houses, and participated in their proceedings and in the joint convention that elected Mr. Sykes to the Senate. With these requirements fulfilled by the capitol legislature, it would be impossible to put any other construction on the rejection of Mr. Sykes than that the Senate does not deem compliance with law in the

organization of the legislature of the State essential to its legal existence or the validity of its acts. On the other hand, the retention of Mr. Spencer, elected by a body of men assembled without warrant of law, at a place not designated for the meeting of the general assembly, with less than a quorum of persons in either house, holding certificates of election issued in pursuance of law and presided over by persons other than those designated in the constitution as the presiding officers of the two houses of the legislature, would be an unequivocal declaration on the part of the Senate of the United States that a revolutionary body of men may constitute itself the legislature of Alabama, and perform the functions appertaining to the general assembly of the State.

The enunciation of such a doctrine, either expressly or by implication, arising from the retention of Mr. Spencer in the position he occupies, would subject the Senate to the suspicion in the popular mind of being governed in its decision by party predilection. Unjust as such a suspicion might be, the preservation of its own dignity demands that no occasion shall occur from which it could possibly arise. No higher duty devolves upon the Senate than the preservation of its own character from reproach. Within the last few years it has suffered in public esteem from causes which it is unnecessary to name, and it is to be hoped nothing in connection with this contest may occur to weaken its claim to the respect and confidence of the country.

The decision of this contest against Mr. Sykes, elected by a legislature assembled with all the forms of law, and in favor of Mr. Spencer, elected by a legislature convened in contempt of law, would encourage faction and invite to revolution in every State of the Union in which political parties are about equal in numerical strength. The defeated party, basing its action on allegations of fraud, instead of pursuing the remedy pointed out by law, will seek the correction of its real or fancied wrongs by imitating the example of the court-house legislature of Alabama. For the justification of its action, it could point to the indorsement by the Senate of the proceedings of that revolutionary body. By recognizing the capitol legislature, however, and deciding the contest in favor of Mr. Sykes, the Senate would administer a just rebuke to lawlessness, promote public order and morality, and enforce the observance of law in the organization of legislative bodies throughout the land.

Much more important considerations are involved in this contest than the mere question which of the persons claiming shall be allowed to sit as a member in this body. If that was the single question to be decided, it would be worthy of the most careful and deliberate action of the Senate. Private rights ought not to be hastily or inconsiderately determined, but should be as carefully guarded and preserved by the decision of this body as they would be by the judgment of the highest legal tribunal in the land. Important, however, as the question of personal rights may be, it dwindles into insignificance in view of the graver consequences to result from the determination of this contest by the Senate. Presented in this issue is the broad question whether, in one of the States of this Union, legitimate legislative government, sanctioned by every requirement of the constitution and laws of the State, can be superseded by faction, and a revolutionary body, met without the forms and in contempt of law, receive the approval and sanction of the Senate as the lawful general assembly of the State.

This is the grave question which must be decided in the determination of the contest now before the Senate. Upon that decision may depend, in no small degree, the preservation of future peace and harmony, not only in Alabama, but in every State of the Union. In disposing of this case, no encouragement should be given, directly or indirectly, to a disregard of law; but in its action in the matter before it the Senate should teach the wholesome lesson that a due observance of the provisions of law is alike the duty and interest of every citizen, whether acting in a private or public capacity, and that no attempt to ignore or evade its requirements can meet the approval or be sustained by the American Senate.

The State of Alabama has a right to be represented on this floor by a Senator chosen by the legislature of the State organized in conformity with the requirements of her constitution and laws. That right would be secured in the admission of Mr. Sykes. The undersigned therefore respectfully submit the following resolution and recommend its adoption:

Resolved, That Francis W. Sykes, having been duly and legally elected a Senator from the State of Alabama for the constitutional term commencing March 4, 1873, is entitled to the seat in this body now held by the Hon. George E. Spencer.

ELI SAULSBURY.
WILLIAM T. HAMILTON.

WEDNESDAY, *May* 27, 1874.

On motion by Mr. Hamilton, of Maryland, the Senate proceeded to consider the resolution reported by the Committee on Privileges and Elections, to whom was referred the memorial of Francis W. Sykes, claiming a seat in the Senate as Senator from the State of Alabama, viz:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes."

An amendment to the resolution having been proposed by Mr. Hamilton, of Maryland,

Pending debate,

On motion by Mr. Conkling, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 4287–4290 of the Congressional Record, vol. ii, part 5. Mr. Hamilton's speech is found on pages 323–331 of the Appendix, vol. ii, part 6.]

THURSDAY, *May* 28, 1874.

The President *pro tempore* announced that the morning hour had expired and called up the unfinished business of the Senate at its adjournment yesterday, viz, the resolution reported by the Committee on Privileges and Elections, to whom was referred the memorial of Francis W. Sykes, claiming a seat in the Senate as a Senator from the State of Alabama, as follows:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes."

The Senate resumed the consideration of the said resolution.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting—

"That the Hon. George E. Spencer, not having been elected a Senator from the State of Alabama by the lawful legislature of that State, is not entitled to a seat in this body,"

After debate,

It was determined in the negative—yeas 11, nays 33.

On motion by Mr. Hamilton, of Maryland, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Bogy, Davis, Hager, Hamilton of Maryland, Hamilton of Texas, Johnston, McCreery, Merrimon, Ransom, and Saulsbury.

Those who voted in the negative are Messrs. Alcorn, Anthony, Boreman, Carpenter, Chandler, Clayton, Conkling, Conover, Dorsey, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Harvey, Howe, Ingalls, Logan, Mitchell, Morrill of Maine, Morrill of Vermont, Morton, Oglesby, Patterson, Pratt, Ramsey, Scott, Sherman, Sprague, Stewart, Wadleigh, Washburn, West, and Wright.

So the amendment was not agreed to.

On motion by Mr. Hamilton, of Maryland, to amend the resolution by striking out all after "resolved" and in lieu thereof inserting—

"That Francis W. Sykes, having been duly and legally elected a Senator from the State of Alabama for the constitutional term commencing March 4, 1873, is entitled to the seat in this body now held by the Hon. George E. Spencer,"

It was determined in the negative.

The question recurring on the resolution reported by the Committee on Privileges and Elections, viz:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the memorial of Francis W. Sykes,"

On the question to agree thereto, it was determined in the affirmative.

[The debate is found on pages 4325–4330 of the Congressional Record, vol. ii, part 5.]

COMPENSATION OF MR. SYKES.

[First session of the Forty-third Congress.]

THURSDAY, *May* 28, 1874.

Mr. Hamilton, of Maryland, submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That Francis W. Sykes, late contestant for a seat in this body from the State of Alabama, be allowed the salary of a Senator from the 4th of March, 1873, up to the 28th day of March, 1874, and one mileage each way."

FRIDAY, *June* 5, 1874.

On motion by Mr. Hamilton, of Maryland, the Senate proceeded to consider the resolution submitted by him on the 29th of May last, directing the Secretary of the Senate to pay certain compensation to Francis W. Sykes, late claimant of a seat in the Senate as a Senator from the State of Alabama; and

An amendment having been proposed by Mr. Carpenter,

Pending debate,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

[The debate is found on pages 4596–4598 of the Congressional Record, vol. ii, part 5.]

WEDNESDAY, *June* 10, 1874.

On motion by Mr. Hamilton, of Maryland, the Senate resumed the consideration of the resolution reported by him from the Committee on Privileges and Elections, on the 29th instant, directing the Secretary of the Senate to pay certain compensation to Francis W. Sykes as a claimant to a seat in the Senate as a Senator from the State of Alabama.

An amendment having been proposed by Mr. Carpenter, and an amendment to the amendment having been proposed by Mr. Hamilton, of Maryland,

After debate,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

[The debate is found on pages 4798–4800 of the Congressional Record, vol. ii, part 5.]

THURSDAY, *June* 11, 1874.

On motion by Mr. Hamilton, of Maryland, the Senate resumed the consideration of the resolution reported by him from the Committee on Privileges and Elections, on the 29th May last, viz:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay to Francis W. Sykes, late contestant from the State of Alabama, out of the appropriations for compensation and mileage for Senators, the sum of $8,374.80, being the salary of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874, inclusive."

On motion by Mr. Carpenter to amend the resolution in lines 4 and 5 by striking out "$8,374.80, being the salary of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874, inclusive," and in lieu thereof inserting "$3,000;"

On motion by Mr. Hamilton, of Maryland, to amend the amendment by striking out "$3,000" and in lieu thereof inserting "$6,500,"

After debate, it was determined in the negative—yeas 25, nays 32.

On motion by Mr. Hamilton, of Maryland, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Alcorn, Anthony Bayard, Bogy, Conover, Cooper, Davis, Goldthwaite, Gordon, Hager, Hamilton of Maryland, Johnston, Kelly, Logan, McCreery, Merrimon, Morton, Norwood, Patterson, Ramsey, Ransom, Saulsbury, Stockton, Thurman, and Tipton.

Those who voted in the negative are Messrs. Allison, Boreman, Boutwell, Buckingham, Cameron, Carpenter, Chandler, Conkling, Cragin, Edmunds, Ferry of Michigan, Frelinghuysen, Gilbert, Hamilton of Texas, Hamlin, Harvey, Howe, Ingalls, Mitchell, Morrill of Maine, Morrill of Vermont, Oglesby, Pease, Pratt, Sargent, Sherman, Sprague, Stewart, Wadleigh, Washburn, Windom, and Wright.

So the amendment to the amendment was not agreed to.

The question recurring on the amendment of Mr. Carpenter,

Ordered, That the further consideration of the said resolution be postponed to to-morrow.

[The debate is found on pages 4850–4852 of the Congressional Record, vol. ii, part 5.]

[Second session of the Forty-third Congress.]

WEDNESDAY, *December* 23, 1874.

On motion by Mr. Hamilton, of Maryland,

Ordered, That the resolution directing the Secretary to pay Francis W. Sykes the salary of a Senator while contesting a seat in the Senate be recommitted to the Committee on Privileges and Elections.

WEDNESDAY, *March* 3, 1875.

Mr. Hamilton, of Maryland, from the Committee on Privileges and Elections, reported the following resolution:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, directed and authorized to pay to Francis W. Sykes, late contestant from the State of Alabama, the pay and mileage of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874."

[First session of the Forty-fourth Congress.]

THURSDAY, *February* 3, 1876.

Mr. Saulsbury submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay to Francis W. Sykes, late contestant from the State of Alabama, the pay and mileage of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874."

WEDNESDAY, *March* 8, 1876.

Mr. Cooper, from the Committee on Privileges and Elections, to whom was referred the resolution of Mr. Saulsbury, submitted on the 3d of February last, to pay Francis W. Sykes the compensation and mileage of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874, reported it without amendment, and submitted a report (No. 135) thereon.

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MARCH 8, 1876.—Ordered to be printed.

Mr. Cooper, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred Senate resolution No. 10, to pay Francis W. Sykes the compensation and mileage of a Senator from the 4th day of March, 1873, to the 28th day of May, 1874, have had the same under consideration, and submit the following report:

The rule established by the Senate in cases similar to the present one has been uniform. A person applying for a seat in this body by reason of an election by the legislature of a State, although his application has been refused, and another adjudged entitled to the seat, has been paid the amount he would have been entitled to receive if he had been admitted and served the time the contest was pending. The action of the Senate upon such cases has been with such great unanimity as to call for little or no debate. The reasons, therefore, upon which the rule is based can only be surmised. It may be said the person claims his seat in pursuance of an implied duty imposed upon him to thus assert the right of his State to be represented in this body, which duty he owes to the public, and that expenses incurred in the performance of a public duty should be paid out of the common treasury.

A proper respect for the action of a State in the choice of a Senator may also justify the rule.

The committee see nothing in the present case to take it out of the general rule; they therefore recommend the passage of the resolution.

SECOND INVESTIGATION OF MR. SPENCER'S ELECTION.

THURSDAY, *December* 16, 1875.

Mr. Spencer rose to a question of privilege, and, having addressed the Senate upon the subject of certain charges made in connection with his election as a Senator, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections are hereby instructed to investigate into and inquire whether in the election of George E. Spencer as a Senator in Congress from the State of Alabama there were used, or caused to be used and employed, corrupt means or corrupt practices to secure his election to the seat he now holds; and that said committee be empowered to administer oaths, to send for persons and papers, to take testimony, to employ stenographers and such clerical assistance as they may deem necessary, and to sit during the recess of Congress, if considered advisable, and to report the result of their investigations as soon as practicable."

[The debate is found on pages 232, 233 of the Congressional Record, vol. iv, part 1.]

TUESDAY, *January* 18, 1876.

Mr. Goldthwaite presented a report of the joint committee of the general assembly of Alabama, accompanied by a memorial and testimony, in regard to the alleged election of George E. Spencer as a Senator from that State; which was referred to the Committee on Privileges and Elections.

MONDAY, *January* 24, 1876.

Mr. Goldthwaite presented a memorial of the general assembly of the State of Alabama, praying that the seat in the United States Senate now held by George E. Spencer may be declared vacant; which was referred to the Committee on Privileges and Elections.

FRIDAY, *March* 3, 1876.

Mr. Morton submitted the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That the sum of $15,000 be appropriated from the contingent fund of the

Senate to defray the expenses of the investigation into the facts attending the election of the Hon. George E. Spencer as a member of this body by the legislature of Alabama; to be disbursed on the warrant of the chairman of the Committee on Privileges and Elections."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time by unanimous consent.

Resolved, That it pass.

WEDNESDAY, *May* 3, 1876.

Mr. Morton submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That 300 copies of the testimony taken in the investigation of the charges against George E. Spencer be printed for the use of the Senate."

SATURDAY, *May* 20, 1876.

Mr. Morton, from the Committee on Privileges and Elections, who were instructed by a resolution of the Senate of the 16th December last to investigate into and inquire whether in the election of George E. Spencer as a Senator in Congress from the State of Alabama there were used and employed corrupt means or corrupt practices to secure his seat he now holds; and to which committee was referred the memorial of the legislature of Alabama charging that George E. Spencer had not been legally elected a Senator from that State, accompanied by a copy of certain testimony purporting to have been taken by a committee of said legislature, and a certain report of said committee thereon, submitted a report (No. 331) thereon, accompanied by the testimony taken by said Committee on Privileges and Elections, and a request that the said committee be discharged from the further consideration of the subject.

Mr. Saulsbury asked and obtained leave of the Senate to submit, on some subsequent day, the views* of the minority of the Committee on Privileges and Elections on the foregoing subject.

REPORT OF COMMITTEE.†

[The committee consisted of Messrs. Morton (chairman), Logan, Mitchell, Wadleigh, Cameron of Wisconsin, McMillan, Saulsbury, Merrimon, and Cooper.]

IN THE SENATE OF THE UNITED STATES.

MAY 20, 1876.—Ordered to be printed.

Mr. Morton, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections beg leave to submit the following report:

On the 16th day of December, 1875, the Senate adopted the following resolution:

"*Resolved*, That the Committee on Privileges and Elections be hereby instructed to investigate into and inquire whether in the election of George E. Spencer as a Senator in Congress from the State of Alabama there were used and employed corrupt means or corrupt practices to secure his election to the seat he now holds; and that the said committee be empowered to administer oaths, to send for persons and papers, to take testimony, to employ stenographers and such clerical assistance as they may deem necessary, and to sit during the recess of Congress if considered advisable, and to report the result of their investigations as soon as possible."

Afterward a memorial from the legislature of Alabama, charging that Mr. Spencer had not been duly and legally elected, which was accompanied by a copy of the testimony purporting to have been taken by a committee of that legislature, and a report of the committee upon the testimony, was also referred to the Committee on Privileges and Elections.

This testimony was *ex parte* in its character, very much of it hearsay, and could not be received by the committee as evidence.

The question whether Mr. Spencer was elected by the lawful legislature of Alabama, raised in the memorial referred to, and in the specifications filed before the committee by the counsel, Mr. Morgan, who represented the State of Alabama, was considered by a majority of the committee to have been fully settled in the contest for the seat occupied by Mr. Spencer, before made, in the Senate by Mr. Sykes.

The question in that contest was whether what was known as the court-house legis-

*The views of the minority referred to were never presented

†Taken from Senate Reports, 44th Cong., 1st sess., No. 331. The testimony accompanying the report is here omitted.

lature, by which Mr. Spencer was elected, or the capitol legislature, by which Mr. Sykes was elected, was the lawful legislature of Alabama. After full consideration and argument of counsel, it was determined by the committee and afterward by the Senate that the court-house legislature was the lawful one, and that Mr. Spencer and not Mr. Sykes was entitled to the seat.

The question having been definitely settled, it was considered by the committee that it was not competent for the committee or the Senate to reopen it, and that it must be treated as *res adjudicata*.

Upon the other branch of the inquiry, as to whether Mr. Spencer, or his friends, had been guilty of bribery, corruption, or other unlawful practices in procuring his election, the committee made faithful and diligent inquiry. Mr. Morgan, counsel for the accusers, subpœnaed and examined many witnesses, and, after the testimony was over, supported the charge against Mr. Spencer by a lengthy argument.

Those charges were not proven in any respect. No witness testified that Mr. Spencer had given, directly or indirectly, or offered to give money, or anything of value, in consideration of votes, or support, in the Alabama legislature; nor was it shown that any of his friends had done so. Some hearsay testimony was offered to the effect that certain persons had said that they had received money in consideration for voting for Mr. Spencer for the Senate; but this testimony was ruled out by the committee. The persons alleged to have made these statements were competent witnesses, but were not produced, nor was it proven that any money had been paid to them for such a purpose by anybody, whether a known friend of Mr. Spencer or not.

The counsel for the accusers complain strongly of the rejection of such testimony; but its illegality and worthless character were too plain to require argument, and had it been admitted it might have contributed to make some scandal, but would have proved nothing. Attempts were made to offer the hearsay statements against Mr. Spencer of persons who were not shown to have been engaged with him in any conspiracy to procure his election by corruption or undue means, and by whose statements made in his absence he could not be bound by any known principle of law, which were also rejected by the committee.

While hearsay evidence was thus excluded, the door was thrown open widely to prove the payment of money by any person to any member of the legislature, or to be used with the legislature, to procure Mr. Spencer's election, by any person, whether such person was shown to be a friend of Mr. Spencer or not.

The committee deem it unnecessary to go into the full details of the case, and having thus given the general result, beg leave to be discharged from the further consideration of the resolution and memorial, and herewith submit copies of the testimony taken before the committee.

REIMBURSEMENT OF MR. SPENCER'S EXPENSES.

THURSDAY, *December* 18, 1884.

Mr. Hoar presented a petition of George E. Spencer, late a Senator from the State of Alabama, praying to be reimbursed the amount necessarily incurred by him in defending his title to a seat in the Senate; which was referred to the Committee on Privileges and Elections.

FRIDAY, *February* 13, 1885.

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution for consideration:

"*Resolved*, That there be allowed and paid out of the contingent fund of the Senate to George E. Spencer, formerly a Senator from the State of Alabama, the sum of $7,132, being the amount actually and necessarily expended by him in maintaining his title to his seat."

FRIDAY, *February* 20, 1885.

On motion by Mr. Hoar, the Senate proceeded to consider the resolution given above, and it was

Ordered, That it be referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

TUESDAY, *February* 24, 1885.

Mr. Jones, of Nevada, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution (given above), reported it without amendment.

TUESDAY, *March* 3, 1885.

On motion by Mr. Jones, of Nevada, the Senate proceeded to consider the resolution (given above), and

Resolved, That the Senate agree thereto.

[Special session of Senate, March, 1877.]

L. Q. C. LAMAR,

Senator from Mississippi from March 6, 1877, till he resigned, March 9, 1885.

Mr. Lamar was first elected for the term beginning March 4, 1877. Objection being made March 5, 1877, to the oaths of office being administered to him, his credentials were laid on the table. The following day, the credentials were taken from the table after debate, and he was sworn. It appears from the debates that the objections to the admission of Mr. Lamar were upon the ground that the "State government in Mississippi was a usurpation." (An inquiry into alleged frauds in the election in Mississippi in November, 1875, had been made by a select committee and a report thereon submitted to the Senate August 7, 1876.) Most Senators proceeded upon the ground that Mr. Lamar had at least a *prima facie* title to the seat and should be sworn, though it was claimed that this rule had not been followed in the case of Mr. Pinchback, of Louisiana.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 44th Cong. (special session, March, 1877).

The debate is found on pages 5–15 of the Congressional Record, vol. vi.

SATURDAY, *March* 3, 1877.

Mr. Alcorn presented the credentials of L. Q. C. Lamar, elected a Senator by the legislature of the State of Mississippi for the term of six years commencing March 4, 1877; which were read.

MONDAY, *March* 5, 1877.

Mr. Anthony submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials of Senators-elect in all disputed or contested cases lie upon the table until to-morrow."

Objection under the foregoing resolution having been made to the oaths of office being administered to Mr. L. Q. C. Lamar from Mississippi, whose credentials were heretofore presented,

Ordered, That his credentials lie on the table.

TUESDAY, *March* 6, 1877.

Mr. Wallace submitted the following resolution for consideration:

"*Resolved*, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn."

Mr. Spencer called for the reading of a report made to the Senate at the first session of the Forty-fourth Congress, by the Committee on Privileges and Elections, on the subject of recent elections in the State of Mississippi.

Mr. Wallace having objected to the reading of the said report,

The Vice-President submitted the question to the Senate, Shall the report be read? and it was determined in the negative.

The question recurring on the resolution of Mr. Wallace,

On motion by Mr. Spencer to amend the resolution by striking out, in the last line thereof, the words "that he be sworn," and in lieu thereof inserting "be referred to the Committee on Privileges and Elections when the committee shall be appointed,"

On the question to agree thereto,

After debate, it was determined in the negative—yeas 1, nays 58.

On motion by Mr. Spencer, the yeas and nays being desired by one-fifth of the Senators present,

The Senator who voted in the affirmative is Mr. Wadleigh.

Those who voted in the negative are Messrs. Allison, Anthony, Bailey, Barnum, Bayard, Beck, Blaine, Bogy, Booth, Bruce, Burnside, Cameron of Pennsylvania, Chaffee, Christiancy, Cockrell, Coke, Conkling, Conover, Davis of Illinois, Davis of West Virginia, Dawes, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Hoar, Howe, Johnston, Jones of Florida, Jones of Nevada, Kernan Kirkwood, McCreery, McDonald, McMillan, McPherson, Maxey, Mitchell, Morton, Oglesby, Paddock, Patterson, Plumb, Randolph, Ransom, Rollins, Saulsbury, Saunders, Sharon, Sherman, Teller, Thurman, Wallace, Whyte, and Withers.

So the amendment was not agreed to.

The question recurring on the resolution of Mr. Wallace,

On the question to agree thereto,

After debate, it was determined in the affirmative—yeas 57, nays 1.

On motion by Mr. Spencer, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Bailey, Barnum, Bayard, Beck, Blaine, Bogy, Booth, Bruce, Burnside, Chaffee, Christiancy, Cockrell, Coke, Conkling, Conover, Davis of Illinois, Davis of West Virginia, Dawes, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Hoar, Howe, Johnston, Jones of Florida, Jones of Nevada, Kernan, Kirkwood, McCreery, McDonald, McMillan, McPherson, Maxey, Mitchell, Morrill, Morton, Oglesby, Paddock, Patterson, Plumb, Randolph, Ransom, Saulsbury, Saunders, Sharon, Sherman, Teller, Thurman, Wallace, Whyte, and Withers.

The Senator who voted in the negative is Mr. Wadleigh.

So it was

Resolved, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn.

Whereupon

The oaths prescribed by law were administered to Mr. Lamar by the Vice-President, and he took his seat in the Senate.

[Special session of the Senate, March, 1877.]

JOHN T. MORGAN,

Senator from Alabama from March 8, 1877. [Held seat until death in 1907.]

Mr. Morgan was first elected for the term beginning March 4, 1877. Objection being made March 5, 1877, to the oaths of office being administered to him, his credentials were laid on the table. The credentials were taken from the table March 8, after debate, and he was sworn. It appears from the debate that objection was made to his admission on the ground that the legislature elected in August, 1876—the one electing Mr. Morgan—had been fraudulently elected, and were not representatives of the people. (An investigation into the Alabama elections of 1876 had been made by the Committee on Privileges and Elections, and a report thereon submitted to the Senate March 3, 1877.) It further appears that the Senate proceeded upon the ground that Mr. Morgan had at least a *prima facie* title to the seat.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 44th Cong., 2d sess. (special session, March, 1877).

The debates are found on pages 24-31 of the Congressional Record, vol. vi.

TUESDAY, *February* 27, 1877.

Mr. Gordon presented the credentials of John T. Morgan, elected a Senator by the legislature of Alabama for the term of six years commencing March 4, 1877; which were read.

MONDAY, *March* 5, 1877.

Mr. Anthony submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials of Senators-elect in all disputed or contested cases lie upon the table until to-morrow."

Objection under the foregoing resolution having been made to the oaths of office being administered to Mr. John T. Morgan, from Alabama, whose credentials were heretofore presented,

Ordered, That the credentials lie on the table.

WEDNESDAY, *March* 7, 1877.

Mr. Bayard submitted the following resolution for consideration:

"*Resolved*, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table, and that he be sworn."

On motion by Mr. Morrill, the Senate proceeded to the consideration of executive business.

THURSDAY, *March* 8, 1877.

The Senate resumed the consideration of the resolution yesterday submitted by Mr. Bayard, viz:

"*Resolved*, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table, and that he be sworn."

On motion by Mr. Spencer, to amend the resolution by striking out, in the last line thereof the words "he be sworn," and in lieu thereof inserting "they be referred to the Committee on Privileges and Elections when appointed,"

After debate, it was determined in the negative.

The question recurring on the resolution of Mr. Bayard, it was agreed to, as follows:

"*Resolved*, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table, and that he be sworn."

Whereupon

Mr. Morgan appeared at the bar of the Senate, and the oaths prescribed by law having been administered to Mr. Morgan by the Vice-President, he took his seat in the Senate.

[Special session of Senate, March, 1877, and Forty-fifth Congress.]

DAVID T. CORBIN vs. M. C. BUTLER,
of South Carolina.

February 13, 1877, the credentials of Mr. Corbin, elected for the term beginning March 4, 1877, were presented, and March 2, the credentials of Mr. Butler, elected for the same term, were presented. March 7, the Senate resolved that both credentials be referred to the Committee on Privileges and Elections when appointed. November 26, the Senate resolved, after debate, that the committee be discharged from the consideration of Mr. Butler's credentials. November 30, Mr. Butler was sworn as a Senator. February 4, 1879, the committee reported that at the State election held in November, 1876, one hundred and twenty-four persons were to be voted for as members of the house of representatives; that the board of State canvassers declared that only one hundred and sixteen were duly elected; that fifty-nine of these met at the State-house November 28, and organized, being known as the Mackey house; that the other fifty-seven of those elected, together with eight persons having no certificates of election, met on the same day in a private hall and pretended to organize, being known as the Wallace house; that the Mackey house and an unquestioned senate elected Mr. Corbin December 12, 1876, whose credentials were signed by Governor Chamberlain, who was, until December 14, 1876, the unquestioned governor; that the Wallace house, with a minority of the senate, elected Mr. Butler December 19, 1876, whose credentials were signed by Governor Hampton. The committee reported the following conclusions: The Mackey house constituted the lawful house. Though composed of less than a majority of all the possible members of that body (one hundred and twenty-four) there was a "quorum to do business," which consisted of a "majority of the members chosen"—a majority of all those holding lawful certificates of election. Mr. Corbin was legally elected December 12, 1876, and there was no vacancy when Mr. Butler was elected. The Wallace house had no quorum when it organized, and was never a lawful body. The Wallace house had no senate to recognize it. The committee submitted a resolution that Mr. Corbin was duly elected and entitled to have the oath of office administered to him. A minority report held that the decision of the Senate, November 30, 1877, admitting Mr. Butler made the question *res adjudicata;* further, that fifty-nine members did not constitute a legal quorum under the constitution and laws of South Carolina, so that the Mackey house was not the legal house. A motion was made, February 25, 1879, that the Senate proceed to the consideration of the resolution reported by the committee, and it was determined in the negative. February 28, the Vice-President laid before the Senate a letter from Mr. Corbin, withdrawing his claim. No further action was taken by the Senate. Messrs. Corbin and Butler were allowed reimbursement of the necessary expenses of the contest.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 44th Cong., and 45th Cong., and the report of the committee from Senate Reports, 45th Cong., 3d sess, No. 707.

Special references to the debates of each day are inserted below.

TUESDAY, *February* 13, 1877.

Mr. Patterson presented the credentials of David T. Corbin, elected a Senator by the legislature of the State of South Carolina for the term of six years commencing March 4, 1877; which were read.

FRIDAY, *March* 2, 1877.

Mr. Ransom presented the credentials of M. C. Butler, certified by Wade Hampton, as governor of South Carolina, to have been elected a United States Senator by the legislature of that State for the term of six years commencing March 4, 1877; which were read.

Ordered, That they lie on the table.

[Special session of Senate, March, 1877.]

WEDNESDAY, *March* 7, 1877.

Mr. Patterson submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the credentials of David T. Corbin and M. C. Butler, each claiming to be a Senator from the State of South Carolina, lie upon the table until the committees are appointed, and their credentials shall be referred to the Committee on Privileges and Elections."

[First session of the Forty-fifth Congress.]

TUESDAY *November* 20, 1877.

Mr. Thurman submitted the following resolution for consideration:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina."

[The debate is found on pages 556–559 of the Congressional Record, vol. vi.]

WEDNESDAY, *November* 21, 1877.

On motion by Mr. Thurman, the Senate proceeded to consider the resolution yesterday submitted by him to discharge the Committee on Privileges and Elections from the further consideration of the credentials of M. C. Butler; and

After debate,

On motion by Mr. Hoar that the resolution lie on the table,

Mr. Conkling demanded the yeas and nays; which were ordered.

On motion by Mr. Thurman, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 571–581 of the Congressional Record, vol. vi.]

THURSDAY, *November* 22, 1877.

The Senate resumed the consideration of the resolution submitted by Mr. Thurman on the 20th instant, to discharge the Committee on Privileges and Elections from the further consideration of the credentials of M. C. Butler, of South Carolina; and,

The question being on the motion of Mr. Hoar that the resolution lie on the table, it was determined in the negative—yeas 30, nays 32.

The yeas and nays having been heretofore ordered,

Those who voted in the affirmative are Messrs. Allison, Booth, Bruce, Burnside, Cameron of Pennsylvania, Chaffee, Christiancy, Conkling, Dawes, Dorsey, Edmunds, Hamlin, Hoar, Howe, Ingalls, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Rollins, Sargent, Saunders, Spencer, Teller, Wadleigh, and Windom.

Those who voted in the negative are Messrs. Bailey, Barnum, Bayard, Beck, Cockrell, Coke, Conover, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Johnston, Jones of Florida, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

So the motion was not agreed to.

[Several amendments to the resolution of Mr. Thurman were then offered, none of which were agreed to. The debate is found on pages 603–605 of the Congressional Record, vol. vi.]

MONDAY, *November* 26, 1877.

The Vice-President announced that the morning hour had expired, and called up the unfinished business of the Senate at its last adjournment, viz, the resolution submitted by Mr. Thurman on the 20th instant to discharge the Committee on Privileges and Elections from the further consideration of the credentials of M. C. Butler, of South Carolina; and

The Senate resumed the consideration of the said resolution; and,

After debate,

On motion by Mr. Edmunds that the Senate proceed to the consideration of executive business, it was determined in the negative—yeas 28, nays 30.

* * * * * * *

So the motion was not agreed to.

After further debate,

On motion by Mr. Edmunds to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

"That the Committee on Privileges and Elections be, and hereby is, instructed to inquire forthwith, and report as soon as may be, whether any threats, promises, or arrangements respecting existing or contemplated accusations or criminal prosecutions against any Senator, or any other corrupt or otherwise unlawful means or influences have been in any manner used or put in operation, directly or indirectly, by M. C. Butler, one of the claimants to a seat in the Senate from the State of South Carolina, or by any other Senator or other person, for the purpose of influencing the vote of any Senator on the question of discharging said committee from the consideration of said M. C. Butler's credentials or on the other question at the present session of the Senate; and that said committee have power to send for persons and papers, and to sit during the sittings of the Senate,"

It was determined in the negative—yeas 27, nays 30.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Dawes, Dorsey, Edmunds, Hoar, Howe, Ingalls, Jones of Nevada, Kirkwood, McMillan, Mitchell, Morrill, Oglesby, Paddock, Rollins, Saunders, Teller, and Wadleigh.

Those who voted in the negative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke,

Conover, Davis of Illinois, Davis of West Virginia, Dennis, Garland, Gordon, Harris, Hereford, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Matthews, Merrimon, Morgan, Randolph, Ransom, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

So the amendment was not agreed to.

[Several other amendments to the resolution of Mr. Thurman were then offered, none of which were agreed to.]

The question recurring on agreeing to the resolution, as follows:

"*Resolved*, That the Committee on Privileges and Elections be discharged from the consideration of the credentials of M. C. Butler, of South Carolina,"

It was determined in the affirmative—yeas 29, nays 27.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke, Conover, Davis of West Virginia, Dennis, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Conkling, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Rollins, Saunders, Spencer, Teller, and Wadleigh.

So the resolution was agreed to.

* * * * * * *

Mr. Thurman submitted a motion that M. C. Butler, of South Carolina, be sworn as Senator from that State.

Mr. Edmunds objected to the consideration of the motion this day.

[The debate is found on pages 638–714 of the Congressional Record, vol. vi.]

WEDNESDAY, *November* 28, 1877.

The Senate proceeded to the consideration of the resolution to admit William Pitt Kellogg to a seat in the Senate.

On motion by Mr. Thurman to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

"That M. C. Butler be now sworn as a Senator from the State of South Carolina,"

After debate,

On the question to agree thereto, the yeas were 30 and the nays were 30.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, Whyte, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Conover, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Rollins, Sargent, Saunders, Spencer, Teller, and Wadleigh.

The vote of the Senate being equally divided,

The Vice-President voted in the negative.

So the amendment was not agreed to.

Upon the announcement of the result of the vote on the amendment,

Mr. Thurman rose to a question of order, and submitted that the provision of the Constitution that the Vice-President shall have no vote unless where the Senate is equally divided does not apply to the case of seating a member; but that questions of seating a member should be left to the Senators themselves, under the provision that each House shall be the judge of the elections, qualifications, and returns of its own members; and,

After debate,

Mr. Thurman withdrew the question of order.

[The debate is found on pages 730–740 of the Congressional Record, vol. vi.]

FRIDAY, *November* 30, 1877.

On motion by Mr. Thurman that M. C. Butler be now sworn as a Senator from the State of South Carolina, it was determined in the affirmative—yeas 29, nays 28.

On motion by Mr. Edmunds, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bailey, Bayard, Beck, Cockrell, Coke,

Conover, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Merrimon, Morgan, Patterson, Randolph, Saulsbury, Thurman, Voorhees, Wallace, and Withers.

Those who voted in the negative are Messrs. Allison, Anthony, Booth, Bruce, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Chaffee, Christiancy, Conkling, Dawes, Dorsey, Edmunds, Hoar, Howe, Jones of Nevada, Kirkwood, McMillan, Matthews, Mitchell, Morrill, Oglesby, Paddock, Rollins, Saunders, Spencer, Teller, and Wadleigh.

So the motion was agreed to.

Mr. M. C. Butler then appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[Second session of the Forty-fifth Congress.]

THURSDAY, *December* 13, 1877.

Mr. Cameron, of Wisconsin, presented the petition of David T. Corbin, praying that his right to a seat in the Senate as Senator from South Carolina may be inquired into and determined by the Senate upon its merits.

SATURDAY, *December* 15, 1877.

Mr. Butler submitted the following resolution for consideration:

"*Resolved*, That the Committee on Privileges and Elections be, and hereby is, instructed to inquire forthwith, and report as soon as may be, whether any threats, promises, or arrangements respecting existing or contemplated accusations or criminal prosecutions against any Senator, or any other corrupt or otherwise unlawful means or influences have been in any manner used or put in operation, directly or indirectly, by M. C. Butler, one of the Senators from the State of South Carolina, or by any other Senator or other person, for the purpose of influencing the vote of Senators on the question of discharging said committee from the consideration of said M. C. Butler's credentials or the other question at the late session of the Senate; and that said committee have power to send for persons and papers, and to sit during the sittings of the Senate."

[The debate is found on pages 235, 236 of the Congressional Record, vol. vii, part 1.]

TUESDAY, *March* 26, 1878.

On motion by Mr. Cameron, of Wisconsin,

Ordered, That the petition of David T. Corbin, praying that his right to a seat in the Senate may be inquired into and determined, be referred to the Committee on Privileges and Elections.

TUESDAY, *June* 4, 1878.

Mr. Wadleigh submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That one hundred copies of the arguments before the Committee on Privileges and Elections in the case of Messrs. Corbin and Butler be printed for the use of the committee."

[Third session of the Forty-fifth Congress.]

THURSDAY, *December* 5, 1878.

Mr. Cameron, of Wisconsin, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That one hundred copies of the report made to the Committee on Privileges and Elections by Mr. Cameron, of Wisconsin, in the matter of the claim of David T. Corbin to a seat in this body as Senator from the State of South Carolina be printed for the use of said committee."

THURSDAY, *January* 23, 1879.

Mr. Wadleigh submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That one hundred copies of the minority report of the subcommittee on Privileges and Elections in the case of Messrs. Butler and Corbin be printed for the use of the committee."

TUESDAY, *February* 4, 1879.

Mr. Cameron, of Wisconsin, from the Committee on Privileges and Elections, to whom were referred the credentials of David T. Corbin, claiming to be Senator-elect from the

State of South Carolina, and his petition praying an inquiry into his right to a seat in the Senate, submitted a report (No. 707) accompanied by the following resolution:

"*Resolved*, That David T. Corbin was on the 12th day of December, A. D. 1876, duly elected by the legislature of the State of South Carolina a Senator from that State in the Congress of the United States for the term of six years commencing on the 4th of March, A. D. 1877, and that as such he is entitled to have the oath of office administered to him."

Mr. Hill asked and obtained leave to submit the views of the minority of the Committee on Privileges and Elections on the foregoing case; which were ordered to be printed, to accompany the report (No. 707).

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 4, 1879.—Ordered to be printed.

Mr. Cameron, of Wisconsin, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the credentials of David T. Corbin and M. C. Butler, each claiming to be Senator-elect from the State of South Carolina, submit the following report:

The resolution of the Senate of March 7, 1877, referring this case, is as follows:

"*Resolved*, That the credentials of David T. Corbin and M. C. Butler, each claiming to be a Senator from the State of South Carolina, lie on the table until the committees are appointed, and their credentials shall then be referred to the Committee on Privileges and Elections."

On the 9th day of March the committees were appointed, and, without any further action on the part of the Senate, this committee received the credentials of David T. Corbin and M. C. Butler. The committee took no action upon these credentials during the special session convened in March, 1877. At the called session, convened on the 15th October, 1877, the Senate passed an order by which the subjects referred to the committees and not acted upon at the close of the March session were returned to the several committees to which they had been referred. Under this order these credentials were returned to this committee.

On the 20th of November, 1877, Mr. Thurman offered a resolution that "the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler." This resolution is to be found in the Congressional Record of November 21, page 12. The final vote upon that question was taken November 30, 1877, and the credentials of Mr. Butler were withdrawn from the committee.

On the 22d of November, 1877, Mr. Edmunds offered an amendment to the resolution of Mr. Thurman for the purpose of attaching the name of D. T. Corbin to the resolution. It appears upon page 27 of the Congressional Record of November 23:

"Mr. EDMUNDS. Mr. President, I am now going to make a motion to amend, that I cannot help thinking will get the votes of the gentlemen who voted against the former proposition. I am sorry I had not thought of it before, because in that case I should have got all their votes in the first instance. After the word 'credentials,' as it stands in the resolution, I move to insert the words 'of William Pitt Kellogg and Henry M. Spofford, of Louisiana, and,' so that the resolution will read, if amended as I now propose, 'that the Committee on Privileges and Elections be discharged from the consideration of the credentials of William Pitt Kellogg and Henry M. Spofford, of Louisiana, and of M. C Butler, of South Carolina'; and I move to add also, after 'Butler,' the words 'and D. T. Corbin,' so as to put them all on that equality where the fourteenth amendment, that we all believe in now, places them."

That motion, as appears on the same page of the Record, was not agreed to.

On the 30th of November, 1877, the Senate having under consideration the contested-election case of William Pitt Kellogg and Henry M. Spofford, the following occurred:

"Mr. EDMUNDS. Mr. President, I ask the liberty to venture to suggest once more the possibility of our coming to an understanding as to taking a vote upon these questions, and I ask that unanimous consent be given in the usual method, not that the Journal shall bind as an order, but the understanding of Senators does: I ask unanimous consent to come to this understanding among Senators:

"'First, to vote on the Kellogg-Spofford case at or before 2 o'clock and 30 minutes p. m. to-day'—

"By which I mean the next 2 o'clock and 30 minutes, one hour from this time by the clock—

"'The chairman of the committee or any one allowed by him to have the last hour to sum up if desired.'

"Mr. THURMAN. That would give him all the time now.

"Mr. EDMUNDS. Exactly; but your side has had all the evening on the Kellogg case.

"Mr. THURMAN. Go ahead.

"Mr. EDMUNDS. 'Second, to vote on the Butler-Corbin case at or before the expiration of one hour after the Kellogg-Spofford case is disposed of, the time to be equally divided, the chairman of the committee or some one for him to have the last thirty minutes to close the debate.'

"I ask unanimous consent to come to that understanding, Mr. President.

"The VICE-PRESIDENT. Is there objection?

"Mr. GARLAND. Is there nothing, I ask the Senator from Vermont, of the other case?

"Mr. EDMUNDS. I propose nothing. I ask unanimous consent for that I have named, nothing more, nothing less.

"Mr. GARLAND. I do not think it is an improper proposition at all.

"Mr. THURMAN. Mr. President, I hope the proposition will be agreed to, and I ask my Democratic friends on this floor to agree to it and to trust to me that it will result in an arrangement perfectly honorable and fair to both parties.

"The VICE-PRESIDENT. Is there objection to the proposition? The Chair hears none.

"Several SENATORS. Question! Question!"—(Congressional Record, vol. vi, 1877, pages 796, 797.)

The resolution seating Mr. Kellogg was then adopted.

Thereupon Mr. Thurman moved that M. C. Butler be sworn in as Senator from South Carolina, and the resolution was voted upon and adopted without debate.

On the 13th of December, 1877, Mr. Corbin's petition was presented to the Senate, asking that his claim to a seat in the Senate be considered upon its merits.

The petition is as follows:

To the honorable Senate of the United States:

Your petitioner, David T. Corbin, of the State of South Carolina, shows to your honorable body that he was, on the 12th day of December, A. D. 1876, duly and lawfully elected by the legislature of the State of South Carolina to the office of United States Senator from that State for the term of six years commencing the 4th day of March, A. D. 1877.

That in said election all the provisions of the Constitution and laws of the United States were complied with, and your petitioner was regularly and duly declared elected by the legislature of said State, and duly commissioned accordingly by the governor of said State.

And your petitioner further shows that his credentials were presented to your honorable body before the close of the last regular session; and at the commencement of the extra session in March last said credentials, together with the credentials of M. C. Butler (who claimed to have been elected also Senator from South Carolina), were referred to the Committee on Privileges and Elections of your honorable body.

And your petitioner shows, on information and belief, that his said credentials have, since said reference of them to said committee, remained in the possession of said committee, and that no action has been taken thereon, either by said committee or the Senate.

And your petitioner now prays that your honorable body will, in justice to your petitioner, and in justice to the legislature of the State of South Carolina that elected and the governor that commissioned him, inquire into, hear, and determine on their merits the claim and right of your petitioner to a seat in your honorable body as Senator from the State of South Carolina.

All of which is respectfully submitted.

DAVID T. CORBIN.

On the 26th day of March, 1878, this petition was referred to this committee. At the very outset of the committee's examination of Mr. Corbin's claim they were met with a plea to their jurisdiction, submitted by the counsel of Mr. M. C. Butler, as follows:

"The sitting member respectfully submits that the Committee on Privileges and Elections cannot entertain jurisdiction of the contestant's claim to the seat of a Senator from the State of South Carolina in the Congress of the United States. He bases his denial of the right of the committee to take jurisdiction of the case upon the following grounds:

"1. In the adjudication of a contested-election case, under that clause of the Constitution which makes each House "the judge of the elections, returns, and qualifications of its own members," the Senate acts as a judicial tribunal. And the general principle that every question in issue settled by the final judgment of a judicial tribunal becomes *res judicata* as between the parties thereto applies to judgments of the Senate in contested-election cases.

"2. The contestant's petition, referred to the committee March 26, 1878, suggests no question which was not adjudicated by the Senate in the determination of this cause at the first session of the Forty-fifth Congress; nor was any question involved in the contestant's case as presented to the committee or to the Senate at that session which was not adjudicated in that determination.

"3. Inasmuch as the Senate has no set forms for its judicial decisions, the nature and scope of an adjudication will be determined, not by the mere form of the judgment, but by the whole record of the case.

"4. When the Senate adjudicates a contested-election case upon its merits the jurisdition of the committee over the case *ipso facto* terminates, whatever formalities may or may not attend the termination of such jurisdiction.

"5. Judicial tribunals of last resort will not rehear a cause after final judgment, on the application of a party, but only on a motion to reconsider made by a member of the tribunal who concurred in the decision; nor even in such a case after the expiration of the term at which the judgment is rendered. And this principle applies to decisions made by the Senate in contested-election cases."

An elaborate discussion of the proposition stated in this plea to the jurisdiction is not necessary, as while expressing no opinion on their general soundness, the committee overruled the plea on the ground that the same is not supported by the facts in the case. The claim or right of Mr. Corbin to a seat in the Senate as Senator from the State of South Carolina is not *res adjudicata*, because in point of fact it has not been passed upon and adjudicated by the Senate.

To ascertain what has and what has not been determined in any given case, reference must be had to the record of the proceedings taken therein.

If the record shows the controversy between the parties determined upon a consideration of the merits, then that determination binds the parties and their privies, and precludes further inquiry.

The facts above stated, from the records of the Senate in regard to Mr. Corbin's case, show that his credentials were referred to this committee of the Senate, and that no action of the Senate has been had to withdraw them from the committee. And the fact is that the credentials have been with the committee to the present time by the direct action of the Senate. No case has in any form been made up between Mr. Corbin and Mr. Butler and submitted to the Senate to be passed upon, and no case, as between them, has been passed upon by the Senate.

Mr. Thurman's resolution, that the Committee on Privileges and Elections be discharged from the further consideration of the credentials of M. C. Butler, of South Carolina, meant precisely what it said. Its language is too clear to be misunderstood. It indicates a mere purpose on the part of the mover to dispense with the further service of the Committee on Privileges and Elections in the consideration of Mr. Butler's credentials.

If there was any question as to his purpose, Mr. Thurman's remarks on introducing it would relieve it of any doubt. He said, among other things, on introducing it—

* * * * * * *

"I do not ask them in this resolution to decide that Mr. Butler is chosen Senator from South Carolina. I ask that the committee be discharged from the consideration of his credentials. Any one who believes Mr. Corbin to have been elected can make a like motion in his case, and thus the whole case will be before the Senate; and all I ask is that the Senate will hear and decide."

In the discussion that followed on this resolution the Record shows it was, without exception, the purpose of Senators to show why this resolution on the one hand should be adopted, and on the other why it should not be adopted. Much was incidentally said by individual Senators as to the validity of the claims of Mr. Butler and Mr. Corbin respectively, but this was, as plainly appears, with a view to influence action upon the pending resolution But whatever individual Senators said in the course of the discussion, the action of the Senate is to be looked to finally to acertain what was determined. When the resolution was adopted its effect was simply to bring before the Senate the credentials of M. C. Butler. It did not bring before the Senate the credentials of D. T. Corbin.

After Mr. Butler's credentials were thus brought before the Senate, a motion was made that he be sworn in as Senator from South Carolina, and without debate the vote was taken and the motion adopted. Mr. Butler was then sworn in. Swearing in a Senator on his credentials has always been regarded as admitting him to his seat on the *prima facie* case made by those credentials. There is no instance in the history of the Senate where a member has been so sworn in and allowed to take his seat as Senator that such admission has been held to preclude investigation into the merits of his title. On the other hand the precedents are exactly the reverse. The cases of James Shields of Illinois, James Harlan of Iowa, Bright and Fitch of Indiana, and of Mallory of Florida, reported

in Bartlett's Contested Election Cases in Congress, at pages 606 621, 629, and 668, are examples of this rule.

But the principle of *res adjudicata* can only apply where parties to the controversy have been before the court or body having jurisdiction thereof, and have been heard upon the merits of their respective claims, and a decision has been rendered thereon.

In the present case Mr. Corbin has never been a party before the Senate to any controversy with Mr. Butler respecting his rights to a seat as Senator. The Senate, by its action, has not permitted him to be a party to any such controversy, and the merits of his case have never been passed upon by the Senate. Therefore, the doctrine of *res adjudicata* has no application to the case.

So holding, the committee have proceeded to inquire into the grounds of Mr. Corbin's claim to a seat in the United States Senate as Senator from the State of South Carolina.

The grounds upon which his claim rests are as follows:

A general election was held in that State November 7, 1876, for State and county officers, and for members of the house of representatives of the State legislature, and for a part of the members of the State senate.

The returns of this election were made, first, by the several boards of precinct managers—each board consisting of three members—to the commissioners of election for their respective counties, called in this connection boards of "county canvassers"; second, by the several boards of county canvassers to the board of State canvassers at Columbia, the capital of the State; and, third, by the board of State canvassers who finally acted upon the returns and determined and declared the results.

The board of State canvassers on November 22, 1876, completed their canvass of this election and returned as duly elected sixteen (16) State senators and one hundred and sixteen (116) members of the house of representatives.

Subsequently, and previous to November 28, 1876, the day of the meeting of the legislature, the secretary of state delivered the official certificate of his election to each person declared elected by the board of State canvassers.

On the 28th day of November, 1876, the newly elected senators, with those holding over from the former election, met and organized as the senate, in the senate chamber in the State-house. The legality of the senate as a legislative body and the regularity of its organization are not now and never have been questioned.

On the same day fifty-nine (59) of the persons declared elected by the board of State canvassers met in the hall of the house of representatives in the State-house and organized as the house of representatives, the other fifty-seven members, holding certificates of election from the board of State canvassers, refusing to meet with them. These fifty-seven members met in a private hall in the city of Columbia, and pretended to organize as a house of representatives by the election of William H. Wallace as speaker. The fifty-nine members at the State-house elected E. W. M. Mackey speaker.

The two bodies organized at the State-house recognized each other, respectively, as the senate and house of representatives of the State by the interchange of official communications pertaining to legislative business. They also officially recognized Governor Chamberlain as the governor of the State, and were officially recognized by him as the senate and house of representatives, together constituting the legislature of the State.

On November 29, 1876, five persons who contested the election of the persons declared elected by the board of State canvassers as representatives of Barnwell County were declared by this house of representatives at the State-house to be entitled to seats, and were admitted and sworn in as members.

On December 2, 1876, five persons who in like manner contested the election of the persons declared elected by the board of State canvassers as representatives of Abbeville County were declared by this house to be entitled to seats, and were admitted and sworn in as members.

On December 5, 1876, four other persons, contestants for seats from Aiken County, were in like manner admitted and sworn in as members.

The members thus admitted, with the original membership of fifty-nine, make the whole number of members of this house of representatives (commonly known as the Mackey house) seventy-three.

On December 2, 1876, this house of representatives considered the matter of the election for members of the house of representatives in Edgefield and Laurens Counties, and declared that no valid election was held in those counties on the 7th of November, 1876.

On the 12th day of December, 1876, being the second Tuesday after the said 28th day of November, 1876, the two bodies above described proceeded, in the manner prescribed by the statutes of the United States (U. S. Rev. Stat., Tit. II, ch. 1, p. 3), to elect a Senator in Congress.

D. T. Corbin received a majority of all the votes cast in both bodies on December 12, 1876.

On the following day, December 13, 1876, the two bodies convened in joint assembly at 12 o'clock meridian; the journal of each house was read; and it appearing that D. T. Corbin had received a majority of all the votes in each house, he was declared duly elected Senator.

Mr. Corbin's credentials were signed on December 13, 1876, by Governor Chamberlain, who was, until December 14, 1876, the unquestioned governor of the State, General Hampton not claiming to hold the office until after his inauguration on December 14, 1876.

Upon this general statement of facts arises the question, was the election of Mr. Corbin valid, and is he now entitled to a seat in this body as a Senator from the State of South Carolina?

I. It has already been stated that no question has ever been made as to the complete validity, as a legislative body and a constituent house of the general assembly, of the senate which sat in the State-house and co-operated with the house of representatives, in which Mr. Corbin received a majority of votes. No other body claimed to be the senate.

This senate never in any manner recognized the existence, as a legislative body, of the other assemblage which assumed to be the house of representatives (commonly known as the Wallace house), and which met in a private hall in Columbia.

The action of this senate, therefore, so far as it enters into the title of Mr. Corbin, need not be further discussed. It was valid.

The part performed by the house of representatives which sat in the State-house in the election of Mr. Corbin presents the most important question which arises in this case.

The validity of this body is called in question. It is claimed, in denial of Mr. Corbin's title, that this body was never a valid legislative body under the constitution and laws of South Carolina; that it never had a quorum of lawfully elected members; that all its acts were null and void.

The facts upon which this question must be decided are these:

The constitution of the State, Article II, section 4, provides as follows:

"The house of representatives shall consist of one hundred and twenty-four members, to be apportioned among the several counties according to the number of inhabitants in each."

Article II, section 14, is as follows:

"Each house shall judge of the election returns and qualifications of its own members; and a majority of each house shall constitute a quorum to do business."

At the election of November 7, 1876, one hundred and twenty-four persons were to be voted for as members of the house of representatives. Of this number, constituting a full house, the board of State canvassers declared that only one hundred and sixteen were duly elected, and the secretary of state issued certificates of election to only one hundred and sixteen, the canvassers at the same time placing upon the records a declaration of their inability, by reason of unlawful influences and practices in the election, to determine that any persons had been duly elected as representatives for the counties of Edgefield and Laurens.

Of the one hundred and sixteen persons thus declared elected by the board of State canvassers, and holding certificates of election from the secretary of state, fifty-nine took part in the organization of the house of representatives in the State-house on November 28, 1876, being a majority of all the members declared elected by the board of State canvassers and holding certificates of election from the secretary of state.

Was the body thus composed and organized the legal house of representatives of the State?

Attention has been called to the fact that after the organization of the house of representatives which elected Mr. Corbin certain of those who took part in that organization withdrew and acted with another assemblage calling itself the house of representatives, thereby reducing the number of canvassing board members sitting in the Mackey house from fifty-nine to fifty-three, of whom only forty-four voted for Mr. Corbin.

There is no force in these suggestions, because the fact is that the number of members who acted with the Mackey house was never reduced below fifty-nine. It is true that a few of those who formed part of the original fifty-nine canvassing board members of the Mackey house left their seats in the State-house and joined the Wallace house; but before a single such person had left the Mackey house had, upon contests duly made, admitted other members in number more than equal to those who afterward left.

If, therefore, the original house of fifty-nine members was a lawful house on the day of its organization, it was a lawful house at all times thereafter till its final adjournment December 22, 1876. If it was a lawful house for any purpose it was a lawful house for the purpose of deciding contested elections of its own members and for admitting those whom it might adjudge to be lawfully elected.

The statement that out of the original fifty-nine who organized the Mackey house only forty-four voted for Mr. Corbin has no significance. At the time of his election the inquiry was not how many canvassing board members voted for Mr. Corbin, but how many lawful members voted for him. If the house was lawfully organized on November 28, then the members admitted on the 29th, and subsequently, were lawful members, entitled to all the rights and powers belonging to any members.

But to the point of the legality of the Mackey house.

The constitutional provisions which regulate the matter of a legislative quorum in South Carolina are (1) that "the house shall consist of one hundred and twenty-four members," and (2) that "a majority of each house shall constitute a quorum to do business."

Stated in its most condensed form, the inquiry here is, what is the meaning of the phrase "a majority of each house"? Does it mean a majority of one hundred and twenty-four or a majority of the members duly elected or qualified?

As an original question it would seem that there are strong reasons why the latter view should be adopted.

If the former view be adopted a contingency may easily occur in which it will be absolutely impossible to organize a lawful house. If under any circumstances there should be a failure to elect a majority of the whole possible representation, the government would be brought at once to a dead stop; nor would there be any power anywhere to remove the obstruction.

In opposition to this view it is said that if it be held that a number less than a majority of the whole possible representation constitute a quorum, then under some circumstances it will be in the power of a small fraction of the whole representation to hold and exercise the powers of the house. This is admitted; but such a danger will not menace the life itself of the State. The government will be able to go on without recourse to extra legal remedies.

All governments aim at self-perpetuation. No element of self-destruction is intentionally admitted into the framework or fundamental law of a State. All constitutional provisions should therefore receive a construction, if possible, which shall be in harmony with this idea of the perpetuity of the government, of its unbroken life and efficiency. If the rule were adopted that a quorum of the house of representatives of South Carolina must consist of at least sixty-three members, then if from any cause sixty-three members should not be elected, it would be impossible by any constitutional methods to obtain a house of representatives at least until the next general election.

No speaker could be chosen; no writs of election could be issued. Did the fifty-nine members composing the body at the State-house constitute a quorum of the house of representatives?

The most controlling decisions upon this question are those of the two Houses of Congress.

The Constitution of the United States and the constitution of South Carolina may be said to contain identical provisions upon this point. The Constitution of the United States provides as follows:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years.—(Article I, section 3.)

"The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative."—(Article I, section 2.)

The only respect in which these provisions differ from the corresponding provisions of the constitution of South Carolina is that here the numerical aggregate of Senators and Representatives is not stated. The rule of representation is laid down, and under that rule there is always at any specified point of time a fixed number of Senators and Representatives in Congress, precisely as much so as in South Carolina.

In principle these two constitutional provisions are identical, and it is idle to insist that the mere verbal difference is of the least importance.

The provisions respecting a quorum in the Constitution of the United States and that of South Carolina are identical in terms, namely:

"A majority of each house shall constitute a quorum to do business."

It will be found that in the Senate of the United States prior to 1862 it was held as a matter of parliamentary practice in some instances that a quorum consisted of a majority of the whole possible representation, and in other instances of a majority of Senators elected and qualified.

The question does not appear to have been discussed by the Senate, or to have been maturely considered, until after April 11, 1862. On that day Mr. Sherman, of Ohio, offered a resolution, which was referred to the Committee on the Judiciary, in these words:

"*Resolved*, That a majority of the Senators duly elected and entitled to seats in this body is a constitutional quorum."—(Congressional Globe, April 11, 1862.)

On July 9, 1862, this resolution was debated in the Senate and laid upon the table by a vote of 19 to 18.

On March 7, 1864, Mr. Sherman offered a resolution, which was referred to the Committee on the Judiciary, in these words:

"*Resolved*, That a quorum of the Senate consists of a majority of the Senators duly chosen or qualified."

On May 3, 1864, the Committee on the Judiciary having been discharged from the further consideration of the resolution, it was taken up and debated. On this and the following day the subject was elaborately discussed, especially by Senators Carlisle and Davis against the resolution, and by Senators Johnson and Sherman in its favor. The words "or qualified" having been struck out, the resolution was adopted by a vote of 26 to 11, May 4, 1864, in these words:

"*Resolved*, That a quorum of the Senate consists of a majority of the Senators duly chosen."—(Congressional Globe, March 7, May 3 and 4, 1864.)

The precedents in the House of Representatives prior to 1861 had been varying, but here, as in the Senate, the subject does not appear to have been maturely considered until 1861. During the first session of the Thirty-seventh Congress, in the House of Representatives, Speaker Grow finally decided that a quorum of the House consisted of a majority of the members chosen, and he was sustained by the House in this decision.—(Journal H. R., 1st sess. 37th Congress.)

The effort has sometimes been made to disparage this precedent by stating that it was made under the stress of a necessity to secure an organization of the House. This is a mistake. The decision was made fifteen days after the organization of the House, and upon a question which did not involve the question of the validity of the organization.

The resolution adopted by the Senate in 1864 has since been adopted by the Senate as a permanent rule, and now appears in Rule 1.

If, in opposition to these precedents, it is urged that they were made because of special circumstances then existing, or upon certain constitutional theories regarding the status of the States then in rebellion, the answer is that there is no doubt that the peril of an opposite construction did lead to the final reversal of former precedents. And justly so. One of the truest canons of constitutional construction is that which adopts the construction which best effectuates the purpose of the instrument or provision to be construed. A construction which leads directly to the practical paralysis of the legislative power of a State can never be admitted.

Professor Farrar, in his Manual of the Constitution of the United States, page 166, says in relation to the constitutional provision respecting a quorum that "this has been held to be a majority of the members actually sworn in and entitled to seats at the time, and not a majority of a full delegation from all the States."

Another precedent arose in the Senate of the United States on March 2, 1861, when a proposition to amend the Constitution was on its passage. The Constitution, upon this point, provides that "Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution," &c.

When the vote was taken in the Senate, March 2, 1861, Mr. Trumbull raised the point of order that this provision required two-thirds of all the Senators which all the States were entitled to elect. The Presiding Officer overruled the point of order, and upon appeal the ruling was sustained by a vote of 33 to 1.

Another precedent of considerable force is found in connection with the ratification of the fifteenth amendment to the Constitution. The constitution of Indiana provided that two-thirds of each house should constitute a quorum. In 1867 certain members of the legislature resigned in order to defeat a vote upon the ratification of the amendment. The remaining members thereupon decided that two-thirds of the actual membership constituted a quorum, and proceeded to ratify the amendment. This action was certified in forwarding the vote of the legislature on the ratification of the amendment. No question was raised by Congress in regard to the legality of the vote, and the vote of Indiana, as thus cast, was accepted and counted.

The case of State *vs.* Huggins, 1 McCord, 139, decided in the court of appeals in South Carolina, is in point. Eighteen managers of election were appointed by the legislature for the district of Georgetown. Two had refused to qualify, one was dead, and one was disqualified, reducing the number to fourteen. It was held by the court that a majority of fourteen properly formed the board of managers for the district to determine the validity of the election of a sheriff, a majority of those qualified to serve, and not a majority of the whole number appointed, being a lawful quorum.

Under the provision of the Constitution of the United States that "each House shall be judge of the elections, returns, and qualifications of its own members," the Senate is the sole judge of this matter. The action, opinion, or decision of any other body is, therefore, entitled to such weight or respect only as may be due to the reasons which support it.

It is proper to consider the connection of the supreme court of the State of South Carolina with this case. And it may be remarked that this presents the most remarkable and, perhaps, unfortunate feature of the controversy. That court may be said, without injustice, to have taken part in the purely political contests of the State. Instead of leaving such contests to be settled by other departments of the government, where they properly belong, the court engaged in those contests.

The action of that court was taken under these circumstances: After the Mackey house and the Wallace house were each organized, the former with fifty-nine and the latter with fifty-seven members declared elected by the canvassing board, a petition was presented to the supreme court by Mr. Wallace, as speaker of the Wallace house, asking a mandamus to compel the secretary of state and the speaker of the Mackey house to deliver to him the returns of the election for governor and lieutenant-governor.

By Article III, section 4, of the constitution of the State, these returns are required to be sent by the managers of the election to the secretary of state, who is required to return them to the speaker of the house of representatives.

By the return of the secretary of state to the rule to show cause, issued by the supreme court upon the petition above stated, it appeared that that officer had delivered the returns to the speaker of the Mackey house.

The return of the speaker of the Mackey house showed that he had received the returns from the secretary of state, and held them by virtue of his office as speaker, and he denied the power and jurisdiction of the court in the matter.

The court thereupon reserved the question as to the secretary of state for further argument, and dismissed the petition as to Speaker Mackey.

In coming to this conclusion, the court said that "sixty-three members were in their seats when Mr. Wallace was elected. * * * That the house of representatives consisted of one hundred and twenty-four members, and sixty-three were necessary for a quorum to do business. * * * That all the members had certificates from the secretary of state except eight, and the qualification of these eight was established by the proceedings in this court. * * * That no matter what was the character of the certificates they had, the return of the board of State canvassers to the court, showing that they had received the greatest number of votes in their particular counties, entitled them to access to the floor for the purpose of organization."

In taking cognizance of this matter and rendering a decision therein the court plainly transgressed the limits of its judicial powers, and its decision is void and binding on no one.

The constitution of the State, in section 26 of Article I, provides that "in the government of this Commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other."

That the due organization of the house of representatives is a legislative power or function, and not a judicial one, seems too clear for argument. Two bodies were claiming each to be the lawful house of representatives. This was a purely political question. It was a question between two sections or parts of one legislative body, each claiming to represent that body. No other questions were involved.

Whether Mackey or Wallace was entitled to have the election returns was a question which directly involved the action of the members of the legislative body, not in its effects upon citizens generally, but in relation to the due organization of that body under powers granted to it alone by the constitution.

The interposition of the court was not only without authority, but was also absolutely unnecessary. There was ample power in the lawful house of representatives to afford the necessary remedy in the matter if any remedy was needed.

The judgment of the court itself shows for another reason its want of jurisdiction over the case. It held that Mackey, not being an official person, could not be reached by mandamus and dismissed the petition. It could grant no relief, accomplish no result, and yet it proceeded to express an opinion. This was extrajudicial. The court must have recognized this dilemma at the outset, namely, if Mackey is speaker he is the lawful custodian of the returns; if he is not speaker he is not such an official person as can be reached by mandamus. Hence, in either event, no writ could have been issued, and nothing remained but to dismiss the petition.

Under these circumstances, the expression of an opinion that Wallace was the speaker and that sixty-three members are necessary to form a quorum was utterly uncalled for, a mere empty *obiter dictum*.

When, therefore, it is claimed that the supreme court of the State is empowered to construe the constitution, and hence to decide upon the question of a quorum, the answer is that this is true only when the court has a proper case before it requiring the decision of such a question.

But further, it is to be noted that the court in giving this opinion assumed the fact, now denied, that one hundred and twenty-four members of the house, instead of one hundred and sixteen, had been in fact chosen.

The supreme court gave no reason for the opinion that sixty-three members were necessary to form a quorum. It was their unsupported opinion, a *dictum* in every sense, not expressed in the course of reasoning or discussion leading to a judgment, and wholly unsupported by argument.

In Carroll *vs.* Lessee of Carroll, 16 How., 28, Judge Curtis said: "This court, and other courts organized under the common law, has never held itself bound by any part of an opinion which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *vs.* Virginia, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of Marbury *vs.* Madison. And Mr. Chief-Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte* Christy, 3 How., 292, and Jenness *vs.* Peck, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

The conclusion on this point is that the construction of that provision of the Constitution of the United States relative to a quorum given by both Houses of Congress is applicable to a like provision in the constitution of the State of South Carolina.

It is a construction dictated by sound reason and public policy. And if it is a safe and sound construction of the Constitution of the United States it is equally a safe and sound construction of the constitution of the State of South Carolina.

A quorum, therefore, of either house of the legislature of South Carolina must be held to be a majority of the members chosen.

Legality of the action of the board of State canvassers.

There is another question lying back of those already discussed which must receive attention, viz: Was the action of the board of State canvassers in refusing to certify the election of members of the house for Edgefield and Laurens Counties legal?

The fact has already been stated that the board of State canvassers did not determine and declare any persons elected to the house of representatives for Edgefield and Laurens Counties. It may also be mentioned here that, in consequence of this action of the board of State canvassers, no person representing Edgefield or Laurens Counties took part in the organization of the Mackey house.

The provisions of the statutes of South Carolina defining the powers and duties of the canvassing boards which are important to the present question are as follows:

"SEC. 16. The board of county canvassers shall then proceed to count the votes of the county, and shall make such statements thereof as the nature of the election shall require within ten days of the time of the first meeting as a board of county canvassers, and shall transmit to the board of State canvassers any protest and all papers relating to the election.

"SEC. 24. The board of State canvassers shall, upon certified copies of the statements made by the board of county canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct, and subscribe the same with their proper names.

"SEC. 25. They shall make and subscribe, on the proper statement, a certificate of their determination, and shall deliver the same to the secretary of state.

"SEC. 26. Upon such statements they shall then proceed to determine and declare what persons have been by the greatest number of votes duly elected to such offices or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise, when the power to do so does not, by the constitution, reside in some other body.

"SEC. 27. The board shall have power to adjourn from day to day for a term not exceeding ten days."

A large mass of evidence in the form of affidavits was laid before the board of State canvassers, tending to show irregularities and illegal influences affecting the election in the counties of Edgefield and Laurens, to such an extent as to render it impossible for the board to determine and declare who had been duly elected. A summary of that evidence appears in the "statement" of Mr. Corbin's case, and need not be repeated here.

Under the provisions of the statutes which have now been presented, and upon the evidences affecting the election in Edgefield and Laurens Counties referred to, the board of State canvassers determined that they could make no statement or determination of the election in those counties.

The board of State canvassers was authorized to reach such a conclusion if, in their judgment, the facts presented to them warranted it. They were required "to proceed to determine and declare what persons have been by the greatest number of votes duly elected to such offices, or either of them. In the present instance they found themselves unable to determine and declare that any persons had been by the greatest number of votes duly elected as representatives for Edgefield and Laurens Counties, and they so declared. If, for purposes of argument, it were here admitted that it was the duty of the board to declare what persons appeared to be elected upon the face of the returns, still until they did so declare, or until the house of representatives itself had acted upon the question, the persons claiming to be elected as representatives for these counties could have no claim to take part in the organization or proceedings of the house of representatives.

It has been claimed in argument that the action of the board of State canvassers was illegal because they undertook to decide a case under protest or contest, when the power to do so resided, by the constitution, in the house of representatives itself. The answer to this is that they did not undertake to decide any cases under protest or contest, or to decide at all upon the final right of any person to sit as representative for Edgefield or Laurens Counties. Their action may more properly be described as a reference of the matter to that body which, by law, had a right to pass finally upon the question of the election, qualifications, and returns of its own members.

It is true that in many, and perhaps most of the States, the powers and duties of the returning or canvassing boards have been held to be merely ministerial, consisting in the aggregation of the several returns from the various voting precincts throughout the State. The question, however, whether the powers and duties of a particular canvassing board are merely ministerial or not will always depend upon the law under which they act; and it does not follow that because, as a general rule, the powers of canvassing boards are merely ministerial that they are so in any particular instance.

Action of the supreme court of South Carolina.

While the board of State canvassers were engaged in the canvassing of the elections proceedings were instituted in the supreme court of the State for the purpose of controlling their action. And it is proper, in order to meet objections, to consider the relations of those proceedings to the present question.

Those proceedings consisted of the petition of the Democratic candidates for the various State offices; first, for a writ of prohibition to restrain the State canvassers from doing anything except the ministerial acts of ascertaining from the returns and statements forwarded by the boards of county canvassers for the respective counties the persons who have received the highest number of votes for the offices for which they were candidates, and declare the same and certify the statements to the secretary of state; second, for a writ of mandamus to compel the board to ascertain from the said returns and statements the persons who received the greatest number of votes for the offices for which they were candidates, and to declare the same and certify such declaration to the secretary of state, &c.

Upon this petition a rule to show cause was granted by the court, to which a return was made by the board of State canvassers, setting forth the powers conferred on them by the statute; alleging that they were then proceeding to discharge their whole duty according to the constitution and laws of the State, &c. Thereupon the court made an order commanding the board to proceed to aggregate the statements forwarded to them by the boards of county canvassers, and ascertain the persons who have received the greatest number of votes for the offices for which they were candidates, respectively, at the general election, and to certify their action in the premises under this order of the court.

The board accordingly made a return to the court under this order, giving the various aggregates of the votes for the various candidates as they appeared on the face of the county canvassers' return. The portion of this return relating to the counties of Edgefield and Laurens is as follows:

"The board of State canvassers, respondents herein, hereby certify that it appears by the statements of the several boards of county canvassers laid before the board that the following named persons have received the number of votes set opposite their respective names for the several offices designated, namely:

EDGEFIELD COUNTY.

SENATOR.

M W. Gary 6,368
I Cain 3,121

NOTE.—This county is allowed one senator.

REPRESENTATIVES.

W. S. Allen	6,250
J. C. Sheppard	6,250
James Callison	6,245
T. E. Jennings	6,250
H. A. Shaw	6,251
Paris Simpkins	3,123
Elisha B. Harris	3,118
David Graham	3,120
Archie Weldon	3,118
Augustus Simpkins	3,119

NOTE.—This county is allowed five representatives.

LAURENS COUNTY.

SENATOR.

R. S. Todd	2,898
J. Y. P. Owens	1,813

NOTE.—This county is allowed one senator.

REPRESENTATIVES.

J. B. Humbert	2,911
J. Washington Watts	2,909
D. Wade Anderson	2,908
A. T. B. Hunter	1,811
W. H. Rutherford	1,810
Harry McDaniel	1,809

NOTE.—This county is allowed three representatives.

"The board further certifies that 'this statement is made to the court in obedience to its order of November 17, 1876, but is respectfully submitted that under the present proceedings in this court this board is not by law compelled to report any of its actions to the court.'

* * * * * * *

"This board further shows to this court that allegations and evidences of fraud have been filed with this board as to the election held in Edgefield County by many of the managers of election in said county; but similar allegations have been made and filed as to one or more precincts in Barnwell County; that the statements of the commissioners of election for Laurens County laid before this board were signed by two commissioners only, one of whom signed, as he certifies, under protest; said commissioner has also filed an affidavit that the reason he signed said statements was because he was in fear of bodily injury if he refused to do so; that various protests and notices of contest have been filed from many other counties of the State, alleging irregularities on the part of election officers, illegal voting, &c.

"That in view of said allegations, protests, and notices of contests, none of which have been heard or passed upon by this board, because of the pendency of these proceedings, this board cannot, in their opinion, properly ascertain and certify who have actually received the greater number of legal votes in said counties for the several offices voted for unless they have the opportunity of investigating these allegations and hearing evidence upon these protests."

This statement having been made to the court, the next day the court of its own motion made the following order:

"*It is ordered,* That a writ of peremptory mandamus do issue, directed to the chairman and members of the board of State canvassers and the secretary of state, commanding the said board forthwith to declare duly elected to the offices of senators and members of the house of representatives the persons who by said certificate of the said board to this court have received the greatest number of votes therefor, and to forthwith deliver a certified statement and declaration thereof to the secretary of state; and commanding the secretary of state to make the proper record thereof in his office, and without delay transmit a copy thereof, under the seal of his office, to each person thereby declared to be elected, a like copy to the governor, and cause a copy thereof to be printed in one or more public newspapers of this State."

Before this latter order was served upon the members of the board, the ten days allowed by law having expired, the board completed its canvass of the election returns, declared the election, and adjourned *sine die.*

The course of the supreme court in this case is deserving of notice in several respects.

First. When the petition and the return were before the court there had been no refusal

by the board to do any duty imposed upon it. The board had only begun their work as canvassers when the court issued its order in mandamus. It is an elementary principle of law that a refusal to perform a duty must precede an application for mandamus. Eight of the ten days within which they could act still remained.

Second. The court immediately issued an order requiring the board to report to the court itself the result of the face of the returns. This was an order for which no foundation had been laid in the proceedings. It was wholly irregular and without authority of law. Such an order could only have been granted, if at all, by way of a writ of certiorari, which had not been prayed for in this case.

The object of this order cannot be mistaken. It was to secure for the court the information necessary to determine beforehand the order to be made in order to accomplish a desired end. Can any other purpose be suggested? The court is asked in the petition for a writ of mandamus to order the board to aggregate the returns and certify the results. The court say in reply, let the board show us first what the results will be. When those results were presented to the court then the order was made to declare those persons elected who, according to the said report made to the court, had received the highest number of votes.

Third. Aside from all these evidences of partisan purposes, the action of the supreme court was wholly without jurisdiction. This is true as to all the officers voted for at that election, and particularly of members of the legislature. It was in fact a plain usurpation of power, whereby the functions of the board of State canvassers were usurped by the supreme court, and the board required by the court to declare a specified result dictated to it by the court.

After the board had acted the court could by *quo warranto* have reversed the action of the board in cases where such a writ would lie; but as to members of the legislature it was without jurisdiction at any time to entertain the case. The house of representatives, under the constitution, had sole jurisdiction of the matter.

Such action on the part of the court is without precedent in South Carolina. It is believed to be without precedent in any State.

The board had a right to reach a conclusion uninfluenced and uncontrolled by any power. If it acted wrongly or illegally, its action could by various means be reviewed and corrected.

No power could rightfully compel any decision, and especially any particular decision, until the expiration of the ten days allowed for its action.

The only subsequent action of the court in this case was the imprisonment of the board for contempt of the order which was not served on them till after their adjournment *sine die*.

Cushing, in his Law and Practice of Legislative Assemblies (page 52, section 141), speaking of returning officers, says:

"It remains to be observed, in conclusion, that the proceedings of these (returning) officers, from the necessity of the case, are, in the first instance, uncontrollable by any other authority whatever; so that if, on the one hand, notwithstanding an election has been effected, the returning officers neglect or refuse to make the proper return, the party thereby injured is without remedy or orders until the assembly to which he is chosen has examined his case and adjudged him to be duly elected; and, on the other hand, if the returning officers make a return when no election has in fact taken place, or of one who is not eligible, the person returned will not only be entitled, but it is his duty, to assume and discharge the functions of a member until his return and election be adjudged void."

After the final adjournment of the board of State canvassers, November 22, 1876, the order of the supreme court already recited was served upon them.

That the board then had no power to reassemble and act upon the returns is clear.—(Cooley on Const. Lim., 622; Clark *vs.* Buchanan, 2 Minn., 346; 33 N. Y., 603.)

In Minnesota it has been held, in accordance with the principle just stated, that if the board of canvassers, after canvassing the votes, adjourn without day, their power in the premises is at an end, and they cannot reassemble; neither can a court, by mandamus, compel them to reassemble, or give them any power in case of their doing so.—(Clark *vs.* Buchanan, 2 Minn., 346. See also Gooding *vs.* Wilson, 42d Congress; State *vs.* Daumwirth, 21 Ohio, 216.)

The decision of the supreme court of South Carolina was subsequently reviewed on habeas corpus and set aside by Hon. Hugh L. Bond, of the United States circuit court.

The State supreme court proceeded to imprison the members of the board for contempt.

After their imprisonment a writ of habeas corpus was sued out before Judge Bond, United States circuit judge, sitting at Columbia. Judge Bond delivered an elaborate decision in which he held that the proceedings in the supreme court of the State were without jurisdiction, and that its order was void. He says:

"The first question to be decided at this time and upon this motion is whether or not

the supreme court of the State of South Carolina had jurisdiction to hear and determine the matter before it."

After quoting the sections of the constitution which confer upon the supreme court its jurisdiction, and the sections of the statute which define the powers of the board of canvassers, he continues:

"The objection to the jurisdiction of the supreme court made by the petitioners is that they are a part of the executive department of the government charged with the execution of a law of the State, and that they alone are authorized to canvass the votes, and that they are not subject in the exercise of their functions to the control of the judicial branch of the government.

"The Supreme Court of the United States in a very able opinion by Mr. Justice Miller, in the case of Gaines *vs.* Thompson, 7 Wall., 347, has very clearly determined what the law is on this subject, and that is, 'that if it appear that the act which the court is asked to compel the officer of the executive department of the government to do be purely ministerial, the court having jurisdiction to issue the writ of mandamus may compel the executive officer to perform his duty; but if the act required to be done by the executive officer be not merely ministerial but discretionary, or one about which he is to exercise his judgment, a court cannot by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of official duty.' And the court further says that 'the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given them.' And for this Mr. Justice Miller quotes the opinion of Chief-Justice Taney in the case of the Commissioner of Patents *vs.* Whitely, 4 Wall., 522, and the law is stated to the same effect in a very celebrated case in Maryland, by Chief-Justice Bowie, Miles *vs.* Bradford, 22 Md. Rep., 170, a case where the power of the governor to canvass the votes was not so broadly given as in the case at bar.

"That the duty of this board of canvassers was not merely ministerial, but that they were clothed with a large discretion, it seems to me is very plain. They were not merely to take the returns and aggregate them. They were to canvass them. That is, they were to examine, to sift, to scrutinize them, which implies a power to reject such as were not lawful in their judgment; and more, they were to receive all cases under protest or contest that might arise when the power to do so did not by the constitution reside in some other body.

"They were the executive officers appointed to declare the election of such persons as had in their judgment the majority of the legal votes cast. If they decided erroneously or falsely the remedy of those candidates who thought themselves wronged was by *quo warranto;* but no court had the jurisdiction to compel the board of State canvassers to do otherwise than their own judgment dictated.

"It remains now to be seen what the court was asked to do by the relators. Their suggestion sets forth 'that the board is proceeding to hear and determine all matters of protest and contest before them in regard to the election of persons who were candidates at the general election, and is proceeding to certify their determination in such contests and protests to the secretary of state.' And they pray that a writ of mandamus may issue commanding them to ascertain from 'the managers' returns and statements forwarded to them by the boards of county canvassers, the persons who at the general election on the said 7th day of November, ultimo, had the highest number of votes; and commanding them and compelling them to revoke and annul any determination or decision which they may have made in any case of contest or protest, if any such there be.'

"Under the cases cited in the opinion of the Supreme Court of the United States, Gaines *vs.* Thompson, 7 Wall., 347, above referred to, I am of opinion that the supreme court of the State of South Carolina had no jurisdiction to entertain any such 'suggestion' or 'petition.' * * * The board of State canvassers is required to meet on the 10th day of November for the purpose of sifting, scrutinizing, not merely aggregating, the statements of the county boards. * * *

"We have shown from the 'suggestion' itself that in our judgment the court had no jurisdiction to entertain it, and though the returns (to this writ) show that the parties are in custody solely for not obeying the mandate of the court respecting State officers, it is our duty to go behind the returns and look at the case as it presented itself to the supreme court at its inception. What the relators asked the court to do in their original suggestion is perfectly plain, and we have above quoted the paragraph of the 'suggestion' which constituted the ground of complaint of the relators. In my judgment the whole matter was beyond the jurisdiction of the supreme court, and any order passed by them upon such 'suggestion' is void. * * *

"I think this proceeding in the supreme court was beyond the jurisdiction of that court; that the board of State canvassers were clothed under the law with discretionary

powers, which required them to discriminate the votes, to determine and certify the candidates elected after scrutiny, and that they were a part of the executive department of the government and were in no wise subject to the control as to what they should do after they had commenced to perform that duty of the judicial department."

We concur in the conclusions reached by Judge Bond.

Some importance in argument was attached to the action of the Wallace house in passing upon and affirming the right of the persons who claimed to represent Edgefield and Laurens Counties. From the journal of the Wallace house it appears that on December 6 the credentials of the persons claiming to be elected for Edgefield and Laurens Counties were referred to the Committee on Privileges and Elections to investigate and report as to their right to hold seats.

On December 7 this committee reported that the persons referred to were duly elected and entitled to their seats, and this report was adopted.

The chief and only real significance of this action is that it is evidence of the want of confidence on the part of the Wallace house in the legality of its own original organization, as well as in the right of the persons claiming to be elected for Edgefield and Laurens Counties to take part in the proceedings of that body.

The claim is that on the 7th of December, when the Wallace house adopted the resolution seating the Edgefield and Laurens members, that house contained sixty-three canvassing board members, and hence that the action of the house in seating those members cannot be questioned. It is to be noted first that this claim is a concession that that house to be a valid house must have a majority of one hundred and twenty-four, holding the certificates of the canvassing board.

If this be so, then the Wallace house on the day of its organization was clearly without a quorum to do business, for it had only fifty-seven members holding such certificates.

The six members who joined that house between November 29 and December 7 had all been sworn in as members of the Mackey house, and had acted with that house in effecting its organization.

If, now, the Mackey house was a valid house of representatives at its organization, the subsequent withdrawal of these six members to join another body could have no effect either to impair the validity of the Mackey house or to cure the invalidity of the Wallace house. If their absence had reduced the body below a quorum the house could do no business, but, in point of fact, their absence did not reduce the Mackey house below a quorum.

On the same day, December 7, the Wallace house also adopted resolutions declaring valid the election of the speaker and subordinate officers of that house on the 28th of November.

This action is another evidence that the Wallace house regarded its organization on the 28th of November as at least of very doubtful validity.

Organization of the house of representatives.

Passing now from questions affecting the legality of the action of the board of canvassers we come to questions concerning the mode of organizing the Mackey house, and especially the exclusion therefrom of all persons not declared elected by the canvassing board.

The legal and parliamentary principles on which the Mackey house was organized may be stated as follows:

First. That no persons except those declared elected and duly returned by the board of State canvassers and holding certificates of the secretary of state were entitled by law or usage to be placed upon the roll.—(Cushing, sections 229 and 240.)

Second. That the organization of the house must be effected by those persons only whose election had thus been declared by the board of State canvassers and certified by the secretary of state in accordance with the law of the State.

Third. That all other persons claiming to be entitled to seats in the house of representatives must submit their claims to the house after its organization by the members whose seats were undisputed.—(Cushing, sections 229 and 240.)

"It is to be observed in the outset that when a number of persons come together, each claiming to be a member of a legislative body, those persons who hold the usual credentials of membership are alone entitled to participate in the organization."—(McCrary's Law of Elections, 377.)

"It is apparent that the case of Sykes *vs.* Spencer is not in conflict with the rule that in the organization of legislative bodies persons holding the usual credentials are alone authorized to act."—(McCrary's Law of Elections, 392.)

In the well-known case of Kerr *vs.* Trego, 47 Pa. S. R. —, cited in Brightly's Leading Cases on Elections (page 632), Chief-Justice Lowrie, of the supreme court of Pennsylvania, laid down the following principle:

"On the division of a body that ought to be a unit the test of which represents the

legitimate social succession is which of them has maintained the regular forms of organization according to the law and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them. This is the uniform rule in such cases."

And in the same case, speaking of the custom of the clerk of the former organization taking charge of the organization of the new body, he says (page 638):

"It has the sanction of the common usage of every public body into which only a portion of new members is annually elected. It is the periodical form of reorganizing the select council and the senate of the State, and also the form of organizing the Senate of the United States on the meeting of a new Congress, when the Vice-President does not appear and the last President *pro tempore* does; and we understand this custom to be uniform throughout the United States, though this is not very important. And when there is a President whose term as a member has expired, then the functions of the clerks continue, and they, in all cases, act as the organs of reorganizing the body, and continue to hold office until their successors are chosen and qualified. Our State and Federal Houses of Representatives are illustration enough of this. So universal is this mode of organizing all sorts of legislative and municipal bodies that all departures from it can be justified only as founded on special and peculiar usages or on positive legislation. Whenever this form is adhered to, a schism of the body becomes impossible, though the process of organization may be very tardy.

"It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so; but no law can guard against such frauds so as to entirely prevent them, just as it cannot entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the processes of an election or organization. But so much more the need for order and law in this part of the process; the law can dictate that, though it cannot furnish honesty and sound judgment to the actors in it. That the law and order that we have announced have existed so long and so generally is proof, at least, that they are better than no law at all."

In Wilson's Digest of Parliamentary Law, section 1603, page 221, this author says:

"At the commencement of every regular session the Clerk of the House opens the session by calling the names of members by States and Territories, if in Congress, and by counties if in State legislative assemblies. If a quorum answer to their names, he will put the following question: 'Is it the pleasure of the House to proceed to the election of a Speaker?' If decided in the affirmative, tellers are generally appointed to conduct the vote."

This seems to be the universal custom in the organization of legislative bodies, and such custom not only prevails in South Carolina, but is specially established by the rules of the house of representatives of this State.

Rule 80 of the rules of the house of representatives of this State is as follows:

"In all cases not determined by these rules, or by the laws, or by the constitution of this State, as ratified on the 14th, 15th, and 16th days of April, 1868, this house shall conform to the parliamentary law which governs the House of Representatives of the United States Congress."

Rule 81 is as follows:

"These rules shall be the rules of the house of representatives of the present and succeeding general assemblies until otherwise ordered."

Turning now to Barclay's Digest (pages 44 *et seq.*, and 126), we find that the law governing the House of Representatives of the United States Congress requires the Clerk of the last House to make up the roll of the members of the new House by placing thereon the names of such persons only whose credentials show "that they were regularly elected"; that having ascertained, by a call of this roll, that a quorum is present, the Clerk then proceeds to call the names of the members for the choice of a Speaker; the Speaker being chosen, assumes the duties of presiding officer, and, after swearing in the members, the oath of office being first administered to him, proceeds to complete the organization. Pending the election of a Speaker the Clerk preserves order and decorum.

Upon the question of the right of the claimants from Edgefield and Laurens Counties to be placed upon the roll, and to participate in the organization, the following citation from Cushing's Law and Practice of Legislative Assemblies, section 229, page 87, is in point:

"The right to assume the functions of a member, in the first instance, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the return or certificate of election; those persons who have been declared elected and are duly returned being considered as members until their election is investigated and set aside, and those who are not so returned being excluded from exercising the function of members, even though duly elected, until their election is investigated and their right admitted."

To the same effect is section 141 (page 52) of the same work, which has already been cited in connection with the action of the Supreme Court.

In section 238 (page 91) of the same work, in discussing the principles of parliamentary law governing the assembly and organization of legislative bodies, Cushing says:

"Hence it has occurred more than once that struggles for political power have begun among the members of our legislative assemblies, even before their organization; and it has happened on the one hand that persons whose rights of membership were in dispute, and who had not the legal and regular evidence of election, have taken upon themselves the functions of members; and, on the other, that persons having the legal evidence of membership have been excluded from participating in the proceedings."

In order to avoid such difficulties, this distinguished writer lays down the following principles in section 240, which are applicable to the question now under consideration:

"That no person who is not duly returned is a member, even though legally elected, until his election is established.

"That those members who are duly returned, and they alone (the members whose rights are to be determined being excluded), constitute a judicial tribunal for the decision of all questions of this nature."

In Kerr *vs.* Trego (Brightly's Election Cases, page 636), already cited, the Chief-Justice said:

"In all bodies that are under law, the law is that where there has been an authorized election for the office in controversy the certificate of election which is sanctioned by law or usage is a *prima facie* written title to the office, and can be set aside only by a contest in the form prescribed by law. This is not now disputed. No doubt this gives great power to dishonest election officers; but we know no remedy for this but by the choice of honest men."

It is proper here in this connection to again refer to the language already quoted from the same authority (page 638):

"It is objected that a rule that attributes so much power to the officers of the previous year gives them an advantage which they may use arbitrarily and fraudulently against the new members, so as to secure to themselves an illegitimate majority. No doubt this may be so; but no law can guard against such frauds so as to entirely prevent them, just as it cannot entirely prevent stealing and perjury and bribery; the people are liable to such frauds at every step in the process of an election or organization. But so much the more need for order and law in this part of the processes; the law can dictate that, though it cannot furnish honesty and sound judgment to the actors in it. That the law and order which we have announced have existed so long and so generally is proof, at least, that they are better than no law at all."

Applying the law as now stated to the facts in the present instance, it is clear, first, that there were no representatives from Edgefield and Laurens Counties having certificates of election according to the law and usage of this State; and second, that under the law, without such certificates, the clerk had no right to place the names of any persons upon the roll of the house as representatives from these counties.

It follows that fifty-nine members of the house of representatives who met in the State-house at Columbia and organized by the election of E. W. M. Mackey as speaker were lawfully convened, were lawfully organized, and, under the constitution of South Carolina, constituted the lawful house of representatives of that State. Though less than a majority of all the possible members of that body (one hundred and twenty-four), there was a "quorum to do business," which consisted of a "majority of the members chosen"—a majority of all those holding lawful certificates of election.

This house of representatives, in connection with the unquestioned senate, constituting together, as they did, the legislature of the State of South Carolina, proceeded on the 12th day of December, 1876, to the election of a Senator to represent that State in the Senate of the United States for the term of six years to commence on the 4th of March, 1877. The election was duly held, duly determined and declared, and D. T. Corbin was duly and formally declared elected Senator, and subsequently he was duly commissioned as such by the governor of the State. He is, therefore, entitled, on the merits of his case, to a seat in the Senate as a Senator from South Carolina for the term of six years commencing on the 4th of March, A. D. 1877.

M. C. Butler's case.

Under the view taken of the facts relative to Mr. Corbin's election and the legal effect thereof, it would seem unnecessary to discuss the grounds of Mr. Butler's claim to be Senator, as it is impossible that he should have been legally elected if Mr. Corbin had already been elected. That the legislature cannot, after electing one person as Senator, subsequently set aside this election and elect another person to the same seat has been decided by the Senate in the case of Potter *vs.* Robbins, from Rhode Island. But we

think it is not improper in this connection to consider briefly the facts in his case, and upon which his title depends.

The fifty-seven Democratic members of the house of representatives holding certificates of election under the determination of the board of State canvassers on the 28th day of November, 1876, declined to enter the State-house and unite with the other fifty-nine Republican members of the house of representatives there assembled; but, by themselves, assembled in a private hall, called Carolina Hall, in the city of Columbia. Eight other persons, five from Edgefield County and three from Laurens County, claiming to be members of the house of representatives elect, but holding no certificates of election from the board of State canvassers, assembled with said fifty-seven members at Carolina Hall. This body, so made up, organized by electing William H. Wallace speaker. In the organization of this body it was assumed that the fifty-seven members with certificates of election and the eight persons claiming seats from Edgefield and Laurens, but who had no certificates of election, constituted a quorum of the house of representatives, and the same was competent to do business.

On the 4th, 5th, and 6th of December, 1876, six members of the house of representatives assembled at the State-house, and who had been regularly sworn in as members of that house and had taken part in its organization, retired therefrom, and joined the Wallace house at Carolina Hall. One of them subsequently returned to his seat in the body at the State-house.

This body, at Carolina Hall, on the 12th day of December, 1876, this being the second Tuesday after the meeting and pretended organization thereof, proceeded to vote for a United States Senator, taking one ballot, which resulted in no choice. From day to day this house continued to vote for a United States Senator, but without making any choice, until the 19th of December, 1876, when, having then present eleven members of the senate (six less than a majority of that body), the election resulted in the choice of M. C. Butler as Senator. The senate, as such, never recognized in any manner this assemblage at Carolina Hall as the house of representatives; but always recognized the other body assembled in the State-house as the lawful house of representatives.

Was the election of Mr. Butler under these circumstances valid? It is impossible that it can be so regarded.

There was no quorum, no majority of the members chosen at the then recent election, present. As already stated, one hundred and sixteen members of the house of representatives had been chosen at the recent election, and no more. Of this number fifty-nine were necessary for a "quorum to do business," and there were but fifty-seven here present. Such a body could not lawfully organize as a house of representatives, and all its pretended acts were void. Again, it is not possible to recognize this body as the legislature of South Carolina, which under the United States Constitution alone could elect a Senator.

The legislature of the State of South Carolina consists, under the constitution of that State, of a senate and house of representatives.

A quorum of those two bodies must each meet and organize, and they must recognize each other before they can be considered the legislature of the State. Until this is done the legislature is not organized.

This body never had a senate recognizing and corresponding with it. Without such a body, even if itself lawful, it was nothing in law, and could do nothing as a legislative body. It did not, in fact, during its whole session do any legislative act or pretend that it could do any. It recognized its own impotency in this respect, but, strange inconsistency, it made a dash at the election of a United States Senator.

The defects in Mr. Butler's title to a seat in the Senate as Senator from the State of South Carolina may be stated briefly as follows:

1. There was no vacancy to be filled at the time of his election on December 19, 1876, as Mr. Corbin had been lawfully elected to said office on the 12th of December, 1876.

2. The house of representatives that assumed to elect Mr. Butler had no quorum at the time it was organized, and was never, therefore, a lawful body.

The additions made to it by recruits from the house of representatives assembled in the State-house did not make it a lawful body. If that house was a lawful body at its organization, it would so remain, notwithstanding the absence of five of its members.

If, by their absence, it was reduced below a quorum, no business could be done except to adjourn or send for the absent members.

But that house was not in fact at any time reduced below a quorum. It remained intact from the day of its organization, November 28, 1876, till December 22, 1876, following, when, in connection with the senate, it adjourned.

3. But admitting all that is claimed by Mr. Butler for the Wallace house at Carolina Hall, that it was lawfully organized and had a quorum of the house present, still, while this would invalidate Mr. Corbin's election, it would not make valid Mr. Butler's election. The single and isolated house of representatives of South Carolina cannot by

any process of reasoning be held to constitute the legislature of that State. The constitution of that State requires a senate and house of representatives for that purpose. But the Wallace house had no senate to recognize it. It stood isolated and alone, and, so standing, it could originate no lawful action. It could no more elect a Senator than it could enact laws.

The following resolution is submitted as the determination of the committee upon the merits of this controversy:

Resolved, That David T. Corbin was, on the 12th day of December, A. D. 1876, duly elected by the legislature of the State of South Carolina a Senator from that State in the Congress of the United States for the term of six years commencing on the 4th day of March, A. D. 1877, and that, as such, he is entitled to have the oath of office administered to him.

VIEWS OF THE MINORITY.

The undersigned members of the Committee on Privileges and Elections, to which committee was referred the petition of David T. Corbin, praying the Senate "to inquire into, hear, and determine on their merits the claim and right of the petitioner to a seat in the Senate from the State of South Carolina for the term of six years commencing on the 4th day of March, A. D. 1877," being unable to agree with the reasoning and conclusion of the majority of the committee, respectfully submit the following as their views in the premises.

On the 7th of March, 1877, the credentials of David T. Corbin and M. C. Butler, each claiming the seat as Senator from South Carolina, were ordered to lie on the table and be referred to the Committee on Privileges and Elections when appointed. Two days thereafter the committee was appointed, and received the credentials of both claimants for the seat.

Mr. Butler filed a printed statement setting forth the issues of fact and law upon which he claimed the seat.

Mr. Corbin also filed a like statement setting forth the issues of fact and law upon which he claimed the seat.

Replies to the statements thus made were also filed.

On examination of the issues thus made up there seemed to be no material issue of fact between the contestants, and the question as to which of them, or whether either, was duly elected by a legal legislature was one of law.

In this condition the contest remained until the 20th of November, 1877, and on this latter day a motion was made in the Senate "that the Committee on Privileges and Elections be discharged from the consideration of the credentials of M. C. Butler, of South Carolina." The reason alleged for this motion was that the facts were all stated in the records furnished by the contestants; that neither of the contestants desired to take any testimony *aliunde*, and that the question of law could be debated and decided in the Senate as well without as with a report from the committee.

On the 27th of November, after elaborate debate, this resolution to discharge the committee was accepted by the Senate, and after further debate, and after the statements made and printed in behalf of Mr. Corbin and arguments on both sides had been read and made in the Senate, the Senate agreed to a motiton to swear in Mr. Butler, and he was, on the 30th of November, sworn in as the Senator from South Carolina for the term in contest. A vote admitting one contestant to a seat is certainly a vote denying the same seat to another contestant when both contestants are parties to the issue. No motion was made to reconsider this action of the Senate, and no reservation was made looking to any further contest between the claimants. On the 26th of March, 1878, and during a subsequent session of Congress, the petition now under consideration by Mr. Corbin, asking the Senate "to inquire into, hear, and determine his right and claim" to the same seat in the Senate was referred to this committee.

In considering this petition the facts which have been presented to this committee are precisely the same which were presented on the former consideration of this case. Not a new fact has been presented, nor offered to be presented, and not an old fact has been withdrawn or modified, nor offered to be withdrawn or modified. The arguments now made have been made from the same statements and briefs filed on the former hearing, and not a new question of law has been presented except the issue of *res adjudicata*. No charge of fraud has been made against the former decision. No allegation that testimony was before excluded which ought to have been admitted, or that testimony was admitted which ought to have been excluded; no request by either party to produce testimony has been denied, and no pretense that testimony then offered and excluded can now be produced. The jurisdiction is the same; the parties are the same; the subject-matter of contest is the same; the facts are the same, and the questions of law are the same. The petition now before us is a mere, sheer, naked proposition that the Senate at a subsequent session shall revote on the identical questions, facts, and issues on which the Senate voted and decided at a former session.

Without going into a tedious and unnecessary review of the authorities and cases to be found in the books, we deem it sufficient to say that no demand like that contained in the petition of Mr. Corbin was ever granted by this Senate, nor, as we believe, by any legislative body.

In the case of Bright and Fitch, in the Thirty-fifth Congress, the parties to the rehearing asked were new and different, and had not before been heard, and the rehearing itself was asked in a memorial from the legislature of the State of Indiana. But because "all the facts and questions of law involved were as fully known and presented to the Senate" on the former hearing as they were then presented in the memorial of the legislature asking a rehearing, it was held that the judgment first rendered by the Senate "was final, and precluded further inquiry into the subject."

If, on the former hearing, Mr. Corbin had been denied the privilege of introducing material facts which he offered to produce; if he presented material facts now which were then unknown; if all the facts and questions of law now known and presented were not then as fully known and presented, the undersigned will not undertake to say his petition for a rehearing ought not in justice and right to be gravely heard and considered on the merits. But as Mr. Corbin himself has suggested no new facts or questions of law, and as we well know that all the facts and questions of law now known and presented were then quite as well known and presented both to the committee and the Senate, we cannot regard his petition for another vote as entitled to further consideration.

If, however, a majority of the Senate shall differ with us in the view we have presented, and shall, without precedent, without law and without reason, determine to re-examine on its merits the title of Mr. Corbin to the seat which he claims in the Senate, we submit that the former decision, excluding him from that seat, was right, and ought not to be reversed.

There is no controversy between the contestants about the facts, and the only question presented is one of law. The only real question is, whether the house of representatives of the legislature which it is claimed elected Mr. Corbin was a legal house or a legal quorum of a house under the constitution and laws of South Carolina.

By section 4, Article II, of the constitution, it is is provided that "the house of representatives shall consist of one hundred and twenty-four members."

By section 14, Article II, it is provided that "a majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as may be provided by law."

It is difficult to see how language could more plainly define what should be a house, or what should be a quorum of a house, or what only a less number than a quorum had power to do. Nor is there anything in law, morals, or party exigency which can justify a resort to construction or sophistry to confuse such plain language. The number of members who assembled in what is called the Mackey house, which pretended to elect Corbin, was fifty-nine. Clearly this was neither a house nor the quorum of a house, as plainly defined by the constitution of the State, and this number had no power except to adjourn from day to day and compel the attendance of absent members. But this number proceeded to organize as a legal quorum to do business.

The pretext for this extraordinary assumption of power by fifty-nine members was that the board of State canvassers had only issued certificates of election to one hundred and sixteen members, and the claim is that fifty-nine is a majority of one hundred and sixteen. But this very statement admits that a quorum of the house was certified as elected. The fifty-nine, then, are left without excuse for failing to exercise their only power under the constitution, "to compel the attendance of absent members." But the facts show that the people in fact elected one hundred and twenty-four members—a full house. The precinct commissioners and the county commissioners of election, in all the counties, respectively, made out and forwarded the statements required by law showing the votes cast at the election. The board of State canvassers refused to cast up the votes in the counties of Edgefield and Laurens, under the shallow pretext that they were unable to determine whether the elections in those counties were legal. They refused to discharge their plain ministerial duty of casting up the votes and thereby "determine and declare what persons had been by the greatest number of votes duly elected," but excused themselves from this duty by pretending they were not able to determine whether there had been legal elections in those counties! This was a question which, under the constitution, each house alone had authority to determine, and which the board of State canvassers, by plain language of the act creating it, is forbidden to determine.

In due time, also, the house of representatives did determine that there had been elections held in the counties of Edgefield and Laurens, and the returns very plainly showed who had been elected, and, in fact, the full house of one hundred and twenty-four members were elected. Both in fact and law, therefore, fifty-nine was not a quorum of the house to do business, and Mr. Corbin was not elected by a legal legislature.

The facts in this case show very plainly that the board of State canvassers were guilty of a disreputable attempt by mere trickery to defeat the result of the election by the people, and such conduct should not receive the countenance of the Senate.

The undersigned, therefore, recommend that the resolution to seat Mr. Corbin, reported by the majority of the committee, be not adopted.

A. S. MERRIMON.
ELI SAULSBURY.
BENJ. H. HILL.

TUESDAY, *February* 25, 1879.

On motion by Mr. Cameron, of Wisconsin, that the Senate proceed to the consideration of the resolution reported by the Committee on Privileges and Elections declaring David T. Corbin duly elected and entitled to a seat in the Senate as a Senator from the State of South Carolina, it was determined in the negative—yeas 25, nays 36.

On motion by Mr. Conkling, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Blaine, Booth, Cameron of Wisconsin, Chandler, Conkling, Dawes, Dorsey, Edmunds, Ferry, Hamlin, Hoar, Howe, Ingalls, Kirkwood, McMillan, Mitchell, Morrill, Oglesby, Paddock, Plumb, Rollins, Wadleigh, and Windom.

Those who voted in the negative are Messrs. Bailey, Barnum, Bayard, Beck, Cameron of Pennsylvania, Cockrell, Coke, Conover, Davis of Illinois, Davis of West Virginia, Dennis, Eaton, Garland, Gordon, Grover, Harris, Hereford, Hill, Jones of Florida, Kernan, Lamar, McCreery, McDonald, McPherson, Matthews, Maxey, Merrimon, Morgan, Patterson, Ransom, Saulsbury, Shields, Voorhees, Wallace, Whyte, and Withers.

So the motion was not agreed to.

FRIDAY, *February* 28, 1879.

The Vice-President laid before the Senate a letter of David T. Corbin, withdrawing his claim to a seat in the Senate as Senator-elect from the State of South Carolina.

Ordered, That it lie on the table.

[A copy of the letter is found on page 2028 of the Congressional Record, vol. viii, part 3.]

REIMBURSEMENT OF MR. BUTLER'S EXPENSES.

FRIDAY, *March* 17, 1882.

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That there be paid out of the contingent fund of the Senate the sum of $3,500 to M. C. Butler, a Senator from the State of South Carolina, in reimbursement of expenses necessarily incurred by him in defense of his title to his seat."

MONDAY, *March* 20, 1882.

On motion by Mr. Hoar, the Senate proceeded to consider, as in Committee of the Whole, the following resolution reported by him from the Committee on Privileges and Elections on the 17th instant, and no amendment being made it was reported to the Senate:

"A resolution to pay M. C. Butler the expenses incurred by him in defending his title to a seat in the Senate."

Ordered, That it be engrossed and read a third time.

The said resolution was read the third time.

Resolved, That the Senate agree thereto.

[The debate is found on pages 2046, 2047 of the Congressional Record, vol. xiii, part 3.]

REIMBURSEMENT OF MR. CORBIN'S EXPENSES.

"To pay D. T. Corbin, late contestant for a seat in the United States Senate from the State of South Carolina, his expenses of such contest, $10,000."—*U. S. Statutes at Large, 45th Cong.*, 1877–'79, vol. 20, page 400; *sundry civil appropriation bill*, approved March 3, 1879.

[Special session of Senate, March, 1877, and second session of the Forty-fifth Congress.]

LA FAYETTE GROVER,

Senator from Oregon from March 8, 1877, till March 3, 1883.

March 2, 1877, the credentials of Mr. Grover, elected for the term beginning March 4, 1877, were presented. March 7, a memorial of citizens of Oregon protesting against his admission to a seat were presented, and objection was made to the oaths being administered to Mr. Grover at that time. The following day he was admitted after debate. March 9, Mr. Grover submitted a resolution that the memorial be referred to the Committee on Privileges and Elections for investigation. The resolution was agreed to. December 14, 1877, the testimony taken was printed. June 15, 1878, the committee reported that the evidence taken did not sustain any of the charges. The committee asked to be discharged from the further consideration of the subject. One member of the committee, concurring in the conclusion of the committee, submitted views more at length, maintaining that a great injustice was done to Mr. Grover by the consideration given in the Senate to the vague charges preferred against him.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 2d sess. 44th and 45th Congs., and the report of the committee (except the testimony) from Senate Reports, 45th Cong., 2d sess., No. 540.

Special references to the debates of each day are inserted below.

FRIDAY, *March* 2, 1877.

Mr. Kelly presented the credentials of La Fayette Grover, elected a Senator by the legislature of Oregon for the term of six years commencing March 4, 1877; which were read.

WEDNESDAY, *March* 7, 1877.

Mr. Wallace moved that the oaths required by law be now administered to Mr. La Fayette Grover, whose credentials were heretofore presented as a Senator from the State of Oregon, and who appeared at the bar of the Senate.

Mr. Hamlin objected to the oath being now administered to Mr. Grover, for the reason that Mr. Mitchell, a Senator from Oregon, now absent from the Chamber, had received and desired to present to the Senate a memorial of citizens of Oregon remonstrating against the admission of the said Grover to a seat in the Senate.

Pending further debate upon the amendment of Mr. Bayard to the resolution of Mr. Blaine,

Mr. Mitchell asked, and by unanimous consent obtained, leave to present at this time a memorial of citizens of Oregon protesting against the admission of L. F. Grover to a seat in the Senate as a Senator from that State until certain charges therein made can be investigated and disproved.

Ordered, That the memorial lie on the table.

[A statement by Mr. Mitchell and a copy of the memorial are found on pages 22, 23 of the Congressional Record, vol. vi.]

THURSDAY, *March* 8, 1877.

Mr. Wallace submitted the following resolution for consideration:

"Whereas, under the Constitution and the laws and the practice of the Senate, La Fayette Grover, claiming to be a Senator from the State of Oregon—his credentials being regular and in due form and there being no contestant for the seat—and there being in said State but one body claiming to be the legislature, and but one person claiming to be the governor, and there being no doubt or dispute as to the existence of one legal, rightful State government, is entitled to admission to a seat in this body, on the *prima facie* case presented by such credentials, notwithstanding the objections contained in the petition of citizens of the State of Oregon against his admission: Therefore,

"*Resolved*, That the credentials of La Fayette Grover be taken from the table and the oaths of office be now administered to him.

"*Resolved, further*, That the petition of citizens of Oregon containing charges against La Fayette Grover lie on the table until the Committee on Privileges and Elections is organized, when they shall be referred to such committee, together with his credentials, with instructions to investigate such charges and report to the Senate as to their truth or falsity."

On the question to agree thereto,

After debate,

Mr. Whyte demanded a division of the question, and the question being first put on agreeing to the first resolution and preamble,

It was determined in the affirmative.

The question recurring on the second resolution, Mr. Wallace, with the consent of the Senate, withdrew the same.

Whereupon

Mr. Grover presented himself at the bar of the Senate, and the Vice-President having administered to him the oaths prescribed by law, he took his seat in the Senate.

[The debate is found on pages 31–39 of the Congressional Record, vol. vi.]

FRIDAY, *March* 9, 1877.

Mr. Grover submitted the following resolution; which was considered by unanimous consent, and agreed to, viz:

"*Resolved*, That the thirteen memorials heretofore presented to the Senate by Hon. J. H. Mitchell, purporting to be signed by 369 citizens of the State of Oregon, reciting that it was currently reported and generally believed that the election of L. F. Grover as a Senator of the United States was procured by bribery, corruption, and other unlawful means in the legislature of the State of Oregon, and that the said L. F. Grover did corruptly and fraudently issue a certificate of election to one E. A. Cronin as a Presidential elector, on December 6, 1876, and that the said L. F. Grover did bear false witness before the Senate Committee on Privileges and Elections, on or about January 6, 1877, be now referred to the Committee on Privileges and Elections, who shall thoroughly investigate and report upon the foregoing charges, with power to send for persons and papers."

WEDNESDAY, *March* 14, 1877.

Mr. Mitchell submitted the following resolution for consideration:

"*Resolved*, That the Committee on Privileges and Elections be authorized to designate a subcommittee of three of its members who shall have authority to sit in the vacation for the purpose of taking testimony and making report to full committee at commencement of next session in pursuance of the resolution of the Senate authorizing an investigation into certain charges preferred against La Fayette Grover, Senator from Oregon; and such subcommittee shall have all the powers to send for persons and papers and administer oaths that the full committee now has."

THURSDAY, *March* 15, 1877.

Mr. Mitchell presented twenty-three petitions of citizens of Oregon, praying that L. F. Grover may be denied a seat in the Senate until certain charges preferred against him may be investigated; which were referred to the Committee on Privileges and Elections.

The Senate proceeded to consider the resolution yesterday submitted by Mr. Mitchell to authorize the Committee on Privileges and Elections to appoint a subcommittee to sit during the recess for the investigation of certain charges against La Fayette Grover, a Senator from the State of Oregon; and

Pending debate, it was

Ordered, That the further consideration thereof be postponed to to-morrow.

[The latter proceeding is taken from the Record. It does not appear in the Journal. The debate is found on page 42 of the Congressional Record, vol. vi.]

FRIDAY, *March* 16, 1877.

The Senate resumed, &c., and an amendment having been proposed by Mr. Saulsbury,

Pending debate,

On motion by Mr. Allison, the Senate proceeded to the consideration of executive business.

[The debate is found on page 43 of the Congressional Record, vol. vi.]

SATURDAY, *March* 17, 1877.

The Senate resumed the consideration of the resolution submitted by Mr. Mitchell on the 14th instant, to authorize the Committee on Privileges and Elections to appoint a subcommittee to sit during the recess for the investigation of the charges against La Fayette Grover, a Senator from the State of Oregon; and

The question being on the amendment proposed by Mr. Saulsbury, viz: Strike out all after the word "resolved" and in lieu thereof insert:

"That the Committee on Privileges and Elections, to which was referred a resolution of the Senate relating to the election of La Fayette Grover as Senator from the State of Oregon, be, and the said committee is, instructed to appoint the judge of the fourth judicial district of said State a commissioner to take testimony relating to the matters referred to in said resolution, and the said commissioner so appointed shall have power and authority, and it shall be his duty, to issue subpœnas for witnesses as well on behalf of the said La Fayette Grover as against him and to give due notice of the time and

place when and where the testimony will be taken. The testimony so taken shall be forwarded to the said committee, which shall report the same, with their conclusions thereon, at the next regular session of the Senate,"

On motion by Mr. Mitchell to amend the amendment by striking out all after the word "instructed" and in lieu thereof inserting:

"To appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution and report to the full committee on the first Monday in December next; and for such purpose said subcommittee shall have power to sit in vacation; and if they deem expedient, go to the State of Oregon; and such committee shall have power to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers; and the expenses of such subcommittee, not exceeding $10,000, shall be paid out of the contingent fund of the Senate, upon vouchers to be approved by the chairman of such subcommittee,"

After debate,

It was determined in the affirmative.

On motion by Mr. Davis, of West Virginia, to amend the amendment as amended by striking out the work "clerk," it was determined in the negative—yeas 10, nays 34.

On motion by Mr. Davis, of West Virginia, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Beck, Davis of West Virginia, Dennis, Harris, Hereford, Hill, McCreery, McPherson, Wallace, and Whyte.

Those who voted in the negative are Messrs. Allison, Anthony, Bayard, Blaine, Bogy, Chaffee, Christiancy, Conkling, Davis of Illinois, Dorsey, Eaton, Garland, Hamlin, Ingalls, Johnston, Jones of Nevada, McMillan, Maxey, Mitchell, Morrill, Morton, Oglesby, Paddock, Patterson, Plumb, Randolph, Rollins, Sargent, Saulsbury, Saunders, Spencer, Teller, Wadleigh, and Windom.

So the amendment to the amendment was not agreed to.

On motion by Mr. Saulsbury to further amend the amendment by adding thereto the following:

"And that the said L. F. Grover shall be notified of the sessions of the said subcommittee, with the right to be present at the examination of witnesses,"

It was determined in the affirmative.

The amendment of Mr. Saulsbury, as amended, was then agreed to; and,

On the question to agree to the resolution as amended, as follows:

"*Resolved*, That the Committee on Privileges and Elections, to which was referred a resolution of the Senate relating to the election of La Fayette Grover as Senator from the State of Oregon, be, and the said committee is, instructed to appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution, and report to the full committee on the first Monday in December next; and for such purpose such subcommittee shall have power to sit in vacation, and, if they deem expedient, go to the State of Oregon; and such subcommittee shall have power to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the power of the general committee to administer oaths and send for persons and papers; and the expenses of such subcommittee, not exceeding $10,000, shall be paid out of the contingent fund of the Senate upon vouchers to be approved by the chairman of such subcommitte; and that the said L. F. Grover shall be notified of the sessions of the said subcommittee, with the right to be present at the examination of witnesses,"

It was determined in the affirmative—yeas 39, nays 8.

On motion by Mr. Whyte, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Allison, Anthony, Bayard, Blaine, Bogy, Booth, Bruce, Chaffee, Christiancy, Coke, Conkling, Davis of Illinois, Dorsey, Eaton, Garland, Hamlin, Hoar, Howe, Johnston, Jones of Nevada, McMillan, McPherson, Maxey, Mitchell, Morgan, Morrill, Morton, Oglesby, Paddock, Patterson, Randolph, Rollins, Sargent, Saunders, Spencer, Teller, Wadleigh, Windom, and Withers.

Those who voted in the negative are Messrs. Cockrell, Davis of West Virginia, Harris, Hereford, McCreery, Merrimon, Wallace, and Whyte.

So the resolution was agreed to.

[The debate is found on pages 43–46 of the Congressional Record, vol. vi.]

FRIDAY, *December* 14, 1877.

On motion by Mr. McMillan,

Ordered, That the testimony taken before the subcommittee of the Committee on Privileges and Elections, designated to investigate certain charges against La Fayette Grover, a Senator from the State of Oregon, be printed.

SATURDAY *June* 15, 1878.

Mr. Wadleigh, from the Committee on Privileges and Elections, who were instructed by the resolution of the Senate of March 9, 1877, to investigate certain matters touching the election of La Fayette Grover as a Senator from the State of Oregon, submitted a report (No. 540), with a recommendation that the committee be discharged from the further consideration of the resolution, and that any member of said committee have leave to present to the Senate, at the present or the next session, his views in writing upon said testimony; and

Leave was granted as requested.

* * * * * * *

Mr. Saulsbury, from the Committee on Privileges and Elections, submitted his views on the question of the election of La Fayette Grover as a Senator from the State of Oregon, to accompany the report of the committee (No. 540) this day made.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Wadleigh (chairman), Mitchell, Cameron of Wisconsin, McMillan, Hoar, Ingalls, Saulsbury, Merrimon, and Hill.]

IN THE SENATE OF THE UNITED STATES.

JUNE 15, 1878.—Ordered to be printed.

Mr. Wadleigh, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the resolution of the Senate authorizing said committee to investigate and report upon charges that the election of La Fayette Grover as a Senator from the State of Oregon was procured by bribery, corruption, and other unlawful means, report that in their opinion the evidence taken does not sustain any of said charges against him.

Your committee therefore ask to be discharged from the further consideration of said resolution, and that any members of said committee have leave to present to the Senate at the present session or the next session their views in writing upon said testimony.

VIEWS OF MR. SAULSBURY.

Mr. Saulsbury, a member of the subcommittee on Privileges and Elections, appointed to take testimony in reference to the election of the Hon. L. F. Grover as Senator, concurring in the foregoing conclusion of the committee, submits more at length his own views.

At the special session of the Senate in March, 1877, the following resolution, offered by Senator Grover, was adopted, referring to the Committee on Privileges and Elections certain memorials which had been presented to the Senate, and requiring said committee to investigate the allegations therein contained. The resolution is in the following words:

"*Resolved*, That the thirteen memorials heretofore presented to the Senate by Hon. J. H. Mitchell, purporting to be signed by 369 citizens of the State of Oregon, reciting that it was currently reported and generally believed that the election of L. F. Grover as a Senator of the United States was procured by bribery, corruption, and other unlawful means in the legislature of the State of Oregon, and that the said L. F. Grover did corruptly and fraudulently issue a certificate of election to one E. A. Cronin as a Presidential elector on December 6, 1876, and that the said L. F. Grover did bear false witness before the Senate Committee on Privileges and Elections on or about January 6, 1877, be now referred to the Committee on Privileges and Elections, who shall thoroughly investigate and report upon the foregoing charges, with power to send for persons and papers."

The following is a copy of the memorials referred to in the foregoing resolution:

To the Senate of the United States:

Whereas it is currently reported and generally believed that L. F. Grover by bribery, the corrupt use of money, and other unlawful and dishonorable means procured his election to the Senate of the United States by the legislature of the State of Oregon at its last session; and

Whereas the said L. F. Grover, in obedience to a corrupt scheme to defraud the State of Oregon of its proper electoral vote, as the governor thereof did unlawfully, dishonestly, corruptly, and by acts of usurpation, declare elected to the office of Presidential elector for the State of Oregon, on the 6th day of December, 1876, and did issue a

certificate of election to one E. A. Cronin, who had been defeated by the people for said office by more than 1,000 majority; and

Whereas the said L. F. Grover did fraudulently undertake to sustain his said act by falsely testifying as a witness concerning the same before the Senate Committee on Privileges and Elections on or about the 6th day of January, 1877:

Now, therefore, we, the undersigned, citizens of the State of Oregon, earnestly but respectfully ask that the said L. F. Grover be denied a seat in the United States Senate as a Senator from the State of Oregon until the foregoing charges are thoroughly investigated and disproved.

M. L. WILMOT and others.

Subsequently during the same session a resolution was adopted by the Senate instructing the Committee on Privileges and Elections to appoint a subcommittee from its members to take testimony relating to the matters referred to in the said memorials and report the testimony taken to the full committee on the first Monday of the present session.

The following is the resolution last referred to:

"That the Committee on Privileges and Elections, to which was referred a resolution of the Senate relating to the election of La Fayette Grover as Senator from the State of Oregon, be, and the said committee is, instructed to appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution and report to the full committee on the first Monday in December next; and for such purpose such subcommittee shall have power to sit in vacation and if they deem expedient go to the State of Oregon; and such subcommittee shall have power to employ a clerk, stenographer, and sergeant-at-arms, and shall have all the powers of the general committee to administer oaths and send for persons and papers; and the expenses of such subcommittee, not exceeding $10,000, shall be paid out of the contingent fund of the Senate upon vouchers to be presented by the chairman of such committee."

In obedience to said resolution a subcommittee consisting of the late Senator Morton, Senator McMillan, and the undersigned, was appointed, who proceeded to Portland, in the State of Oregon, and examined a large number of witnesses, whose testimony has already been printed by order of the Senate.

The undersigned, as a member of the subcommittee charged with the duty of making the investigations required by the first mentioned resolution, begs leave respectfully to submit his own conclusions from the evidence taken.

An examination of the testimony will show that the widest latitude was given to the investigation by the subcommittee. Witnesses were not restricted to matters within their own knowledge, but were allowed to testify as to their beliefs and suspicions, unsupported by any facts, and to narrate hearsay evidence of no higher character than the fugitive rumors which are not unfrequently current on the streets of a State capital preceding the election of a United States Senator.

It may be at times impossible for a legislative committee to apply to an investigation with which it is charged the rules which govern the admissibility of evidence in courts of justice, but the undersigned must be allowed to express his conviction that in an investigation into the truth of allegations affecting the personal honor of a member of the Senate, as well as his right to a seat in the body, no such wide departure should be allowed in the admission of testimony as the evidence in this case will show was permitted. While Senator Grover can have no cause to regret the latitude that was given to the inquiry into matters alleged against him or the regularity of his election, by reason of anything elicited against him or those to whom he owes his election to the Senate, it ought not to be allowed to become a precedent to govern similar investigations in the future.

The undersigned objected at the very commencement of the investigation to the latitude in the examination of witnesses which is usually allowed in investigations by legislative committees, and insisted on an observance, as far as possible, of the rules which obtain in courts of justice in that regard. Had his suggestion been adopted in practice, the testimony in this case would have been compressed into a very narrow compass, and would have excluded a large mass of irrelevant testimony taken by the subcommittee. The undersigned begs leave to refer to the objections which he made on this point, found at pages 9, 10, and 11 of the printed testimony.

Without reviewing in detail the testimony taken by the subcommittee, the undersigned has no hesitation in saying that, so far from justifying the insinuations contained in the memorials presented to the Senate and referred to the Committee on Privileges and Elections, it completely vindicates Senator Grover from the aspersions attempted to be cast upon him, and establishes beyond question the regularity and fairness of his election as a Senator.

The testimony shows that the two houses of the Oregon legislature voted separately for Senator on the day fixed by the act of Congress, and met in joint convention and voted

for Senator daily thereafter until Senator Grover received the votes of a majority of all the members of the legislature. In the vote taken in the two houses separately, and in every vote in the joint convention, he received a larger number of votes than any other candidate.

The testimony will further show that Senator Grover, in the final caucus of the Democratic members of the legislature, received the caucus nomination, and was thereafter the only recognized candidate of his party for the position, and as such received ultimately the vote of every democratic member of the legislature.

The testimony further shows that during the contest for Senator Governor Grover repeatedly assured his personal and political friends that he did not desire and would not have an election that was not honorable to himself and his party, and offered to withdraw from the contest if the Democratic members could agree upon any other candidate.

In the opinion of the undersigned, no member of the Senate is freer from suspicion of having procured his election to the body by improper means than Senator Grover, while none perhaps has been subjected to more unjust and slanderous accusations, or could have vindicated his character more completely against the assaults of personal and political foes.

The only witness who directly or indirectly sought to connect Senator Grover with bribery, or who in fact professed to know anything about the corruption of any member of the legislature, was a man by the name of Styles. This witness, who had made an affidavit to be sent to Washington to be used to prevent Governor Grover from taking his seat in the Senate, testified before the committee to a conversation between Governor Grover, Mr. Gilfry, and William H. Watkins in reference to the purchase of the vote of a member of the legislature by the name of Goodman, and also to a conversation which he had with Goodman, and also to seeing another member, by the name of Mosier, come out of the room of Governor Grover into the room of Mr. Gilfry with several hundred dollars in gold in his hands. In reference to the first statement he was contradicted by Goodman, Gilfry, and Watkins, and in reference to the second by Gilfry and Mosier. See testimony of Mr. Goodman, page 445, from which the following extract is taken:

"[The Senator here called the attention of the witness to certain passages in the testimony of Mr. Styles, as printed in a newspaper which he held in his hand.]

"Question. Did Governor Grover ever make any promise to you of any office whatever in case he was elected?—Answer. Never.

"Q. Did he approach you on the subject of voting for him?—A. I had a talk with Governor Grover, but he did not mention concerning my voting for him.

"Q. He said nothing in that conversation in the way of inducements; he held out no inducements for you to vote for him?—A. He did not offer me any inducement whatever; in the talk with him he asked me if I was not afraid that I was injuring the prospects of the Democratic party in this State by holding out as I did against the caucus, but he never during the conversation asked me to vote for him.

"Q. Did you state to this man Styles at any time that you could get a thousand dollars for your vote?—A. I never did. I consider that that gentleman has done me and Governor Grover a great injustice, and he stands before the people of Oregon to-day a perjured villain.

"Q. No person in your county, as I understand, believes any such allegation against you?

"Senator McMillan. Senator, that is taking a pretty wide range, it seems to me.

"Senator Saulsbury. No, sir; this gentleman is a man of character, and I take it that he has a right to say before this committee what he knows as to what his neighbors think of this thing.

"The Witness. No, sir; nobody believes it.

"Q. Are you regarded in your community as a corrupt man?—A. I think not; I hope not, at least.

"Q. Do you believe there are any Republicans in that county that would charge it upon you?—A. I don't believe there are.

"Q. Now I will ask you this question, Mr. Goodman: Did you ever, directly or indirectly, receive one dollar for your vote for Governor Grover for the Senate?—A. No, sir, never; not one dollar. No man ever approached me upon that subject, either of the Grover faction or the Nesmith faction.

"Q. Were you, directly or indirectly, influenced by any pecuniary consideration or reward, in any shape, manner, or form, or by promises of office or money, directly or indirectly, in connection with your vote for Governor Grover for the Senate?—A. There was no influence brought to bear upon me whatever."

See also the testimony of Mr. Watkins, page 589, &c.

See also testimony of J. H. Mosier, page 412, from which the following extract is taken:

"Question. Do you know a man by the name of W. H. N. Styles, who has testified

before the committee?—Answer. I never saw the man that I know of. That is him right over there, I believe [turning to the left and pointing to a row of by-standers]. No, I am mistaken; I beg your pardon; that is a better-looking man than he was. I will take it all back. He was sitting right over there [pointing] a few moments ago.

"Q. You say you never saw the man that you know of—never saw him till now?—A. I never saw him till yesterday. I never saw him in my life that I know of till I came here.

"Q. That man in his testimony swears as follows:

"'Q. Did you see Mosier at any time after the election?—A. I did.

"'Q. Where did you see him?—A. I was introduced to him in Mr. Gilfry's office.'

"Q. Now, I ask you, Mr. Mosier, if it is true that you were introduced to Mr. Styles in Mr. Gilfry's office, as he swears?—A. I never was; I never was introduced to any man by that name.

"Q. He says in his testimony as follows:

"'Q. When was that?—A. One or two days after the election I sat down there waiting for Mr. Gilfry to come in. As I sat there perhaps fifteen minutes, I guess, some gentleman came in. I supposed Mr. Gilfry was in the other room. I heard some one talking in there, but I did not go in. I sat down there. The gentleman came in who was in the other room, that is, in the governor's room. I may have sat there fifteen or twenty minutes and Mr. Mosier came in from the governor's room.'

"Q. I ask you now, Mr. Mosier, if that assertion in this testimony is true?—A. It is not, sir. I never was in the governor's private room in my life to my knowledge.

"Q. You say here upon your honor and upon your oath that that is not true?—A. I never was in Governor Grover's private room in my life.

"Q. The testimony of Mr. Styles goes on:

"'Q. Mr. Mosier came in from the governor's room?—A. Yes, sir.

"'Q. Through the door in the partition?—A. Yes, sir. He came into the room where I was and had money in his hand.'

"Q. I ask you, sir, if on any occasion you ever were in the governor's room?—A. I was not, to my recollection.

"Q. I ask you, sir, if you ever came out of the governor's room with money in your hand?—A. No, sir; and any man that makes that assertion or testifies to that statement is a liar.

"Senator McMillan. Mr. Mosier, the use of that kind of language does not add anything to the strength of your testimony.

"Senator Saulsbury (to the witness). Say it in your own language, sir. You have a perfect right to defend and vindicate your reputation here and elsewhere.

"The Witness. Yes, sir; I have, and I will do it, too. I have a right to say what I know about this thing, and I say it is false.

"[The answer of the witness was greeted by applause from a portion of the by-standers.]

"The Chairman. I said a while ago that if these unseemly demonstrations were repeated I should feel it to be necessary to clear this room. Any demonstrations of applause, or otherwise, calculated either to encourage and embolden or to discourage and intimidate a witness are evidently improper. I shall let it pass this time; but if after this second warning this thing is repeated I shall have the room cleared. I do not want to give anybody any offense, or to put anybody out if I can help it, but such demonstrations as this are highly improper, as every man who indulges in it must know, and cannot be tolerated here.

"The Witness. These things do not encourage me any; I shall state the facts all the same, whether they stamp their feet or not."

See also testimony of H. H. Gilfry, from which the following extract is taken:

"Senator Saulsbury. I ask you, sir, if you ever saw Mr. Mosier in Governor Grover's private office?—Answer. No, sir; I did not. I do not think he was in there at all during the session of the legislature.

"Q. Was he ever in the governor's private office with you?—A. Mr. Mosier? No, sir; he never was.

"Q. Did you ever see any money paid to Mr. Mosier?—A. I never did; no, sir.

"Q. Or to any other member of the legislature?—A. I never did; not a cent, sir.

"Q. On the occasion here referred to, or at any other time?—A. No, sir; never.

"Q. Did you ever see Mr. Mosier with any money in his hand in your room?—A. No, sir.

"Q. Or anywhere else?—A. No, sir.

"Q. Did you ever come from the governor's room into your own office and find Mr. Styles in your own office?—A. No, sir; I never did.

"Q. Do you pronounce that statement, then, so far as it relates to you, an unmitigated falsehood?—A. I do, emphatically. It is an unmitigated falsehood, without any foundation whatever."—(Testimony, page 578.)

In relation to other matters testified to by Styles, intended to affect the character of Senator Palmer, of the State legislature, he is not only contradicted most positively by Senator Palmer, but his testimony is proven to be false by the overwhelming testimony of from four to seven witnesses, on every important point.

Styles is also impeached by more than twenty witnesses, who swear that his character for truth was bad, and that they would not believe him on oath.

Nothing but the importance which was attached to the statements of this man Styles by those who originated and prosecuted the charges against Senator Grover could have justified so extended a notice of his testimony; but it would be improper to dismiss the statements of this witness without saying that for his perjury in this investigation he was indicted in the United States district court in Oregon and tried before a jury largely composed of Republicans, eleven of whom were in favor of conviction to one opposed; and on a second trial he again escaped because of a divided jury. At this last trial the most important witness to prove the guilt of the accused was necessarily absent, attending to his public duties in Washington.

It will be observed from an examination of the testimony that the theory of those who sought to impeach the regularity of the election of Senator Grover was that the money used in the alleged bribery of members of the legislature was furnished by the Hon. Joseph S. Smith, formerly a member of Congress, and Hon. B. Goldsmith, formerly mayor of the city of Portland. Mr. Smith came before the subcommittee and swore that he never, directly or indirectly, furnished any money to influence the vote of any member of the legislature on the Senatorial or any other question; that he was in Salem but once, and only for a short time, during the Senatorial contest, and then only to prevent the use of his own name for the position, which he had been informed might be done; and that he did not while there speak to any member of the general assembly on the subject of electing a Senator.

Mr. Goldsmith was, during the investigation, in the city of New York with one of his children, whom he had taken there for the purpose of having a difficult operation performed, and was consequently not before the committee, but telegraphed to the chairman his willingness to appear at any time and place convenient to the committee, and testify touching his alleged complicity with the corruption of members of the legislature, and subsequently sent an affidavit denying emphatically having furnished one dollar for the purpose of affecting the action of any member of the legislature upon the Senatorial question. Independently of the statements of Mr. Goldsmith himself, it was abundantly proved that he took but very little part in the contest, and was present in Salem only to procure legislation affecting his own interest, and for that reason was careful not to become mixed up in the Senatorial question, which might prejudice his own business before the legislature. Besides, it was conclusively shown that Mr. Goldsmith's financial condition was at the time such that he could not, if he had desired, advance money for so improper a purpose.

The only members of the legislature who voted for Senator Grover against whom the least whisper of suspicion was heard in the undefined rumors circulated by party malignity or inspired by the chagrin of disappointed hope were Mr. Goodman, of Umatilla County; Mr. Straight, of Clackamas County; Messrs. Mosier and Butler, of Wasco County; Senator Palmer, of Benton and Polk Counties; and R. W. Wilson, deceased, a representative from Clatsop and Tillamook Counties.

Whatever suspicions were indulged at any time in reference to Goodman, Straight, Butler, and Palmer, except so far as Mr. Goodman was charged by Styles, had their only foundation in the fact that they were known to be in favor of another gentleman for Senator, and some of them did not recognize the binding obligation of a caucus nomination, and therefore did not take part in the caucus, and voted in the separate houses and in joint convention several times for their first choice for Senator, and until they became satisfied that he could not be elected, when they cast their votes for Senator Grover.

All of those gentlemen are men of character and standing in their respective counties, and testified before the subcommittee denying most positively that they had been influenced in voting for Governor Grover by any corrupt or other improper consideration, and explained fully their entire course upon the Senatorial question. Neither of them had aught against Senator Grover, who, they declared, was from the first their second choice. Their testimony is full upon this point, and the undersigned refers to it with full confidence that it will satisfy every one who will take the trouble to read it of the candor and honesty of the witnesses, not only in testifying before the subcommittee, but in their entire action upon the Senatorial question.

With reference to Mr. Mosier, his indiscreet conversation while intoxicated gave rise to suspicions that he desired to procure money for his vote for Senator, and the man Styles was doubtless instigated thereby to charge him with having received money from Governor Grover, as already stated. The testimony of Mr. Mosier in reply to the statements of Styles has already been given. In his testimony he further stated that his only object in the conversations cited against him was to ascertain the truth of rumors to the

effect that money was being used to defeat the election of Senator Grover, and that he neither received nor desired to receive one cent for his vote on the Senatorial question. The testimony shows that he voted in caucus and on every vote but one in the separate houses and in joint convention of the two houses for Senator Grover, and that he withdrew his support from Grover on one vote because he was informed that the Senator was opposed to certain local improvements in which the people of his county were interested, and upon being assured that he had been misinformed upon that point he again voted steadily for Governor Grover, who was his first choice. He was shown to be a reputable and honest man by persons who had known him for a long time, and to be in good circumstances and under no necessity to obtain money in any improper way. The undersigned does not believe that Mr. Mosier was either given or promised pecuniary or other reward for his support of Senator Grover, and that whatever suspicions were entertained against his integrity were traceable to his own indiscreet conduct while in a state of inebriety.

The only other member whose character was assailed by suspicions detailed before the subcommittee was R. W. Wilson, deceased. Mr. Wilson, being dead, could not personally vindicate his character before the subcommittee; but every ground alleged for the suspicions entertained by any one against him was fully met and shown to be without foundation.

He was shown by the testimony of Governor Chadwick and other gentlemen who knew him well to be a man of sterling integrity and character, and in the opinion of the undersigned, based upon the testimony before the subcommittee, not the slightest justification existed for the attempted defamation of his fair name while living or his memory now that he is no more. He had always been a Democrat of the strictest sect, adhering to the usages of the party and supporting its candidates, whether made in convention or in caucus, and but followed out the rule of his life and the will of his constituents in supporting Governor Grover after he was nominated in caucus, although his personal predilections were in favor of another.

An attempt was made by a Republican by the name of Brown, an employé about the custom-house in Portland, to induce him by an offer of $1,500 to vote against Grover. Mr. Wilson communicated this insult to friends and took legal advice with a view of prosecuting Brown criminally for his offense. Brown testified before the committee to his own infamy and guilt, but failed to inculpate Wilson in his crime or cast a stain upon his untarnished memory. In the opinion of the undersigned no more unjustifiable attempt or more signal failure was ever made to blast the reputation of a worthy man.

A careful examination of the testimony taken before the subcommittee it is confidently believed will satisfy any unbiased mind that the story of bribery and corruption in the election of Senator Grover was unwarranted by any fact or circumstance worthy of a moment's consideration. Even the most uncharitable political opponent will find in that testimony not only ample refutation of the slanderous rumors circulated to the prejudice of Senator Grover and the members of the legislature who supported him, but abundant proof that his election to the Senate was free from every taint and honorable alike to him and the legislature of Oregon.

It will be observed that the memorials hereinbefore set out, referred to the Committee on Privileges and Elections, do not charge Senator Grover directly with procuring his election to the Senate by corrupt means, but simply state that "it is currently reported and generally believed" that such was the fact, and ask that he be denied a seat in the Senate until these charges are investigated. The undersigned cannot withhold the expression of his conviction that great injustice was done to Senator Grover by the consideration given in the Senate to these loose and undefined charges, if charges they can be called. They were made the basis of an objection to his right to a seat in the Senate, which was not withdrawn until it had been announced on the floor of the Senate that he would ask an investigation.

It is the first time in the history of the Senate when charges so vague and indefinite against a member-elect have received the least consideration, and it is to be hoped that it will not hereafter be regarded as a precedent to excuse injustice to others entitled to seats in this body. The testimony will show that these memorials were distributed from the custom-house in Portland (where they were proved to have been first seen) through the mails to Republican postmasters for the purpose of procuring signatures; and the man Brown, already referred to, employed in some subordinate position about that building, testified that he went into different counties with these petitions for that purpose. With the exception of this man Brown, no satisfactory proof could be obtained as to who were the guilty parties; but in the opinion of the undersigned, drawn from all the facts and circumstances proved in this investigation, the charges against Senator Grover contained in these memorials originated in a conspiracy to deprive him, by perjury and subornation of perjury, of a seat in the Senate to which he had been fairly elected by the legislature of Oregon.

ELI SAULSBURY.

[Forty-fifth Congress—Second and third sessions.]

STANLEY MATTHEWS,

Senator from Ohio from October 15, 1877, *till March* 3, 1879.

June 5, 1878, Mr. Matthews submitted a resolution that a select committee be appointed to consider what connection, if any, he had had with any real or pretended frauds committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of reward made by any one to one James E. Anderson in consideration of any official conduct by said Anderson in relation to said election, and to inquire into all the circumstances of any recommendation by himself of the said Anderson for appointment to office. The resolution was agreed to. March 1, 1879, the committee reported that they met on the 21st day of June, 1878, for the purpose of examining Mr. Anderson; that he refused to testify; that Congress having adjourned they could not compel him to testify; that the committee met again in December, 1878, and not agreeing to a motion that the Senate be requested to take proceedings to compel Mr. Anderson's attendance, reported to the Senate a resolution that the House of Representatives be requested to transmit to the Senate a copy of Mr. Anderson's testimony relating to Mr. Matthews before a House committee; that the testimony was transmitted and referred to this committee January 28, 1879; that Mr. Matthews was then examined. The committee found unanimously the statements of Mr. Matthews to be true; that he had had no connection with any real or supposed frauds in the election in Louisiana, and that he was not guilty of any corrupt conduct in any of the matters referred to in the testimony, while they regarded his action in respect to Mr. Anderson's effort to obtain an appointment to office, under the circumstances, as wrong and injurious to the public interest. No further action on the subject was taken by the Senate.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals 45th Cong., 2d and 3d sess., and the report of the committee from Senate Reports, 45th Cong., 3d sess., vol. 2, No. 867.

There were no debates.

WEDNESDAY, *June* 5, 1878.

Mr. Matthews rose to a question of privilege, and having addressed the Senate upon the subject of certain statements made elsewhere, calculated to reflect upon his character and standing as a member of the Senate, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That a select committee of seven Senators be appointed to inquire into and consider all things touching the matter stated and referred to by the Senator from Ohio [Mr. Matthews] and the events connected therewith, and particularly what connection, if any, that Senator had with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of protection or reward, if any, made by any one to one James E. Anderson, or others, in consideration of, or connection with, any official conduct by said Anderson or others, in relation to said election or the returns thereof; and into all the circumstances of any recommendation by the said Senator of the said Anderson for appointment to office; and that said committee have power to send for persons and papers, to employ a clerk and stenographer, and have leave to sit during the recess."

Ordered, That the committee be appointed by the President *pro tempore*.

[Mr. Matthews's remarks are found on page 4119 of the Congressional Record, vol. vii, part 4.]

SATURDAY, *June* 8, 1878.

The President *pro tempore* appointed Mr. Edmunds, Mr. Allison, Mr. Ingalls, Mr. Hoar, Mr. Davis of Illinois, Mr. Whyte, and Mr. Jones of Florida members of the select committee authorized by the resolution of the 5th instant to inquire into certain matters touching the late Presidential election in Louisiana.

WEDNESDAY, *June* 12, 1878.

On motion by Mr. Allison,

Ordered, That the select committee appointed to inquire into certain matters touching the late Presidential election in Louisiana have leave to sit during the sessions of the Senate.

WEDNESDAY, *June* 19, 1878.

Mr. Allison submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the select committee appointed under the resolution of the 5th instant to make inquiry concerning the alleged connection of Senator Matthews with matters relative to the late Presidential election in Louisiana, in exercising the power heretofore granted to sit during the recess of Congress, may hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation."

[Third session of the Forty-fifth Congress.]

TUESDAY, *December* 10, 1878.

Mr. Allison, from the select committee to inquire into certain matters touching the late Presidential election in Louisiana, reported the following resolution which was considered by unanimous consent, and agreed to:

"*Resolved*, That the House of Representatives be respectfully requested to transmit to the Senate a copy of the testimony of one James E. Anderson relating to the Hon. Stanley Matthews, a member of the Senate from the State of Ohio, understood to have been taken before one of the committees of the House of Representatives."

MONDAY, *January* 27, 1879.

A message from the House of Representatives, by Mr. Adams, its Clerk:

"Mr. President, I am directed to communicate to the Senate, in compliance with its request of December 10, 1878, a copy of the testimony of James E. Anderson, given before the committee of the House of Representatives on investigation of alleged frauds in the electoral vote of the States of Louisiana and Florida."

TUESDAY, *January* 28, 1879.

The testimony* of James E. Anderson before a committee of the House of Representatives, yesterday received from the House of Representatives in response to a resolution of the Senate of December 10, 1878, was referred to the select committee to inquire into certain matters touching the late Presidential election in Louisiana, and ordered to be printed.

SATURDAY, *March* 1, 1879.

Mr. Allison, from the select committee who were directed by a resolution of June 5, 1878, to inquire into certain matters touching the late Presidential election in Louisiana, submitted a report (No. 867) thereon, with the recommendation that they be discharged from the further consideration of the subject.

REPORT OF COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MARCH 1, 1879.—Ordered to be printed.

Mr. Allison, from the Select Committee to inquire into certain matters touching the late Presidential Election in Louisiana, submitted the following report:

The committee appointed in pursuance of the following resolution adopted by the Senate on the 5th June, 1878—

"*Resolved*, That a select committee of seven Senators be appointed to inquire into and consider all things touching the matter stated and referred to by the Senator from Ohio [Mr. Matthews], and the events connected therewith, and particularly what connection, if any, that Senator had with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of protection or reward, if any, made by any one to one James E. Anderson, or others, in consideration of or connection with any official conduct by said Anderson or others, in relation to said election or the returns thereof; and into all the circumstances of any recommendation by the said Senator of the said Anderson for appointment to office; and that said committee have power to send for persons and papers, to employ a clerk and stenographer, and have leave to sit during the recess"—

submit the following report of their proceedings:

The committee held its first meeting on the 11th June, 1878, and determined, on the 13th of June, to summon James E. Anderson, named in said resolution. Mr. Anderson appeared, but was not examined, for the reason that his presence was requested before a committee of the House, known as the Potter committee, as appears from the following letter addressed to the acting chairman:

HOUSE OF REPRESENTATIVES,
Washington, D. C., June 13, 1878.

Mr. Senator ALLISON,
Chairman, &c.:

Mrs. Jenks is about to be put on the stand, and we would prefer, if entirely agreeable to the Senate committee, that Mr. Anderson should be present during her examination. This is important to the House committee. At any other time take him.

W. R. MORRISON,
Acting Chairman.

* Found in Senate Miscellaneous, 42d Cong., 3d sess., vol. 1, No. 50.

The committee again met on the 21st of June, when Anderson, the witness, again appeared and refused to testify; the circumstances of his refusal are fully set forth in the printed proceedings of the committee herewith reported. Congress having adjourned on the 20th day of June, 1878, the committee had no power to compel the witness, Anderson, to testify. On motion of Mr. Whyte, the committee adjourned to meet again when called by the chairman of the committee, it being then understood that no meeting would be called during the recess of Congress, as the committee had no power to enforce its orders in vacation. The committee again met on the 10th day of December, 1878. The chairman stated that he had received a telegram from James E. Anderson, dated Eureka, Nev., saying that he would now appear before the committee if summoned. On motion of Mr. Edmunds, it was

"*Ordered*, That there be reported to the Senate the following:

"'*Resolved*, That the House of Representatives be respectfully requested to transmit to the Senate a copy of the testimony of one James E. Anderson relating to the Hon. Stanley Matthews, a member of the Senate from the State of Ohio, understood to have been taken before one of the committees of the House of Representatives.'

"Mr. Edmunds submitted a motion that James E. Anderson be reported to the Senate as in contempt of its authority for refusing to testify before this committee, and that the Senate be requested to take the proper proceedings to secure his attendance.

"The motion was not agreed to, there being three ayes: Messrs. Edmunds, Davis, and Whyte. The noes were: Messrs. Allison (chairman), Hoar, and Ingalls. Mr. Jones, absent.

"On motion of Mr. Whyte, the committee adjourned to meet at the call of the chairman"—

It being understood that the committee should await the action of the House on the resolution calling for the testimony of Anderson taken by the House committee, which resolution was reported to the Senate on the 10th of December, 1878, and agreed to. On the 28th day of January, 1879, the House of Representatives transmitted to the Senate the testimony of James E. Anderson in pursuance of the request made by resolution of the Senate heretofore referred to, passed on the 10th day of December, 1878. This testimony was on the 28th day of January, 1879, referred to this committee and ordered to be printed. On the 7th February the committee met pursuant to the call of the chairman—

"Present: the chairman (Mr. Allison), Mr. Edmunds, Mr. Hoar, Mr. Davis, and Mr. Whyte"—

When the following proceedings were had:

"On motion of Mr. Edmunds, Senator Matthews was directed to be notified that the committee had received a copy of the testimony of James E. Anderson before a select committee of the House of Representatives, and was ready to hear what he had to say on the subject.

"The chairman having transmitted such notification, Hon. Stanley Matthews appeared before the committee.

"The CHAIRMAN. Senator Matthews, this committee now has the testimony of James E. Anderson, which, I believe, I called your attention to some days ago and furnished you a copy of; and the committee are ready to hear anything you may wish to say in reference to that testimony.

"Mr. MATTHEWS. I am ready to be sworn.

"Mr. EDMUNDS. I presume, also, the committee is ready to hear you in reference to whether you desire to have Mr. Anderson called for further examination by this committee.

"Mr. MATTHEWS. In regard to the inquiry in respect to my wishes as to whether the committee shall recall Mr. Anderson, I desire to say that it is a matter in which I have no wish, and desire to express none, believing that I ought to leave the matter entirely to the discretion of the committee to do in that matter, and in respect to any other witness, what they ought to do under the duty imposed upon them by the resolution of the Senate.

"Mr. EDMUNDS. We understand you to mean by that, Mr. Matthews, that in your judgment, so far as your own vindication is concerned, you do not desire us to compel him to attend.

"Mr. MATTHEWS. I do not make any request of that kind to the committee, and do not deem it necessary that I should do so for my own vindication.

"The CHAIRMAN. Then we will proceed with your examination.

"Hon. STANLEY MATTHEWS sworn and examined.

"The WITNESS. By a reading of the resolution, Mr. Chairman and gentlemen, it appears that the committee were appointed to 'inquire into and consider all things touching the matters stated and referred to' by myself in the personal statement which I made to the Senate on the 5th of June last, and reported in the Congressional Record, 'and par-

ticularly what connection, if any,' I had 'with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of protection or reward, if any, made by any one to one James E. Anderson or others, in consideration of or in connection with any official conduct by said Anderson or others in relation to said election or the returns thereof, and into all the circumstances of any recommendation by the said Senator of the said Anderson for appointment to office.'

"In order to enable the committee to rightly understand my relation to the whole subject, and also as a necessary preliminary to any statement I may have to make in reference to the testimony of Mr. Anderson himself, it will be necessary for me to make a statement in respect to the visit that I made to New Orleans in November, 1876.

"On the 11th day of November, 1876, which was Saturday, I received a telegram at Cincinnati from the President of the United States, General Grant, requesting me to proceed to New Orleans for the purpose of witnessing, with other gentlemen, the canvass and count of the votes in that State for the Presidential electors. I replied to that telegram to the effect that I would leave Cincinnati for New Orleans in obedience to that request that night. I learned during the course of the day that General Edward F. Noyes, now the United States minister at Paris, and the Hon. Job E. Stevenson, formerly a Representative in Congress from one of the districts in Cincinnati, were also going on the same train, and I met them that night on the car.

"On arriving at Louisville and leaving there, I ascertained that a number of gentlemen prominent in public life and members of the Democratic party were also on their way to New Orleans in connection with the same matter. Among others were Senator McDonald, ex-Senator Trumbull of Illinois, General Palmer of Illinois, a gentleman from Indiana, Mr. Julian, Judge Stallo of Cincinnati, and some other gentlemen, some from Chicago, whose names I do not now recall.

"We reached New Orleans on Monday at or near noon, and proceeded to the St. Charles Hotel, where General Noyes, Mr. Stevenson, and myself took rooms. No other gentlemen of the Republican party who subsequently participated in the proceedings there arrived until the lapse of two or three days.

"In the mean time a communication in writing had been addressed by the Democratic visitors to the Republican visitors, which had been put into my hands and held until the arrival of gentlemen who were expected to act with us, and was replied to after consultation, all of which was made a matter of publication at the time. In the mean time I had seen a great many persons in New Orleans, citizens of that place and of Louisiana, of both political parties, and had heard a great deal from them in reference to the general situation of the State in regard to the recent election, and obtained certain general impressions in respect to it, but did not acquire any knowledge of the details of the matter as it was expected that they might appear.

"In the latter part of the week, not ealier than Friday and possibly on Saturday morning, for the first time I saw any of the members of the returning board. On that occasion I met General Thomas C. Anderson and ex-Governor J. Madison Wells at the custom-house in company on my part with Mr. Sherman, the present Secretary of the Treasury, Mr. Stoughton of New York, and some other gentlemen whose names I do not recall. A general conversation ensued on the subject of the political situation in Louisiana and in reference to the general duties that were charged by law upon the returning board and its members, in which there was nothing said inconsistent with a strong expression of a general desire on the part of all the persons present that there should be a fair, open, and lawful canvass and count of the vote, and an expression on the part of those charged with that of a determination to do their duty fully in that respect without reference to the result, and no probable result was then discussed as likely to follow any course that might be adopted, no intimation that it was to come out in any specific way one way or the other.

"The fact was known and referred to that there were present in the city a considerable number of gentlemen representing both political parties, who had come there for the purpose of witnessing the proceedings of the board, and it was strongly urged by Mr. Sherman, Mr. Stoughton, and myself upon the two gentlemen who constituted members of that board that there should be an invitation from the board to representatives of these delegations to be present at their meetings and was acquiesced in immediately by General Anderson and Governor Wells, and I was requested to make a draught of a proper resolution containing such an invitation and request, which I immediately proceeded to do, and which, after some change of phraseology, was considered to be suitable, was delivered into the hands of one or the other of these gentlemen for the purpose of being offered in the board when it should hold its first meeting, and which afterward, upon an examination of their published proceedings, I found to be substantially the one which they did in fact adopt.

"In the mean time it became apparent to me that the proceedings which I had come

down to witness would be prolonged beyond any expectation that I had entertained when I accepted the invitation to attend, and having left my home and business upon a few hours' notice, had not made suitable preparation for any absence such as was necessarily required for that purpose; and I accordingly made my apologies to the gentlemen with whom I was expected to be associated, and left New Orleans on Saturday evening, being November 18, for Cincinnati, where I arrived on Monday morning, the 20th, without having been present at any meeting of the returning-board, without having ever seen any of the documents which were to be presented to them containing returns of the elections or other accompanying papers, and without in any way having participated in any of their proceedings beyond what I have already stated. So that in answer to the question as to 'what connection' I had 'with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876,' as stated in the resolution of investigation, it is apparent that there was no place for any such connection, for I was not present in the State or at the place where anything of the sort was possible and knew nothing in reference to the matter.

"During that time, as I have already stated, I saw a great many persons of both political parties, citizens of New Orleans, and of course at this time I am not able to say positively whom I saw and whom I did not see. I am quite sure, so far as I can be sure of anything of the sort, that I did not see during my stay in New Orleans Mr. James E. Anderson, for when I afterward saw him it was for the first time, as it appeared to me from his appearance. I did not recognize the fact at that time that I had ever seen him before. I had heard of one Anderson as being a supervisor of registration for the election in East Feliciana Parish, in connection with the fact stated in New Orleans at the time that one of the questions that would arise before the board in reference to the returns of that election would be whether the protest ought to have accompanied the returns, or whether it was valid, although placed upon the returns subsequently, it being stated that the excuse for not putting it upon the return at the time was that it could not be safely done by the officer for fear of his life.

"I refer now to the fact that I do not believe I saw Mr. Anderson in New Orleans during that time, for the reason that in a letter which he seems to have produced before the committee of the House of Representatives, addressed to Weber, dated November 20, 1876, and contained in page 15 of his printed testimony as printed for the use of the Senate, he uses my name as if at that time he had had some communication with me or some knowledge of me in reference to the matter as to which he testified, for in that letter he says:

"'I am not satisfied, and have no more faith in Sherman, Matthews & Co. than I have in Pitt Kellogg.'

"And in order to rebut the implication arising from his use of my name in that connection, I desire to say that at that time I had no knowledge of the man other than what I have just stated. I had never seen him; I had never had any communication with him, and had never made any communication intended for him, and knew nothing of any communication that he had with anybody else.

"Mr. WHYTE. He swears he never met you until he met you in Cincinnati.

"The WITNESS. I believe that is the case. Now, the first time that I ever did see him, according to my memory, assisted by a memorandum, was the 23d day of March, 1877. I get that date not from my memory alone, for I would not be able to refer to the precise date, but upon the envelope containing the paper known as the Nash agreement, the original of which is now in the hands of the committee of the House. I made a pencil memorandum of that day as being the day of its receipt, although I did not make it on the day when I received it. I did not make that memorandum until I received subsequently a letter from Anderson of April 7, 1877, from New Orleans, in which was inclosed the other paper known as the Weber agreement.

"Mr. DAVIS, of Illinois. He puts the date he gave you that as the 22d.

"The WITNESS. I refer to that now because I do not wish to appear to contradict him unnecessarily and where I am not wholly sure that I am accurate.

"The CHAIRMAN. You fix it at the 23d.

"The WITNESS. The 23d is the memorandum in pencil on the back of this envelope, but having made it not at the time but subsequently to the time when I received the letter of April 7, I may have made an error in my then recollection of the day.

"Mr. Anderson, in his testimony, on page 26, undertakes to give the substance of what passed in our interview on that occasion, and I quote from it as follows. He says:

"'I went into a general history of the election in Louisiana. I told him what part I had taken, of the manner in which the election in East Feliciana had been conducted and in the State; told him they had thrown out my parish on a forged protest; that they had made me promises which they had not fulfilled and had no intention of fulfilling; in fact, told him the whole story of the whole thing right through; went into all the details, with the exception that I omitted any mention of Mr. Sherman's name.'

"That statement is entirely false. He did not go into the 'general history of the election in Louisiana.' He did not tell me 'what part' he 'had taken; of the manner in which the election in East Feliciana had been conducted and in the State.' He did not tell me 'they had thrown out' his 'parish on a forged protest.' He did not tell me 'that they had made promises which they had not fulfilled and had no intention of fulfilling.' He did not tell me what he calls 'the whole story of the whole thing right through,' or go into any of the details of the matters to which he refers. On the contrary, he introduced himself to me in my office, gave me his name, and said that he had been the supervisor of registration in East Feliciana Parish in the Presidential election; that he was a young man who had been in Louisiana for some years, had been active and zealous in the Republican cause during all the period, had labored in season and out of season, by day and by night; had assisted not only in New Orleans but throughout in different parts of the State in organizing the Republican party; that he had rendered what he believed to be valuable, efficient, but so far as he described them entirely honest and honorable services in the promotion of the cause of his party; that he had done this at great sacrifice of time, of money, of health, and at times at great peril of his life from his political opponents; that it was a dangerous service, and so far as he was concerned had been an unrequited service; that, to be sure, he had at that time a subordinate position as a clerk in the custom-house at New Orleans, the amount of the salary of which he did not mention, but he spoke of it as being insufficient to meet the necessities of his family; that he had in addition now to his other misfortunes to have incurred the enmity and hostility of the leaders of the Republican party organization in New Orleans, mentioning the names particularly of Kellogg and Packard with others, and that altogether his life in New Orleans had become intolerable, although if he could get a better and improved condition of things there in respect to salary he would be willing to remain, but that he thought under the circumstances he was entitled to something better elsewhere.

"He narrated this at considerable length and with great apparent earnestness and emotion, exhibiting great feeling and with the appearance of tears, so much so that I was, soon after his conversation commenced, very much enlisted in his interest, possibly the more so because he was appealing to me as against the men whom he said he had benefited there and to whom he naturally would have the right to look, the managers of his own political organization, and suggesting that the cause of their hostility to him was on account also of their hostility to the Republican national administration, to the President and his policy. I said to him that I sympathized with him, that I felt sorry for him, that I would be glad to serve him in any way that was proper, and if I could do so that I would endeavor to obtain for him some suitable employment in the Government, first a better place in New Orleans if it could be had, and, if not, then some other place, he suggesting that he would like to have some position abroad as consul on account of the health of his wife.

"In this matter I gave him no pledge; I brought neither myself nor any one else under any obligation further than the general expression of my good-will, my desire to serve him, and my intention to try to do so, and there was not in the whole course of the conversation the remotest hint that he had been engaged in any unlawful or dishonorable service in behalf of the party, and that he expected me to help reward him for it, nor did he claim that anybody else had made any promises to him in that respect which he had a right to have fulfilled or which he had a right to call upon me to help him in the fulfillment of. It was, so far as the conversation had proceeded up to that time, the ordinary case of an application on behalf of a person who was in great need of employment and who thought he was entitled to it as a matter of recognition for his general service in behalf of his party.

"He appeared to be very gratefully affected by the interest which I seemed to manifest in him, and was profuse in his expressions of pleasure and gratitude that I had received him so differently from the treatment that he had received from those to whom he had a better right, as he thought, to look, and he had gotten up to leave with the satisfaction which he had derived from what I had said to him, when he put his hand in his pocket and took out a paper and said there was a paper which he thought under the circumstances I ought to have, and gave me the original paper which is called the Nash agreement. What is found on page 24 of the testimony is, so far as I remember, a correct copy of it.

"By Mr. EDMUNDS:

"Q. What do you mean by 'original paper'; do you mean genuine paper?—A. I mean merely the original of which this print is a copy, which I furnished.

"By Mr. DAVIS:

"Q. That paper is now in the hands of the Potter committee?—A. Yes, sir. I delivered that paper, together with the other documents called the Weber agreement, into

the hands of General Cox, to be produced before the committee of the House on the examination of Mr. Anderson, together with some original letters which I had from Mr. Anderson, all of which he has produced and which are referred to in the printed testimony.

"By Mr. EDMUNDS:

"Q. In that connection, if I do not interfere with your statement, I should like to ask whether you delivered to General Cox, a member of the House committee, the identical papers that came to you from Anderson?—A. Yes, sir; and I intended to state in reference to that, because Mr. Anderson in his testimony denounces the Weber agreement produced by General Cox as a counterfeit, that it is the precise and identical and only paper of the kind delivered to me by him and conveyed through the mail from New Orleans in a letter dated April 7, 1877. The Nash paper I read when he handed it to me. I read it casually and hastily, but with sufficient attention to observe its character, and I asked what it meant. He thereupon stated to me that it was not what it appeared to be; that he had no design in it to obtain the position of naval officer at New Orleans; that it was perfectly understood that that was so; that he had no idea that Mr. Nash could do it, or that it could be done even if Mr. Nash was willing to do it, and that he had no evidence to suppress showing that the parish of East Feliciana was fairly carried by the Democratic party at the election held in November, 1876, thereby electing the entire State ticket and Congressmen, and that there was no object on his part or design on his part or on Nash's part to suppress any evidence. And on my asking him what it was meant for then, he said it was executed simply for the purpose that he might have a hold on Mr. Nash. There may have been something said in that connection about other and similar papers. If there was, the papers were not described, and I have no recollection of what was said; nor, indeed, have I any recollection that anything was said as to the existence of any other similar paper. My belief is that there was nothing said, because (and that is the reason of my belief) when I received the subsequent letter, dated April 7, containing the Weber agreement, it was a surprise to me as a thing that I had not expected to get.

"Q. Is that in print?—A. The letter itself is in the printed testimony at page 100.

"Q. That is the letter to which you refer?—A. Yes, sir. In the interval before the receipt of that letter I had written the letters contained on page 27 or on different pages of the same leaf.

"Q. Have you now stated all that took place between you and Anderson on the 22d or 23d of March?—A. Yes, sir, further than to say to him at that time that I would give him a letter of introduction to General Harlan when I ascertained that he had arrived in New Orleans, which I did subsequently on the 29th of March, as appears by the letter on page 27.

"I had received a letter after Anderson's leaving me at Cincinnati and going to New Orleans, in which he had inquired what he should say to Nash as to where the Nash agreement was, and in my note to him giving him a note of introduction I told him to say to Nash, if inquired of, that I had the agreement, and I desired Nash should know it.

"By the CHAIRMAN:

"Q. You are now speaking of the letter dated March 27, which is found on page 104 of the printed document?—A. Yes, sir. In that he asks me in reference to Nash: 'Shall I inform him that it is in your possession?' I replied to him on the 29th: 'You should say to Nash, if inquired of, that I have the agreement.'

"The next important step in the matter was the receipt by me of the letter now referred to of April 7, 1877, in which he informed me of what he claimed to be a combination on the part of Packard and others to accomplish some purpose in respect of the title of the President, outlining their hostility to him, stating that they were trying to induce him to go with them, all of which appears by the letter itself. He refers in that letter to what he calls 'the Pitkin *et al.* agreement,' as to which I know nothing more than is contained in that statement, and had never heard of it before.

"By Mr. EDMUNDS:

"Q. Have you ever heard it since until now?—A. Nor since. The Weber agreement is the one of which I have already spoken that he refers to, and which he speaks of as 'the last piece of documentary evidence in existence.' And then adds: 'I will now have to trust entirely to you, as the ill-feeling borne me by the Republican leaders has been intensified by my refusal to aid them in their infamous scheme.' The paper referred to as the Weber agreement is the one contained on page 12 of the printed testimony.

"When I received that paper and read it I made the memorandum in pencil to which I referred on the back of the envelope which had been delivered to me in our conversation, which contained the Nash agreement. At the time I received this paper, and from that time until after Mr. Anderson commenced his testimony before the House committee,

I supposed it to be a genuine document so far as the signatures were concerned, and that, it point of fact, it had been signed and acknowledged and sworn to both by Anderson and Weber, and I had no suspicion to the contrary until——

"By the CHAIRMAN:

"Q. You supposed, when you received it, that it was a genuine document?—A. That it was a genuine document; that is, that the signatures of Weber and Anderson were both in their own handwriting and placed there by themselves.

"By Mr. EDMUNDS:

"Q. Do you know in that connection at what time Weber died and of what disease?—A. I do not. I only know by report.

"Q. Of course, that is what I meant.—A. He was killed, as it was reported, subsequently to this.

"Q. Subsequently to the date of your receipt of the paper?—A. After that; I do not know precisely when.

"By Mr. WHYTE:

"Q. Subsequent to the date of the paper?—A. Yes; whether he was dead when I received the paper or not I do not remember. I do not know what date I have heard ascribed as the date of his death.

"After Anderson had commenced his testimony before the House committee, and my attention was attracted by it, and it was published in the newspapers, my suspicions were excited in regard to this paper and its signatures, and I compared them with other signatures said to be genuine ones of Weber, and it was apparent to any one from that inspection that the handwritings were not written by the same person, and I think a suggestion of that kind leaked out in the newspapers at the time; and it was after that that the paper, having been obtained from me by General Cox, was produced before the committee of the House and exhibited to Mr. Anderson, when he denied that it was the same paper which he had delivered to me. I now repeat and reiterate that if that paper which General Cox produced before the House committee as obtained from me was not the same paper which Mr. Anderson sent to me by mail, then I never received any paper from him of that kind, because the paper was the identical paper and the only paper which I did receive from him, without alteration in any respect.

"By the CHAIRMAN:

"Q. Under cover of the 7th of April?—A. Under cover of the 7th of April, and accompanied by the letter on page 100 of this testimony. It is important to me, that my own conduct should be rightly estimated by the committee and the Senate, that I should state what my impressions were in regard to the character and objects of the two papers.

"The impressions produced upon my mind by the consideration of these papers, and the inferences that I drew from them, as near as I can analyze what the state of my mind was at the time and during the whole progress of the matter, were about these: In the first place, I supposed from the nature of the papers, as well as from the explanation which Mr. Anderson had attempted of the Nash agreement, that the object of their execution and preservation up to that time when they were delivered into my hands was, to use a common and strong phrase, for purposes of black-mail; that himself and Weber had expected to make use of them in some improper way, either with Republicans or Democrats, whichever he might find to be most available for such a purpose, if he could find any, as a lever with which to promote some personal schemes and benefits to themselves. I understood from the nature of the conversation between myself and Mr. Anderson in my office, the circumstances and manner of his delivery at that time of the Nash agreement, and his sending to me by the letter referred to, and from the contents of that letter itself, the Weber agreement, that his object in delivering those papers to me was to deprive himself of the opportunity of making use of them according to their original intention, and to convince me that the purpose for which they were originally executed had been finally abandoned. There were several expressions made use of at the time of the delivery of the Nash agreement which suggested that idea and were intended to convey to my mind the belief that the paper was delivered to me for any purpose that I might see fit to use it for, to be entirely at my disposal, and that the two papers when they both came into my hands were the only copies that there were, that they were originals, and that there were no copies. In other words, that he was surrendering to me all the instruments by which he had ever intended any mischief in order that no mischief might be done by them, that I might be entirely satisfied of it, and that he had done this because he had found that I was ready and willing to help him in his condition by obtaining for him recognition and employment.

"I believe that the papers were given to me in good faith for that purpose, in order that no mischief might be done, that they might not be employed for any evil purpose.

Added to this, I had the impression and belief at that time, not that the papers were evidence of any fraud or wrong committed in the election, as to which I did not believe that any did exist, but that their publication would be regarded by many as strong, if not conclusive, evidence of such, and could have no useful purpose, but, on the contrary, would only tend to promote what I regarded as a mischievous and unfounded public scandal. Therefore I considered it a matter of some importance to what I believed to be public interests that the papers should be in the custody of a person who would not employ them for any such purpose.

"With those impressions on my mind, if I have been able to make myself clearly understood by the committee, I continued to carry out the intention which I had expressed to Mr. Anderson in the interview which I had with him when I first saw him before I had any knowledge of the existence of either paper, and that was to help him to get a suitable public employment, and the letters which are contained in his testimony which passed between us were written in pursuance of that intention and for the purpose of accomplishing that result; and in respect to those letters, they are, so far as I know, all correct, with the exception of one where he has undertaken to furnish the original of a letter addressed to me, and where I have furnished the original as received by me, and they do not entirely correspond, although the difference is not perhaps substantial, but I will point it out. It is the letter of June 19, 1877, the correct and original of which furnished by me is contained on page 106, marked A L, but the copy of which produced by Mr. Anderson to the committee in his testimony is on page 34, and the committee, by comparing the two, will observe the differences.

"Q. The letter that you received from Anderson, dated June 19, 1877, is found on page 106?—A. Yes, sir.

"Q. And the letter which he describes as having sent you of that date is on page 34?—A. Yes, sir.

"By Mr. EDMUNDS:

"Q. And you mean to say you did not receive any two letters such as those?—A. I did not. My explanation in my own mind of the difference is that the letter which he produced on page 34 is the draught of a letter which he intended to send me, and in copying it he changed it so as to make the difference. The one he in fact sent is contained on page 106.

"Q. And that is the only one you received?—A. That is the only one of that date which I received. It would be impossible for me to follow up the whole course of the correspondence and all the matters in connection with it in any connected narrative now from recollection. The matter, however, went on as indicated by the correspondence until I received a letter or telegram from General T. C. H. Smith, who was then the appointment clerk in the Treasury Department. That letter is here.

"By Mr. WHYTE:

"Q. Is not that at the bottom of page 106?—A. I think not, but it may be, perhaps. I am not sure but I received either a letter or a telegram, and my answer, if this be the letter, is not here, but is contained in General Smith's testimony before the House committee. I remember the substance of my answer, which I think was by telegraph, and that was that neither I nor any other person was under any obligation to Mr. Anderson, and that if he was not willing to accept such a position as Mr. Smith was willing to offer and thought a suitable place for him, to drop him and the whole business.

"By the CHAIRMAN:

"Q. Have you a copy of that?—A. I can get it from the House committee, but probably I had better get General Smith's whole testimony.

"By Mr. EDMUNDS:

"Q. What are you now referring to? Is it your letter mentioned in General Smith's note of June 25, 1877, 'A M,' on page 106 at the bottom?—A. No; I think not. I think the one I refer to must have been in answer to this probably, but that will appear when it is produced.

"Subsequently to that I happened to meet Mr. Anderson near Washington. He refers himself to the interview. It was on the train going from here to Baltimore. I had not seen him while we were both remaining in the city.

"By Mr. HOAR:

"Q. When was that?—A. I do not remember the date, but it was subsequent to this correspondence with General Smith, and must have been nearly about that time. It must have been just prior to his writing this letter of June 19.

"Q. Where were you then?—A. I was just leaving Washington.

"Q. At the time of the letters of June 19th and 22d?—A. When I got that letter I

was in Cincinnati. Just prior to his writing that letter, and at the date of the letter, I was in Washington, and I was leaving here and was on the cars when I saw Mr. Anderson. He was on the same train, and told me he was going over to Baltimore to enter upon the duties of some position in the custom-house there that General Smith had given him, and he was very much gratified that he had received it, and was very profuse in his expressions of thankfulness to me for having procured it for him, and I supposed that he was satisfied until that letter came. Subsequent to that I understood that he had obtained employment on a newspaper, the North American, at Philadelphia, and that an arrangement had been made between himself and General Smith by which his brother was to have a place, and did have a place, perhaps the same place that he had vacated in the custom-house at Baltimore, and he expressed himself as very much satisfied with that and pleased with the arrangement, and the matter I considered as having entirely passed beyond any connection of mine with it.

"After that I saw him in Washington once or twice; I do not remember the occasions. He called at my house on more than one occasion, but it had no reference at that time to himself as to any position. He had, as he told me, no further desire for any office for himself; that he was well situated in the newspaper, and it was greatly better for him, and he did not want anything further, and was satisfied with what had been done so far as I was concerned. But he commenced talking then to me about the appointments to be made by the President in reference to New Orleans, the custom-house appointments, the appointment of marshal, but particularly the custom-house appointments; and I was called upon at or about the same time by Dr. Darrall, who had then just been unseated by the House of Representatives from the seat which he claimed from Louisiana, who also began to talk about the custom-house in New Orleans, and about being an applicant for it himself, and I was made aware that it was Mr. Anderson's desire that Dr. Darrall should be appointed, and that it was their joint desire that I should take some steps to secure Dr. Darrall's appointment.

"I said most distinctly at the time and at all times to these gentlemen, either separately or apart, wherever they happened to talk to me on the subject, that I neither could nor would take any part in the matter whatever; that it was a matter in which I had no right to interfere, and in which I had no desire to interfere; that I had been accused by the friends of Governor Packard of standing in the way as the only obstacle to his appointment as collector at New Orleans, and that so far from that I had expressly said that it was none of my business, and in order to satisfy the friends of Governor Packard, and at their desire, I had taken what seemed to me to be the unnecessary pains of going to the President to say that if he thought the public interest would be best served by the appointment of Governor Packard as collector of customs, I hoped that no personal consideration would interfere with the execution of his intentions in that respect, and certainly, so far as I was concerned, that I had no personal reasons for opposing his nomination or confirmation, and that consequently, being in that attitude and having at that time rather made up my mind that perhaps Governor Packard's nomination would be a good thing to do, I declined to have anything further to do with the matter, and in that state, that condition of things, I happened one day—I do not remember the hour of the day—to meet Mr. Anderson in one of the public places of this Capitol, between the Senate Chamber and the entrance in the hall, evidently in a state of intoxication, the first time I had ever seen him in such a condition, and with a very abrupt and insolent address to me, wanted to know what the Administration were going to do about the appointment of a collector of customs at New Orleans, and said he would give them just one week in which to make up their minds about the matter. I immediately, as soon as he had finished his notice, said to him that he was drunk and insulting, and that I should have no further communication with him, and forbade him to approach me or communicate with me in any way whatever. He afterwards called at my house, as I was informed by a servant, with his card, but I declined to see him, and have never seen him since, except publicly and in this room; and all statements made by him or by Dr. Darrall in reference to my having made any promises to use my influence or otherwise take any steps to influence the nomination of himself or anybody else as collector of customs at New Orleans are pure fabrications, without any foundation in truth; and so far as I now recall anything I have said, all that occurs to me as important in reference to this matter, with perhaps this exception, that I ought to say that on no occasion did Mr. Anderson ever, either expressly or by any implication, suggest that he had any promise from Mr. Sherman, or that he knew of any, offering him assistance in the way of public office or otherwise for anything that he did or omitted to do in reference to the election in Louisiana. I never heard of the so-called Sherman letter until it became matter of public notoriety through the newspaper press in connection with this matter; and so far as I am now advised, I submit the matter for further examination to the committee.

"By Mr. EDMUNDS:

"Q. In any of these interviews with Mr. Anderson, did he ever say or in any manner intimate or hint that he had been a party to, or knew of, any misdoings in respect of misrepresenting the true result of the election down there?—A. Never on any occasion in any way whatever. On the contrary, all that was said or suggested necessarily carried just the contrary meaning to my mind.

"Q. I understand you to mean, then, in the statement which you have made, that whatever interest you took in the affair, or whatever you did or said about Anderson's getting a place or anybody else getting a place, was not under any impression that you were helping him on account of any contrivance or misdeed that he had done or knew of, but on account of his having made you believe that he had done the honest and regular work that members of all political parties who are honest feel that they have a right to do?—A. That is what I mean, and that it was in his case a case of peculiar hardship, on the ground of which he made the appeal to me especially, because the persons to whom he would naturally look otherwise, by reason of their hostility to the Administration, as he claimed, had also become hostile to him.

"By the CHAIRMAN:

"Q. In handing you these papers purporting to be agreements, did he explain to you definitely that there had been a purpose at one time, either in his mind or the mind of Mr. Nash or Mr. Weber, to use these papers improperly?—A. The substance of what he said to me in delivering to me the Nash agreement was this: After rising to his feet to leave, after the substance of the conversation as I have related it had closed and I had expressed an intention to help him as far as I could, he put his hand in his pocket and took out the envelope containing the Nash agreement and said: 'Here is a paper that I think you ought to have: I give it to you without any conditions, to do with as you see proper.' I then opened the paper, read it through, observed its general character, and asked him what it meant, and he then proceeded with a statement, which I have already undertaken to give, that it did not mean what it appeared to mean; that there was no evidence to supress; that there was no fraud as to which there was any evidence; that he had no expectation of getting any such office, but that he had had the paper given in order (as I remember) to have a hold on him. That was all the intimation of any illegal purpose. And the other paper came to me inclosed with the letter of April 7, which contained all the information I had in relation to it."

The hour of the meeting of the Senate having arrived, the committee adjourned to meet again on the 11th February. On that day—

"The committee met pursuant to adjournment, all the members present.

"Hon. STANLEY MATTHEWS'S examination continued.

"The WITNESS. Mr. Chairman and gentlemen, I think it important that I should make more distinct and clear one matter. In my first interview with Mr. Anderson when he handed to me the Nash agreement, as I have already stated, he did not state what purpose that paper had been executed for, further than for the purpose as he stated of obtaining some hold on Nash; and took pains to explain the contents of the paper as not meaning what they would appear to mean; that in point of fact there was no evidence of any fraud that he had possession of, and none that he had agreed to suppress, and no expectation of relying as significant upon any promise made in the paper in reference to the office spoken of; and my distinct understanding, from all the circumstances, from his manner, from his conversation, and from the period of time during the conversation when this occurred, was that he delivered that paper to me in token of his surrender of the paper and of all the purposes for which the paper was originally intended to be used or for which it might be used; and what emphasizes that impression and conviction on my mind is that there had been no previous conversation between us in respect to the paper or any of the things to which the paper related, nothing to call it out, no expectation on my part that I should obtain it, no hint from him that there was any such paper until he produced it; and in doing so he said it was a paper which he thought I ought to have, as I supposed in return for the good-will which I had expressed toward him, the interest which I had manifested in his case, stating at the time that he delivered it to me to be treated in whatever way I chose.

"That impression was so strong that I supposed at the time that the object in delivering the paper to me, as he afterward also did with the subsequent paper called the Weber agreement, was for the purpose that I might destroy them. I did not do so, simply because I anticipated a possibility that on the whole it would be better that I should not, so that in case of the happening of any future contingency that I did not then contemplate it would be essential to my own protection in the matter that I should be able to produce the very papers which I had received; but I received them, the first one at that time and the other one subsequently, as evidence, by the act of his delivering them to me, that he desired to be understood as having abandoned whatever design he may have originally entertained of using them in any way whatever.

"By Mr. EDMUNDS:

"Q. If I understood you the other day, you said in that connection that he accompanied that delivery with the statement that there was no such fact in existence to his knowledge as the paper appeared to import?—A. He did distinctly, and I understand him to reiterate that in the testimony which he gave before the House committee, and that impression was corroborated and strengthened by the contents of the letter of the 7th of April, in which he referred to the alleged machinations as against the President by Mr. Packard and his friends, in which they sought to use him, and from the expressions contained in that letter I inferred that the whole matter was false; that is, that there was no foundation in truth or in fact for the things intended to be brought out by the use of him or of any of the instruments of evidence which he was supposed to have, where he says particularly in reference to one part of their plans, 'of course they commit perjury, but that is a small matter here'; and that impression was not affected by the other expression made use of in the same letter, where he speaks of this Weber agreement as being 'the last piece of documentary evidence in existence.' I of course understood it had no probative force of its own, except supposing it to have been signed by the two parties as a confession that would be admissible as against them, but not containing any evidence in itself as against others of the facts that were recited in it.

"In the note which I gave him of introduction to General Harlan on the 29th of March, I stated that the note would be presented 'by Mr. J. E. Anderson, who may desire to communicate with you confidentially,' and in my note to him, which was on the same sheet, 'you can talk to him as fully as to me.' So far as I now remember what was in my own mind at that time, my object in those expressions was simply to have Mr. Anderson converse with General Harlan in respect to himself and his own case and his own desires and his relations to this whole matter just exactly as he had done to me, so that General Harlan, being on the ground, might better judge as to the propriety of undertaking to assist in forwarding any application to be made by him for any promotion, which was the first thing he spoke of as desirable, in the custom-house office at New Orleans. There was no other matter that I remember of which I expected him to speak confidentially about, except the matters which I have testified to here, and which I remember as a part of the conversation.

"There is one other matter which I desire to make a further explanation about. On the 1st of June it appears that he telegraphed me from Washington in a very peremptory style about arranging this affair 'or you can all face the music."

"By Mr. WHYTE:

"Q. That dispatch on page 105 is dated May 1, but I presume that is a mistake?—A. I am not able now to remember what is the correct date. I remember, however, the fact of there being a discrepancy between the two.

"Q. It must be June 1, from the letters?—A. I think so. On page 32 it is June. He apologized for that by a letter written the next day, which will probably fix the date of that. That letter is on page 106. He writes a letter on the 2d of June in which he apologizes for that dispatch, but subsequently to that, on the 19th of June, after he had experienced a disappointment in the character of the position that was given him in the Baltimore custom-house, he writes the letter of that date set out on page 106, in which he says he proposes 'to wait here,' that is, at Washington, 'until Saturday, and if' his case was not settled by that day, to 'take such steps as the occasion might require.' It was subsequent to that, I believe, though I have it not here, that the correspondence between General Smith and myself took place, in which I stated to General Smith, the appointment clerk of the Treasury Department, that neither I nor any one else was under any obligation to Mr. Anderson, and if he did not see fit to accept such position as Mr. Smith thought was suitable to him, to drop him.

"What I desire more distinctly to have understood is the reasons that actuated me in continuing the correspondence with him and continuing to manifest my interest in him after this conduct on his part toward myself, which in respect to that dispatch was insulting. My first reason was my anxiety, considering his disappointment which he had expressed in reference to the treatment he had received from others, and his disappointment in not succeeding through me in getting what he thought he ought to have, to not give him any excuse in his own mind for believing that I had not acted in entire good faith in carrying out the original expressions of my desire communicated to him in my first conversation to do something for him. I had said that to him under the circumstances which I have stated. I excused his own conduct toward myself as perhaps natural to a man who had an intense desire to accomplish his object, who perhaps was very needy, as I supposed he was, and who might suppose that I, like others whom he had charged, was only giving him words of promise without seeking to do anything to make them good, and I was anxious and sensitive that he should have no excuse to charge me with any bad faith.

"My other reason was my desire that the papers which were in my custody under the circumstances which I have stated, meaning by 'the papers' the Nash agreement and the Anderson-Weber agreement, should not be made public. I confess that I thought it was best that they should not be. I saw no reason for making them public in reference to any public interest involved. I did not believe it would do any good. I could not imagine any good that they would subserve, with my opinion as to their character, and I did believe that they might be made the instruments of mischief and of harm by propagating and to some extent confirming in the popular mind a belief in what I believed to be a false and injurious scandal in reference to the whole matter to which they related, and the two considerations together induced me to tolerate with him up to the point which I have described the conduct which the correspondence manifests as displayed by him.

"I believe these are the matters to which alone I care now to make any additions.

"The committee-room was then cleared for deliberation, after which the doors were reopened, and on Mr. Matthews appearing, the following resolution, adopted by the committee during its deliberation, was read to him:

"'*Resolved*, That Mr. Matthews may and ought to be examined in the same manner and to the same extent as if Anderson had testified before this committee to the same matters stated in his testimony before the House committee.'

"By Mr. WHYTE:

"Q. Senator Matthews, in pursuance of the resolution which has been read to you, I should like to ask you whether at the meeting at New Orleans, which you attended in pursuance of the request of President Grant, anything was said about protests in regard to the election in East and West Feliciana?—A. Do you mean the interview that I referred to as having been held at the custom-house with General Anderson and Governor Wells?

"Q. That is the interview.—A. There was no conversation on that subject at that time nor at any time between myself and those two gentlemen, members of the returning board, or between them and others in my presence at any time.

"Q. I do not ask as between them and yourself, but between yourself and any other persons?—A. Nor between myself and any other persons.

"Q. Did you know anything about the failure to make protests by these supervisors in regard to the returns from their parishes at the time the returns were regularly made?

"Mr. EDMUNDS. I wish to suggest that that inquiry appears to imply that there was a failure to file protests, about which I know nothing and I believe the committee know nothing.

"The CHAIRMAN. Mr. Whyte will modify the question, I suppose.

"Mr. WHYTE. The word 'failure' probably I ought not to use. I supposed everybody remembered the fact that the protests were made in New Orleans, and not made in the parishes.

"Mr. EDMUNDS. I do not remember any such fact. I do not know anything about it.

"Mr. WHYTE. The protests are in this testimony and show that they were made in New Orleans. They were part of the document which Mr. Sherman presented to the Senate.

"Mr. EDMUNDS. I only make the suggestion because I know no such fact, know nothing about it. I only wanted to avoid the committee being committed to an implication which the question seemed to make. It may be a correct implication or it may not.

"Mr. WHYTE. I would only say that the protest to which I refer in regard to East Feliciana is dated at New Orleans, and sworn to before Judge Campbell on the 10th of November, 1876, and appears in Senate Miscellaneous Document No. 2, Forty-fourth Congress, second session, page 223.

"The WITNESS. It is also in this testimony of Anderson, on pages 5 and 6.

"Mr. WHYTE. It is.

"The CHAIRMAN. The House has sent to us the entire testimony of Anderson; in other words, has sent us testimony which we did not ask for, and of course it is all printed in this volume. It may not be material in this connection, but it may become so hereafter, and therefore I call attention to the fact.

"The WITNESS. May I go on now?

"The CHAIRMAN. Yes, sir.

"The question of Mr. Whyte was read to the witness, as follows:

"'Do you know anything about the failure to make protests by these supervisors in regard to the returns from their parishes at the time the returns were regularly made?'

A. During the few days I was in New Orleans, between the 13th and 19th of November, 1876, I did hear as a matter of conversation in reference to one or the other, if not both of the parishes of East and West Feliciana, that it was reported that the protests required by law to be made by the officer in charge of the election, called, I believe, the

supervisor of registration, was not made on the day of the election, nor at the place of the election, but was supplied subsequently, but at what time and place I do not remember to have heard; and I understood that the question would arise in reference to the validity of those protests as affecting the returns of the election at those places in regard to the jurisdiction of the returning board to go into the question of those facts, which, under the law, were thought to give them power to invalidate the election itself—such as intimidation, force, fear, riots, &c. I say I heard it as a matter of conversation, but from whom, and where, I cannot state positively, except, as heretofore stated, I did not hear anything said on that subject in the interview at which either of the members of the returning board was present.

"Mr. EDMUNDS. Mr. Chairman, I wish to submit for the consideration of the committee, as a matter of fairness towards every member of it, that the answer of this witness has no tendency to establish the fact of the protests not having been made regularly and according to the laws of Louisiana, and that it can only be received so far as it may affect his personal conduct in relation to the transaction. I do not ask the committee to decide the question now; but, in order that it should not be misunderstood hereafter, I make this suggestion.

"The CHAIRMAN. The suggestion will go in the record.

"Q. (By Mr. WHYTE.) Senator Matthews, Anderson has stated that he told you in conversation, in March, 1877, that his parish of East Feliciana had been 'thrown out on a forged protest.' Did he make any such statement to you as that?—A. He did not tell me anything of the kind.

"Q. Did he then tell you of any promises made to him by anybody in Louisiana in regard to any service that he had rendered in his capacity as a superviser of registration, and that those promises had not been kept?—A. He did not.

"Q. Did he say more to you than to appeal to your generosity to get him some position on account of his services to the Republican party, or did he explain to you that he had rendered peculiar services which ought to be rewarded?—A. His appeal to me was to my generosity and sense of justice to assist him in getting some employment in the Government, largely if not mainly on account of services which he claimed to have rendered to the Republican cause in Louisiana, the nature of which he related quite at length, giving me instances of his assisting in the organization of the party in different parts of the State, in looking to the interests of the party, and mentioned that these services were peculiar in the sense that they had been efficient, and that they had been dangerous, for he referred to the fact that they had been rendered at great sacrifice of time and of what means he had, with the exposure of his person not only to ill-health but to peril of life from his political adversaries; but there was not in the whole of this account the most distant allusion that was not, according to his description of it, entirely honorable and such as an honest man might render if he felt the degree of interest which he claimed to have done in his party and its principles and its cause.

"Q. Did he explain to you after that the nature of the Nash-Anderson agreement, which you say he delivered to you, in that conversation?—A. Yes, in the way which I have already stated.

"Q. Then did he tell you of the Weber-Anderson agreement in that same conversation?—A. My recollection is that he did not.

"Q. Did you tell him to go to New Orleans and wait for the commission known as the MacVeagh commission, which was contemplated at that time?—A. I understood him to say that he was on his way to New Orleans, or that he was going to New Orleans, and I stated to him that the first opportunity I should have to endeavor to do for him what he seemed to wish at that time would be when the commission arrived in New Orleans; that being personally acquainted with General Harlan, and as he desired an effort to be made to improve his condition in the custom-house, I would give him a letter of introduction to him when I heard of his arrival in New Orleans.

"Q. Did he speak of any penitence in regard to the exaction of such an agreement from Nash as is disclosed by this paper?—A. That I inferred from the apologies which he made in reference to it in having me understand that it never was intended to mean what it appeared to mean on its face.

"Q. Then how do you account for the language in his letter of March 27, to be found on page 104:

"'Nash will be here this week, and will demand possession of that agreement, after offering me a (possibly) clerkship. Of course I shall decline. Shall I inform him that it is in your possession?'

"What was the meaning of that?—A. I have no means of answering that. There was no statement made by Mr. Anderson to me of any understanding between him and Mr. Nash in respect to the possession of the agreement. The only explanations he made in regard to its nature were those which I have already given, and I cannot of course say what he meant by this. In reply to his question as to whether he should inform Nash

that it was in my possession, I answered him that I desired him to inform Mr. Nash of that fact in my letter of introduction of March 29, in which I say, 'You should say to Nash, if inquired of, that I have the agreement,' as I desired that Mr. Nash should know that fact.

"Q. Why did you wish Mr. Nash to know that?—A. In order that Mr. Nash might be relieved in his own mind from any such coercion as might be possibly implied from his knowledge of the existence of the paper and his ignorance of its whereabouts. In other words, to relieve him from that which Mr. Anderson described as the object of taking it—that is, Anderson's hold upon him.

"Q. What had Mr. Anderson to say to General Harlan confidentially, which is the language I think you use in your letter?—A. I say in my letter of March 29, introducing Mr. Anderson to General Harlan: 'This will be presented to you by Mr. J. E. Anderson, who may desire to communicate with you confidentially.' What I referred to was the same matters which he had related to me as the foundation for his own claims to my good-will, and particularly that portion which consisted in the description of the hostility which he said he had incurred from the leaders of the Republican organization in New Orleans, described as Packard, Kellogg, and others.

"Q. Mr. Darrall says in his letter that he had talked with you about the Sherman letter; but I think you said you knew nothing about the Sherman letter?—A. Nothing in the world.

"Q. In his letter of April 7 Anderson says: 'Inclosed find Weber agreement. This is the last piece of documentary evidence in existence.' I understood you to say that you knew nothing of that agreement prior to this letter?—A. I did not, nor of the Pitkin agreement spoken of in the preceding sentence.

"Q. On page 111 of the House testimony I find this indorsement apparently on an application of Anderson to be appointed under the State Department as consul:

"'For important reasons I specially request that this request be complied with.'

"That is the request that he may be appointed to a foreign consulate, and then below it:

"'Executive Mansion. Application for appointment United States consul at Callao, Peru. Senator Matthews requests that this appointment be made for important reasons.'

"What 'important reasons' were there that a man like Anderson should be appointed to a consulate?

"Mr. HOAR. On what page is that?

"Mr. WHYTE. I do not see it in the little volume which you have printed here; but it appears in the volume printed by the House.

"The CHAIRMAN. Then the House have not sent it to us.

"Mr. WHYTE. The House have sent all of Anderson's testimony, but have not sent you these letters and papers.

"The WITNESS (after examining the document). The only reasons I had for wishing it were those that I have already explained as operating on my mind in furthering his wishes in respect to an appointment.

"Q. (By Mr. WHYTE.) You subsequently recommended him, did you not, to the collector at New Orleans for an appointment as deputy collector?—A. I did.

"Q. And he did not succeed?—A. He did not.

"Q. On his way back from New Orleans to Washington he alleges that he stopped to see you at Cincinnati in May?—A. I remember Mr. Anderson being in my office subsequently to the first interview; but at what time, either in point of time as to the month or as to the day of the month, or at what period in the history of the whole matter, I do not now remember.

"Q. Anderson states that in that interview you remarked to him—

"'You go right back in the next train; I have just to-day had a letter from the President in regard to your case, and I have written him such a letter as will secure your appointment to some position.'

"Is there any truth in that statement?—A. There is not.

"Q. After he reached Washington he alleges he sent you the dispatch of June 1, containing these words:

"'The President claims to have received no letters. I want no more correspondence and no more nonsense. Come here and settle this affair, or you can all face the music. Care nothing about documents in your possession. Answer immediately.'

"Did you receive that dispatch?—A. The telegram as set out on page 105 differs from the telegram as set out on page 32 in this printed testimony, but not substantially. The words 'answer immediately' occur in the copy on page 105; the words 'telegraph me at once' on page 32. The copy contained on page 105 is the one I received, and is the one furnished by me to General Cox, who produced it before the House committee.

"Q. But the date I think is wrong?—A. The date must be wrong. It is dated 'May 1' there, but it ought to be 'June 1,' undoubtedly.

"Q. The next day he sends you the letter, as I understand, on page 106, stating that he had sent that dispatch on the spur of the moment, which he thinks you might misconstrue?—A. Yes, sir.

"Q. And then remarks, 'do not understand me as threatening you.' Now, in that same letter he says that he has 'thought of a plan by which the President can get rid of me without embarrassing himself; that is, to give the appointment I ask to a gentleman whom I shall designate.' Where was the necessity of the President getting rid of a man like Anderson?—A. I have no more knowledge on that point than you—than Mr. Anderson's own statement.

"Q. Then why was the arrangement made to give his brother a place in the Baltimore custom-house?—A. All I can answer in regard to that is what I afterward ascertained, and that is that it was offered and given to Anderson, and that he tried it and became very much dissatisfied immediately with it, as he expressed himself in his letter of June 19, on page 106, where he describes what the duties of the office were, and then threw it up, refused to keep it, but succeeded, as I understood, in obtaining from General Smith the appointment to the same place, as I always understood, of his own brother.

"Q. I call your attention to the fact that in this letter of the 19th he says that place has been offered him and he has declined it?—A. I know he does say so, but he told me, as I have already stated, when I met him on the train going from Washington to Baltimore, that he was going over there to enter on the duties of it, and was then very much pleased with the idea of having the employment. The next I heard was that I received this letter of June 19, in which he expressed his disgust at the position of inspector of customs. I inferred from that that he had actually entered on the duties of the place, had found what was required of him, and found that they were duties that he was not disposed to perform, and then wrote me that letter in which he says he declined it. My information subsequently was that this arrangement was made which I have just related, that having obtained employment in the office of the North American he abandoned all desire to have any appointment of his own, and obtained from the appointment clerk, General Smith, the appointment of his brother to this place in the Baltimore custom-house, which he himself was not willing to have or to keep, whichever it was.

"Q. The letter of General Smith seems to confirm the theory that he declined altogether to consider the place?—A. I notice that it does. Nevertheless, I still say that he told me that morning on the train going to Baltimore that he was going over there for the purpose of entering on the duties of that office, and I inferred from that statement that he had in fact done it. When I got that letter I presumed that he had probably, on the experience of a day or two, found it was not what he thought it was, and had given it up. It may be, however, that he never did for a day occupy the office. I do not know personally about it.

"Q. On the 11th of February, 1878, he alleges that he addressed you a letter from Philadelphia. Without going into the whole letter—it is on page 107 of the printed testimony—there occurs in it this paragraph:

"'In May last I warned you of just such a state of affairs as has come to pass. Had you adopted my suggestions then (in two respects), it could have been avoided. It is not too late yet, if prompt measures are taken.

"'Am no applicant for nor would I accept any position under the administration, and only desire to avoid the scandal that is in prospective.'

"What did he mean could have been avoided, do you know, in that letter?—A. I do not. My answer to that letter is contained in a letter printed on page 38 of this statement, though there is still some mistake about the date. It must be 'February 12,' although printed 'February 2,' if his letter be correctly dated February 11, for I say:

"'I have your note of yesterday, and in reply beg to say that I do not recollect the suggestions heretofore made by you, to which you refer, and which you think if adopted might still prove advantageous to the public interest, and I would be glad to have you adopt them.'

"This is a misprint. It does not make any sense.

"'I have, however, been subjected to so much misrepresentation in regard to everything I have undertaken to do that I do not think it would be wise for me to go to Philadelphia or Baltimore for the purpose of meeting you. In case you should find it convenient to be in Washington, I shall be pleased to see you.'

"What he referred to I do not know and never did.

"Q. Why did you head that 'personal and confidential'; was there anything special in that?—A. No, sir; nothing more than to have it so understood that I was not writing it for publication. I am satisfied there is a misprint in the letter in the words 'and I would be glad to have you adopt them.' That phrase has no meaning there, and it must be some other term that was used; it must be either 'mention them' or 'repeat them.' Probably 'repeat' is the word.

"The CHAIRMAN. 'Repeat' is probably the word intended there, but you say you have no recollection of it?—A. Yes, sir.

"The CHAIRMAN. The date is explained in the next sentence, because it says the letter is postmarked 'Washington, February 12, Congress'?—A. Yes, sir; the date must be February 12.

"Q. (By Mr. WHYTE.) You wrote to Secretary Evarts on the 14th of May, as these papers seem to show, from Cincinnati a letter recommending Anderson for a consulship. The letter is on page 30 of the printed testimony furnished to the committee, Exhibit O. This letter was written after you had received the Nash agreement and the Weber agreement?—A. Yes, sir.

"Q. In this letter you say you had had a private conversation with the Secretary, and repeat that Mr. Anderson has 'been compelled to act a very difficult part,' and has 'very strong claims upon the administration in the public interests.' Did you think that that was a proper man to represent this Government abroad whom you knew to have exacted these two papers for the purpose of black-mailing the parties?—A. In the abstract I should say no. Under the circumstances I thought it was better to have even such a man put into a position such as might be found for him than to have had the scandal of a publication of these papers. That was my opinion at that time.

"The other members of the committee having declined to ask any further questions,

"The CHAIRMAN. Do you wish to make any further explanation or statement?

"Mr. MATTHEWS. No, sir.

"The committee then deliberated upon the question whether further testimony should be taken or other witnesses called, and no member of the committee proposing to summon any witness, the chairman was requested to make the following statement to Mr. Matthews:

"'Mr. Matthews, the committee have decided that they do not desire to call any witnesses at present. Do you wish to submit any further testimony, or do you desire the committee to summon any witnesses?'

"Mr. MATTHEWS. I do not."

Thereupon it was unanimously agreed that no further testimony should be taken, all of which will more fully appear from the printed minutes and proceedings of the committee herewith reported.

The committe confine themselves to the foregoing narrative of the facts, and, after full consideration, they find unanimously the statements of Mr. Matthews to be true, and that he had no connection with any real or supposed frauds in the election in Louisiana, and that he has not been guilty of any corrupt conduct in any of the matters referred to in the testimony, while we cannot but regard his action in respect to James E. Anderson's effort to obtain an appointment to office, under the circumstances, as wrong and injurious to the public interest.

Proceedings of and before the select committee of the Senate appointed under the resolution of June 5, 1878.

TUESDAY, *June* 11, 1878.

The committee appointed in pursuance of the following resolution adopted by the Senate on the 5th instant, met:

"*Resolved*, That a select committee of seven Senators be appointed to inquire into and consider all things touching the matter stated and referred to by the Senator from Ohio [Mr. Matthews], and the events connected therewith, and particularly what connection, if any, that Senator had with any real or pretended frauds or other wrongs committed in the conduct and returns of the election in the State of Louisiana in 1876, and with any promises of protection or reward, if any, made by any one to one James E. Anderson, or others, in consideration of, or connection with, any official conduct by said Anderson or others in relation to said election or the returns thereof; and into all the circumstances of any recommendation by the said Senator of the said Anderson for appointment to office; and that said committee have power to send for persons and papers, to employ a clerk and stenographer, and have leave to sit during the recess."

Present: Messrs. Allison, Ingalls, Hoar, Davis of Illinois, Whyte, and Jones of Florida.

After consultation it was determined to summon James E. Anderson as a witness for Thursday next.

On motion, the committee adjourned to meet on Thursday next at noon.

THURSDAY, *June* 13, 1878.

The committee met at 12 o'clock m., pursuant to adjournment.

Present: Messrs. Allison, Hoar, Davis, Whyte, and Jones.

James E. Anderson, who had been summoned to attend as a witness, also appeared.

The ACTING CHAIRMAN (Mr. Allison). The witness, Mr. Anderson, is here; but I

have this moment received a note from Mr. Morrison, of the House of Representatives, which I will read:

HOUSE OF REPRESENTATIVES,
Washington, D. C., June 13, 1878.

Mr. Senator ALLISON,
Chairman, &c.:

Mrs. Jenks is about to be put on the stand, and we would prefer, if entirely agreeable to the Senate committee, that Mr. Anderson should be present during her examination. This is important to the House committee. At any other time take him.

W. R. MORRISON,
Acting Chairman.

I submit that to the committee.

Mr. HOAR. Mr. Chairman, I move that Mr. Anderson be excused until the House committee shall consider him at liberty to attend here.

Mr. DAVIS. I move that the chairman request Mr. Morrison to notify us when he will be ready to excuse Mr. Anderson from attendance on the House committee.

The WITNESS. I suggest that that would depend in a great measure on the length of time it will take Mrs. Jenks to testify. I will state to the committee that as soon as Mrs. Jenks is examined I shall be ready to appear here at any hour.

The ACTING CHAIRMAN. Is there objection? [A pause.] It is the sense of the committee, as I understand, that Mr. Anderson is excused, and he will report to us when Mr. Morrison is through with him.

Mr. HOAR. I suggest, Mr. Chairman, that we deem ourselves as still in session, to be notified by the chairman when the witness is ready to be examined.

The ACTING CHAIRMAN. That is the understanding.

FRIDAY, *June* 21, 1878.

The committee met pursuant to call.

Present: Messrs. Allison (acting chairman), Hoar, Ingalls, Davis, Whyte, and Jones.

Hon. Stanley Matthews was present by invitation.

James E. Anderson, who had been summoned as a witness, appeared.

The ACTING CHAIRMAN. Will you be sworn?

Mr. ANDERSON. I will state to the committee before I take the oath that I desire to be represented here by counsel.

The ACTING CHAIRMAN. You desire to be represented by counsel?

Mr. ANDERSON. I desire to be represented by counsel.

The ACTING CHAIRMAN. A witness!

Mr. ANDERSON. A witness. I desire to be represented by counsel.

Mr. HOAR. Mr. Chairman, I suppose he does not desire to have counsel present before we determine the question whether he shall be sworn.

Mr. ANDERSON. I should like to have the question settled before I am sworn as to whether I can have counsel or not.

Mr. DAVIS. That is a matter we can dispose of hereafter. [To the acting chairman.] You can swear him and tell him we can discuss this matter afterward. We cannot dispose of this question now, probably.

The ACTING CHAIRMAN. Have you arranged for your counsel, if you have counsel?

Mr. ANDERSON. I will by to-morrow.

Mr. INGALLS. Mr. Chairman, I hope there will be no delay about swearing the witness.

Mr. DAVIS. Oh, no, sir.

Mr. INGALLS. This is a question for the committee to discuss.

The ACTING CHAIRMAN. You will be sworn, Mr. Anderson.

The oath was administered.

The WITNESS. Now I renew my request.

The ACTING CHAIRMAN. That we shall be obliged to consider.

Mr. DAVIS. With closed doors, of course.

The ACTING CHAIRMAN. I think we had better settle the question now.

The WITNESS. Can you excuse me for ten minutes?

The ACTING CHAIRMAN. No, we cannot excuse you just at this moment.

The room was therefore cleared of all but members of the committee. After some time spent in deliberation the doors were reopened.

The ACTING CHAIRMAN. Mr. Anderson, the committee have decided that you are not entitled to counsel.

The WITNESS. I simply desire to say that I have no statement to make and no questions to answer.

The ACTING CHAIRMAN. We will examine you when we are ready to do so.

Mr. HOAR. I move that the room be cleared.

The ACTING CHAIRMAN. Do I understand you to decline to answer questions?

The WITNESS. I do, emphatically.

The ACTING CHAIRMAN. The committee have decided that you ought to answer such questions as they desire to put to you. We are charged with an examination. All we want is the facts. I will be glad to have you state now to the committee your age, occupation, and business.

The WITNESS. I will state to the committee that I have no desire to throw any obstacle in their way, and it is my object and intention to aid them in everything in this investigation, but I see no reason, no good reason, why I should not be allowed counsel in this matter. I am here absolutely friendless. I believe Mr. Matthews is here to represent himself, and I think somebody should be here to represent me; and unless I am allowed counsel, as I said, I have no questions to answer and shall absolutely decline to answer anything that may be asked of me.

The ACTING CHAIRMAN. The committee have understood——

The WITNESS. That is all I have to say in regard to the matter.

By Mr. INGALLS:

Q. Are you acting in this matter under the advice of counsel?—A. I am not. I am acting under my own advice. I have asked nobody's counsel. I have no counsel here at all.

By Mr. DAVIS:

Q. You are a witness. You are not prosecuted.—A. I understand that. I understand the question, sir.

Q. No court in the world ever allowed a witness counsel.—A. I believe the object of the committee is to get at the truth of this matter. If they are simply desirous of getting at the truth of it, I see no good reason why they should object to my having counsel present, at least somebody who will represent me in the matter.

The ACTING CHAIRMAN. Every gentleman of this committee is a member of the legal profession. We are charged with a duty simply of investigation, and we intend to discharge that duty impartially.

Mr. DAVIS. And protect witnesses.

The ACTING CHAIRMAN. And protect witnesses and everybody.

The WITNESS. Therefore I see no good reason why you should object to my having counsel present. I am perfectly willing, if Mr. Matthews is not present himself to direct this examination, to answer all questions; but if he is present and has the privilege of directing my examination, I claim that I have the same privilege of having a gentleman here who will look after my interests in the matter.

The ACTING CHAIRMAN. Mr. Matthews may be a witness. You can then ask him any questions you may desire, if he should ask you questions.

The WITNESS. Mr. Matthews is a lawyer and is capable of conducting his own case. I am not.

By the ACTING CHAIRMAN:

Q. You decline to state your age, business, and occupation?—A. Under the circumstances I do.

Q. I will ask you another question. When did you make the acquaintance of Senator Matthews?—A. I decline to answer.

Q. Have you ever placed in Mr. Matthews's custody any papers of any character; and, if so, what papers?—A. I decline to answer.

By Mr. DAVIS:

Q. When did you first see Mr. Matthews?—A. I decline to answer.

Q. Have you talked with any counsel on this subject at all?—A. I have not.

Q. Have you talked with any individual who gave you this advice?—A. I have not, except that I asked a gentleman to-day if I was not entitled to counsel before the committee.

By the ACTING CHAIRMAN:

Q. Who was that?—A. I spoke to two gentlemen, Mr. Parish and Mr. Springer, of the House committee.

By Mr. DAVIS:

Q. What did they say to you?—A. Mr. Springer said he thought the committee would not refuse to allow me counsel.

Q. What did Mr. Parish say?—A. Mr. Parish said the same thing.

Mr. HOAR. I move that the chairman be requested to inform the witness that the

questions which are put to him are put by the authority of the committee by the different members.

The ACTING CHAIRMAN (to the witness). You have heard the suggestion of Mr. Hoar, a member of the committee. I have put these questions at the suggestion of the committee and every member of the committee.

The WITNESS. I understand that; it is a matter of no difference by whose authority they are put. I simply under the circumstances decline to answer.

Mr. DAVIS. I will ask you a question, unless the chairman rules it out. How do you need counsel except that when Mr. Matthews testifies you may want to cross-examine him? That is a different question altogether, whether counsel shall be allowed then.—A. Certainly. I think my counsel, if I have one, should hear my testimony as well as Mr. Matthews.

The ACTING CHAIRMAN. We have reporters taking every word you say in short-hand, and it will undoubtedly be published in the newspapers.

The WITNESS. If the newspapers are taking it in short-hand and publishing it every morning, I see no objection to my having counsel. It is simply the addition of one more gentleman to be present.

The ACTING CHAIRMAN. This is a question we cannot argue with you. We have decided it.

By Mr. INGALLS:

Q. I understand your desire to be to employ counsel at your own expense?—A. Yes, sir; if I shall get counsel. I do not presume anybody will do it without expense; at least I have not been fortunate enough so far to get anybody who would.

Mr. HOAR. I move that the room be cleared for consultation.

The WITNESS. I will state again that I have no desire to throw any obstacle in your way, and I simply make that request.

The ACTING CHAIRMAN. But you are throwing an absolute obstacle in the way.

The WITNESS. I think it is only justice to myself to allow that.

Mr. DAVIS. You are a witness to tell the truth.

The WITNESS. I propose to tell the truth.

Mr. DAVIS. To tell the truth in regard to Mr. Matthews, nothing else. We are confining it to that purpose, just to tell the truth, and if every witness in a trial should be allowed counsel, either before a court or a committee, there would be no end.

The WITNESS. I am not brought here simply as a witness, but I am put on trial myself.

Mr. DAVIS. No.

The ACTING CHAIRMAN. Not that.

Mr. DAVIS. So far as we are concerned you are only a witness.

By Mr. WHYTE:

Q. One single question. You then set at defiance, Mr. Anderson, the committee of the Senate, simply because you are not permitted to have counsel here at your own suggestion?—A. That is drawing it rather strongly. I simply say that I decline to answer any questions because I do not think I am allowed the privilege I claim as an American citizen. I will say further that if Mr. Matthews will say he will go before the Potter committee of the House I will testify here.

The ACTING CHAIRMAN. We will not hear that.

Mr. WHYTE. We cannot have any terms about that. I only want to know if I understand you that unless you are permitted to have counsel against the wishes of the committee you decline to testify, and set at defiance the Senate of the United States?

By Mr. INGALLS:

Q. One point, Mr. Anderson. I understood you to be about to say that if Mr. Matthews would go before the Potter committee you would willingly testify here.—A. I will.

Q. Did you have that conversation with Mr. Springer this morning and Mr. Parish?—A. I did not.

Q. Has that proposition been made by you to any other person?—A. It has not been, directly or indirectly.

Q. Has it been suggested to you?—A. I believe I spoke to some newspaper correspondent a few minutes ago. I said if Mr. Matthews would be willing to go before that committee I would be willing to testify over here.

Q. You say that conversation was with a newspaper correspondent?—A. Some newspaper correspondent.

Q. This morning?—A. A few minutes ago. I simply made that suggestion some time during the day. I made it of my own volition, not at his or anybody else's. I simply stated my own opinion.

By the ACTING CHAIRMAN:

Q. I will ask a question now, Mr. Anderson. When did you make up your mind not to testify before this committee unless you were represented by counsel?—A. I thought of it last night coming over here.

Q. Was that the first time you had that impression?—A. That was the first time.

Q. Why did you leave the city, after the committee on the other side had discharged you, without notifying this committee?—A. I called on you with my attorney twice, sent in my card, and you refused to admit us. My wife was sick, and I had other business to look after in this world besides hanging round Washington.

Q. You have never sent me your card.—A. My attorney did.

Q. Who is your attorney?—A. Mr. Sypher, of Philadelphia.

Q. I have never received any card from Mr. Sypher.—A. I was present twice when he sent in his card to the committee-room on appropriations.

By Mr. INGALLS:

Q. Is he the gentleman whom you desire to have appear for you?—A. I have no knowledge whom I shall.

Q. You spoke of him as being your attorney.—A. Mr. Sypher is not in the city. He was my attorney before the House committee.

Q. Were you represented before the House committee by attorney who was present before the committee?—A. Yes, sir.

By the ACTING CHAIRMAN:

Q. And put questions for you?—A. No questions; but he represented my interests.

Q. By leave of the committee?—A. By leave of the committee.

By Mr. DAVIS:

Q. Did you ask the House committee to allow you an attorney?—A. Not specially.

By Mr. INGALLS:

Q. Did they know that he was there as your attorney?—A. Yes, sir.

By Mr. HOAR:

Q. What is Mr. Sypher's first name?—A. J. R.

By Mr. DAVIS:

Q. Did he put any questions to you?—A. None at all

By Mr. INGALLS:

Q. Did he advise you what to answer or refuse to answer?—A. Not at all. Mr. Sypher knew this whole question a year or more ago, and was simply there to look after my interests.

By the ACTING CHAIRMAN:

Q. What are your interests in this matter?—A. My interests are considerable. I have been laboring under the impression that I was liable at any time, the last year or two, to be indicted for perjury in Louisiana in connection with these returns. I went to Mr. Sypher in connection with that matter.

Q. Do you think you are in danger of that here in Washington?—A. Not if I prove that I did not forge returns That has been charged against me.

By Mr. DAVIS:

Q. Did you ask the committee of the House for the privilege of having an attorney?—A. Not directly.

Q. How did you do it?—A. I believe I spoke to Mr. Gibson, of the New York Sun, and told him I should like to be represented by counsel some time ago, and my recollection is that he said he would have it arranged.

By the ACTING CHAIRMAN:

Q. And you think it was arranged?—A. Yes.

By Mr. DAVIS:

Q. You simply went in when Mr. Sypher was present with you, and he asked no questions?—A. None at all.

Q. And did not ask leave to ask any?—A. None at all.

The committee-room was cleared for deliberation; and after some time spent in consultation, Mr. Matthews was invited to attend, and he accordingly appeared.

The ACTING CHAIRMAN. You have heard, Mr. Matthews, what Mr. Anderson has said. Have you any suggestion to make to the committee in reference to going on without Mr. Anderson's testimony?

Mr. DAVIS. In other words, you know that the committee decided that the case, whatever it was, should be made out, and then you should be put on the stand. You have seen how this ends for the present. Have you any suggestion to make? Until the Senate meets we have no way of compelling his attendance.

Mr. MATTHEWS. I dislike very much to take the responsibility of making any suggestions to the committee on the subject. I am ready here to-day, and shall be at any future time that the convenience of the committee shall fix, for the purpose of assisting the committee and facilitating it in any way within my power in the objects and purposes for which it was originated and authorized.

The only course, other than that of waiting until the committee can have the power of the Senate to compel the attendance of the witness, is to obtain from the committee of the other House the statements which he has already made under oath before it, and which constituted the ground on the basis of which I asked the Senate for the appointment of this committee. In case the committee think that that is sufficient for the purpose of the investigation with which they are charged, and obtain that testimony, I am ready to go on as if it had been delivered again here. But whether the committee ought to take that course I think is a question which the committee ought to decide for themselves. I do not wish to be considered as giving any opinion or advice or expressing any wish in regard to that matter.

The ACTING CHAIRMAN. I think we can now relieve you from attendance, Mr. Matthews.

Mr. Matthews thereupon retired; and the doors were thrown open to the public generally.

The ACTING CHAIRMAN. Mr. Reporter, will you state what took place a moment ago when Mr. Matthews was called in.

The stenographer read the statement made by Mr. Matthews.

The ACTING CHAIRMAN. The reporter has stated all that took place. Stand up, Mr. Anderson. [James E. Anderson rose.] The committee have decided that we will require the testimony of Mr. Anderson; and I now wish to ask you, Mr. Anderson, if you are willing to answer such questions as may be propounded to you by the committee or any member of it?

Mr. ANDERSON. I am not.

Q. You still persist?—A. I still persist.

Q. In refusing to answer any question pertaining to the matter before this committee?

Mr. ANDERSON. I do.

Q. And you therefore set the committee at defiance?

Mr. WHYTE. Mr. Chairman, in the absence of the Senate, we have no power to punish Mr. Anderson for the contempt in refusing to answer our questions. Under these circumstances, I move that this committee adjourn, subject to the call of the chairman.

The motion was agreed to.

TUESDAY, *December* 10, 1878.

The committee met at 10½ o'clock a. m., pursuant to call.

Present: Messrs. Edmunds, Allison, Ingalls, Hoar, Davis, and Whyte.

On motion of Mr. Allison, John W. Anderson was appointed clerk.

Mr. Edmunds asked to be excused from service as chairman of the committee, in view of his other duties; and his request was granted.

On motion of Mr. Davis, Mr. Allison was thereupon elected chairman.

On motion of Mr. Edmunds, it was

Ordered, That there be reported to the Senate the following:

"*Resolved*, That the House of Representatives be respectfully requested to transmit to the Senate a copy of the testimony of one James E. Anderson relating to the Hon. Stanley Matthews, a member of the Senate from the State of Ohio, understood to have been taken before one of the committees of the House of Representatives."

Mr. Edmunds submitted a motion that James E. Anderson be reported to the Senate as in contempt of its authority for refusing to testify before this committee, and that the Senate be requested to take the proper proceedings to secure his attendance.

The motion was not agreed to: there being three ayes: Messrs. Edmunds, Davis, and Whyte. The noes were: Messrs. Allison (chairman), Hoar, and Ingalls.

On motion of Mr. Whyte, the committee adjourned to meet at the call of the chairman.

[The rest of the proceedings of the committee are embodied in the report.]

[Forty-sixth Congress—First and second sessions.]

JOHN J. INGALLS,

Senator from Kansas from March 4, 1873, till March 3, 1891

March 19, 1879, the Vice-President laid before the Senate a memorial of certain members of the legislature relative to the election of Mr. Ingalls to his second term of office, beginning March 4, 1879. The memorial was referred to the Committee on Privileges and Elections. March 27, certain letters transmitting a report of a committee of the house of representatives of Kansas, which had investigated said election, was referred to the committee. Certain other papers relative to the election were at other times referred to the committee. June 21, the committee were authorized to make an investigation of the election. February 17, 1880, the committee reported the testimony taken and the following resolution: "*Resolved*, That the testimony taken by the committee proves that bribery and other corrupt means were employed by persons favoring the election of Hon. John J. Ingalls to the Senate, to obtain for him the votes of members of the legislature of Kansas in the Senatorial election in that State. But it is not proved by the testimony that enough votes were secured by such means to determine the result of the election in his favor. Nor is it shown that Senator Ingalls authorized acts of bribery to secure his election." Views of the minority concurred in the part of the report exonerating Mr. Ingalls, but held that "when the report goes further and finds that persons favoring Mr. Ingalls's election were guilty of such practices, it should in justice state what was clearly and unquestionably proved, that such means were employed in opposition to his election." No further action was taken by the Senate. Mr. Ingalls was allowed reimbursement of the necessary expenses incurred in defense of his title to his seat.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 46th Cong., and the report of the committee (without the testimony) from Senate Reports, 46th Cong., 2d sess., No. 277.

Special references to the debates of each day are inserted below.

SATURDAY, *February* 22, 1879.

The Vice-President laid before the Senate the credentials of John J. Ingalls, elected a Senator by the legislature of Kansas for the term of six years commencing March 4, 1879; which were read.

[First session of the Forty-sixth Congress.]

TUESDAY, *March* 18, 1879.

The credentials of John J. Ingalls having been heretofore presented, the oaths prescribed by law were administered to him, and he took his seat in the Senate.

WEDNESDAY, *March* 19, 1879.

The Vice-President laid before the Senate a memorial of certain members of the legislature of Kansas in relation to the election of John J. Ingalls as a Senator from that State; which was referred to the Committee on Privileges and Elections.

THURSDAY, *March* 27, 1879.

The Vice-President laid before the Senate a letter of F. S. Stumbaugh and L. F. Eggers, transmitting a copy of the report of the special committee of the house of representatives of Kansas charged with the investigation of the election of John J. Ingalls to the United States Senate; which was referred to the Committee on Privileges and Elections.

THURSDAY, *April* 24, 1879.

The President *pro tempore* laid before the Senate additional papers signed by F. S. Stumbaugh and L. F. Eggers, in relation to the election of John J. Ingalls to the Senate as a Senator from the State of Kansas; which were referred to the Committee on Privileges and Elections.

FRIDAY, *June* 20, 1879.

Mr. Saulsbury, from the Committee on Privileges and Elections, reported the following resolution for consideration; which was ordered to be printed:

"*Resolved*, That the Committee on Privileges and Elections, to which has been referred memorials in relation to the election of Hon. J. J. Ingalls a Senator by the legislature of the State of Kansas, be, and said committee is hereby, authorized and instructed to investigate the statements and charges contained in said memorials; and for that purpose

said committee is empowered to send for persons and papers, administer oaths, employ a stenographer, clerk, and sergeant-at-arms, and to do all such acts as are necessary and proper in the premises. And said committee may appoint a subcommittee of its members to take testimony in Kansas or elsewhere in the case, which shall report the testimony taken to the committee in December next; and such subcommittee shall have the same authority to administer oaths and to do other necessary acts as are herein conferred upon the full committee; and the said committee, and the subcommittee which it may appoint, may sit during the recess of the Senate for the purpose of making the investigation hereby authorized."

SATURDAY, *June* 21, 1879.

The Senate proceeded to consider the resolution (given above) yesterday reported by Mr. Saulsbury from the Committee on Privileges and Elections; and

Resolved, That the Senate agree thereto.

TUESDAY, *June* 24, 1879.

Mr. Bailey, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the expenses of the investigation ordered by the Senate to be made by the Committee on Privileges and Elections in relation to certain matters connected with the election of Hon. J. J. Ingalls, a Senator from the State of Kansas, be paid out of the 'miscellaneous items' of the contingent fund of the Senate, to be disbursed upon vouchers approved by the chairman of the committee or the chairman of the subcommittee that may be designated by said committee to take testimony in the case."

[Second session of the Forty-sixth Congress.]

MONDAY, *December* 15, 1879.

Mr. Saulsbury, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the Committee on Privileges and Elections be authorized to have printed for its use the testimony taken in Kansas relative to the charges contained in the memorials relative to the election of John J. Ingalls as Senator from the State of Kansas, and such other testimony as may be taken in the said case."

THURSDAY, *December* 18, 1879.

Mr. Saulsbury, from the Committee on Privileges and Elections, reported the following resolution; which was considered by unanimous consent, and agreed to:

"Whereas J. V. Admire, E. B. Purcell, George T. Anthony, Len. T. Smith, and Levi Wilson, citizens and residents of the State of Kansas, were duly served with subpœnas in the months of September and October, 1879, issued by the subcommittee of the Senate Committee on Privileges and Elections, then sitting in Topeka, in said State of Kansas, commanding each of them to appear before said subcommittee and then and there testify in reference to the subject-matters then under consideration by said subcommittee, to wit, charges relating to the election of John J. Ingalls a Senator from said State of Kansas; and

"Whereas said Admire, Purcell, Anthony, Smith, and Wilson refused to appear and testify before said subcommittee as required by said subpœnas: Therefore,

"*Resolved*, That an attachment issue forthwith directed to the Sergeant-at-Arms of the Senate commanding him to bring said J. V. Admire, E. B. Purcell, George T. Anthony, Len. T. Smith, and Levi Wilson forthwith to the bar of the Senate to answer for contempt of a process of this body."

THURSDAY, *January* 8, 1880.

The Sergeant-at-Arms appeared at the bar of the Senate having in custody Leonard T. Smith, Levi Wilson, and E. B. Purcell, arrested by order of the Senate and brought to its bar to answer for a contempt of a process of the Senate.

Whereupon

The Vice-President laid before the Senate the return of the writ of attachment issued to the Sergeant-at-Arms commanding him to bring J. V. Admire, George T. Anthony, Leonard T. Smith, Levi Wilson, and E. B. Purcell to answer for a contempt of a process of the Senate.

The return having been made,

Leonard T. Smith, one of the witnesses, advanced and made statement of his reasons for failure to answer to the summons of the Senate.

On motion by Mr. McMillan that the witness be discharged;

On motion by Mr. Garland to amend the motion as follows, viz: "That the witness, having purged himself of contempt, be discharged from the rule,"

After debate, it was determined in the affirmative.

Mr. Saulsbury submitted the following resolution as an amendment to the motion of Mr. McMillan as amended:

"Whereas Leonard T. Smith, now in custody of the Sergeant-at-Arms on an attachment for contempt for refusing obedience to a summons to appear before a committee of the Senate, has purged himself of contempt, and expressed his willingness to appear before the Committee on Privileges and Elections and answer such proper questions as may be put to him: Therefore,

"*Resolved*, That said Leonard T. Smith be discharged from arrest and that he appear before said Committee on Privileges and Elections and testify under the subpœna served upon him."

It was determined in the negative.

The question recurring on the motion of Mr. McMillan, as amended, it was determined in the affirmative.

Levi Wilson, another of the witnesses, having made statement of his reasons for failure to answer the summons of the Senate,

On motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

E. B. Purcell, another of the witnesses, having made statement of his reasons for failure to answer to the summons of the Senate,

On motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

On motion by Mr. Saulsbury,

Ordered, That the Sergeant-at-Arms have further time to make return concerning the failure of J. V. Admire and George T. Anthony, the other witnesses named in the writ of attachment of December 18, 1879, to answer for a contempt of a process of the Senate.

On motion by Mr. Davis, of Illinois, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 234–241 of the Congressional Record, vol. x, part 1.]

TUESDAY, *January* 20, 1880.

The Sergeant-at-Arms appeared at the bar of the Senate, having in custody J. V. Admire, to answer for contempt in refusing obedience to a summons of the Senate.

Whereupon

The Vice-President laid before the Senate the return of the writ of attachment issued to the Sergeant-at-Arms December 18, 1879, commanding him to bring J. V. Admire, G. T. Anthony, L. T. Smith, Levi Wilson, and E. B. Purcell to answer for a contempt of a process of the Senate.

The return was read.

The witness having made statement of his reasons for failure to answer to the summons of the Senate,

On motion by Mr. Saulsbury that the witness be discharged from the rule, it was determined in the affirmative.

On motion by Mr. Saulsbury,

Ordered, That George T. Anthony, the other witness named in the writ of attachment of December 18, 1879, be discharged as from contempt without appearing before the Senate.

On motion by Mr. Davis, of West Virginia, the Senate proceeded to the consideration of executive business.

[The debate is found on page 415 of the Congressional Record, vol. x, part 1.]

TUESDAY, *February* 17, 1880.

Mr. Saulsbury, from the Committee on Privileges and Elections, to whom was referred the memorials in relation to the election of John J. Ingalls, a Senator from the State of Kansas, submitted a report (No. 277) thereon, accompanied by the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the testimony taken by the committee proves that bribery and other corrupt means were employed by persons favoring the election of Hon. John J. Ingalls in the Senatorial election to the Senate to obtain for him the votes of members of the legislature of Kansas in that State. But it is not proved by the testimony that enough votes were secured by such means to determine the result of the election in his favor, nor is it shown that Senator Ingalls authorized acts of bribery to secure his election."

Mr. Cameron, of Wisconsin, asked and obtained leave to submit the views of a minority of the Committee on Privileges and Elections; which were ordered to be printed to accompany the foregoing report.

On motion by Mr. Saulsbury,

Ordered, That the testimony taken by the Committee on Privileges and Elections in the investigation of the election of John J. Ingalls to the United States Senate from the State of Kansas be printed, and that the committee be discharged from the further consideration of the memorials in relation thereto.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Saulsbury (chairman), Hill of Georgia, Kernan, Bailey, Pryor, Vance, Cameron of Wisconsin, Hoar, and Logan.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 17, 1880.—Ordered to be printed.

Mr. Saulsbury, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred memorials relating to the election of Hon. John J. Ingalls a Senator from the State of Kansas by the legislature of that State, have had the same under consideration and submit the following report:

The committee, under the authority of a resolution adopted by the Senate, appointed a subcommittee of its members with instructions to investigate the charges and statements contained in said memorials. In discharge of the duty assigned them the members of the subcommittee met during the recess of the Senate in the city of Topeka, in said State, and examined a large number of witnesses, whose testimony, together with the testimony of witnesses examined before the whole committee during the present session, is herewith submitted to the Senate.

The views entertained by the committee render it unnecessary to refer more particularly to the testimony, which will be found to sustain the conclusions of the committee expressed in the following resolution:

Resolved, That the testimony taken by the committee proves that bribery and other corrupt means were employed by persons favoring the election of Hon. John J. Ingalls to the Senate to obtain for him the votes of members of the legislature of Kansas in the Senatorial election in that State. But it is not proved by the testimony that enough votes were secured by such means to determine the result of the election in his favor. Nor is it shown that Senator Ingalls authorized acts of bribery to secure his election.

VIEWS OF THE MINORITY.

The undersigned, a minority of the Committee on Privileges and Elections, who were directed to investigate certain statements and charges concerning the recent election of a Senator in the State of Kansas, respectfully submit our views as follows:

We concur in part of the report. We exonerate Mr. Ingalls from any complicity with improper practices. We also find that the result of the election was not accomplished by such practices. We think that when the report goes further and finds that persons favoring Mr. Ingalls's election were guilty of such practices, it should in justice state what was clearly and unquestionably proved, that such means were employed in opposition to his election.

ANGUS CAMERON.
JOHN A. LOGAN.
GEO. F. HOAR.

[Third session of the Forty-sixth Congress.]

FRIDAY, *January* 21, 1881.

Mr. Plumb submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That there be paid to J. V. Admire, L. T. Smith, E. B. Purcell, and George T. Anthony, out of the contingent fund of the United States Senate, the mileage for attending as witnesses from the State of Kansas in the investigation of the election of Hon. J. J. Ingalls the same as the other witnesses received."

[The debate is found on pages 814, 815 of the Congressional Record, vol. xi, part 1.]

FRIDAY, *January* 28, 1881.

On motion by Mr. Hill, of Georgia,

Ordered, That the Committee to Audit and Control the Contingent Expenses of the

Senate be discharged from the further consideration of the resolution submitted by Mr. Plumb January 21, 1881, directing the payment of certain witnesses in the investigation of the election of the Hon. J. J. Ingalls, and that it be referred to the Committee on Privileges and Elections.

REIMBURSEMENT OF MR. INGALLS'S EXPENSES.

FRIDAY, *March* 31, 1882.

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That there be paid out of the contingent fund of the Senate the sum of $8,195 to John J. Ingalls, a Senator from the State of Kansas, in reimbursement of expenses necessarily incurred by him in defense of his title to his seat."

The Senate proceeded, by unanimous consent, to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read a third time.

The said resolution was read a third time by unanimous consent.

Resolved, That the Senate agree thereto.

[Special session of Senate, October, 1881, and first session of the Forty-seventh Congress.]

ELBRIDGE G. LAPHAM AND WARNER MILLER, *of New York.*

October 11, 1881, the day on which Messrs. Lapham and Miller took their seats, a memorial was presented remonstrating against their admission until certain allegations affecting their elections had been investigated. October 21, the memorial was referred to the Committee on Privileges and Elections. December 12, the committee reported back the memorial and asked that it lie on the table, and that the committee be discharged from its further consideration. It was so ordered December 13. The statement of Mr. Hill, in the nature of an oral report, given below, will show the nature of the allegations of the memorial, and the reasons for the action of the committee.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 47th Cong., 1st sess., and the remarks of Mr. Hill from the Congressional Record, vol. xiii, part 1, pages 70, 71.

There were no debates.

[Special session of Senate, October, 1881.]

MONDAY, *October* 10, 1881.

Mr. Edmunds presented the credentials of Elbridge G. Lapham, elected a Senator by the legislature of New York to fill the vacancy occasioned by the resignation of the Hon. Roscoe Conkling; which were read.

Mr. Edmunds presented the credentials of Warner Miller, elected a Senator by the legislature of New York to fill the vacancy occasioned by the resignation of the Hon. Thomas C. Platt; which were read.

TUESDAY, *October* 11, 1881.

On motion by Mr. Edmunds that the oath prescribed by law be now administered to Elbridge G. Lapham and Warner Miller, Senators-elect from the State of New York;

Pending which,

Mr. McPherson presented a memorial of certain members of the legislature of New York, remonstrating against the admission of Mr. Lapham and Mr. Miller to seats in the Senate until certain allegations affecting their elections have been investigated.

Ordered, That it lie on the table.

The question recurring upon the motion of Mr. Edmunds that the oath prescribed by law be now administered to the Senators-elect from the State of New York, it was determined in the affirmative.

Mr. Lapham and Mr. Miller then appeared, and the oath prescribed by law having been administered to them by the President *pro tempore*, they took their seats in the Senate.

FRIDAY, *October* 21, 1881.

Mr. McPherson presented a memorial of Miner Gallop and E. H. Pinney, of New York, remonstrating against the admission of Warner Miller and Elbridge G. Lapham to seats in the Senate until certain allegations affecting their election shall have been investigated; which was referred to the Committee on Privileges and Elections; and,

On motion by Mr. McPherson,

Ordered, That the memorial of certain members of the legislature of New York relating to the same subject, heretofore presented, be referred to the Committee on Privileges and Elections.

[First session of the Forty-seventh Congress.]

THURSDAY, *December* 8, 1881.

On motion by Mr. Hoar,

Ordered, That the petitions of the citizens and members of the legislature of New York concerning the elections of Senators Miller and Lapham be taken from the files of the Senate and referred to the Committee on Privileges and Elections.

MONDAY, *December* 12, 1881.

Mr. Hill, of Georgia, from the Committee on Privileges and Elections, to whom was referred the memorial of certain members of the legislature of the State of New York

affecting the right of the present Senators from that State to occupy seats on the floor of the Senate, reported it back, with the recommendation that the committee be discharged from the further consideration thereof; which was agreed to.*

[Remarks of Mr. Hill, of Georgia, in the nature of an oral report, delivered December 12, 1881, and found on pages 70, 71 of the Congressional Record, vol. xiii, part 1.]

"I am instructed by the Committee on Privileges and Elections to report back to the Senate certain memorials from members of the legislature of New York affecting the right of the present Senators from that State to occupy seats in this Chamber, and to ask that the memorials lie on the table and the committee be discharged from their further consideration.

"In deference to the memorialists, and at the special request of some of them, it is proper that I should state briefly and generally the reasons which authorize this conclusion.

"The memorials set forth five reasons as grounds why these gentlemen should not be allowed to sit here. The first alleges that the legislature did not proceed in separate bodies to vote upon the question until the third Tuesday after notice of the vacancy was communicated by the governor. The facts are such as to create some controversy as to whether they did proceed on the second Tuesday or the third Tuesday after the notice; but, in any view, the committee are unanimously of the opinion that the legislature was not deprived of its constitutional right to elect Senators to this body.

"The second allegation is that at one of the joint sessions of the general assembly a quorum of the State senators was not present. It is not alleged that there was not a quorum present of each body on the days the respective elections took place, but it is alleged or claimed that under the act of 1866 the failure of either body to be present with a quorum on any day deprives the legislature of the right to elect. The committee differ with the memorialists in that view. We think that one body of the legislature could not deprive the legislature of the right to elect by such absence, if unquestionably on the day of the election a quorum of each body of the legislature was present and voting. We think the reason alleged in this ground is not sufficient to invalidate the election.

"The third ground alleged is that there was not a majority of the whole legislature actually voting for the members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the members chosen. In our opinion that was a valid election.

"It is alleged specifically in the memorial that the Stockton case is a precedent to the contrary. On examination it will be found that the Stockton case is not a precedent to the contrary. Mr. Stockton, of New Jersey, in the celebrated case so well known, was chosen, not by a majority, but he was chosen by a plurality vote, the legislature in joint session having declared before the election that a plurality should elect. The Senators now occupying the seats in question, from New York, were not chosen by a plurality vote; they were each chosen by a majority, a quorum of each body being present, and a majority of the joint assembly voting. I will state that if the cases from New York were like the case from New Jersey, I do not think at this day any gentleman would regard the Stockton case as a precedent. Unquestionably the body that elects has a right to prescribe that a plurality may elect, and I think the report made by Senator Trumbull on that occasion is not only correct, but conclusive of the law of the case. The committee, therefore, are of the opinion that that ground is not sufficient to invalidate the election.

"The fourth ground relates to Hon. W. Miller, and alleges that he is guilty of certain conduct in violation of section 1781 and section 1782 of the Revised Statutes which disqualify a member from holding any office of honor, trust, or profit under the United States Government. It is sufficient to say that the Senator from New York has never been convicted of a violation of those sections of the Revised Statutes, and a simple inspection of the sections shows that it is conviction that disqualifies, and not allegations by outsiders or third persons who do not prosecute. Therefore the committee overrule that ground, and think it insufficient, conceding the facts alleged to be true for argument; we do not know anything about them.

"The last ground is one of fact. Before I have alluded to what are called legal grounds or allegations that by legal operation the election is void. The last ground alleges that there were rumors of bribery in procuring the election of these gentlemen. The allegation of mere rumors of bribery is not sufficient, unaccompanied with evidence, to require investigation at the hands of the Senate or of its committees. It is alleged in this memorial that one State senator of New York is under indictment in that State for offering a bribe to a member of the house to vote in the Senatorial election. It is due to the Senators holding the seats that the committee should say that that indictment is not for a

*It appears from the Congressional Record, vol. xiii, part 1, page 76, that the motion that the committee be discharged was agreed to December 13, 1881.

bribe offered to vote for either one of the present Senators. It is due also to state that while we find by reports that have been sent to us and investigations had that there were a great many scandals in connection with the Senatorial election in New York during the late session of the legislature, most of these scandals occurred before the two gentlemen now holding seats became even candidates before that body.

"Therefore, sir, the committee, without going further into details, hold that the respective grounds alleged and all of them together are not sufficient to authorize further investigation, and do not make a case invalidating the election of the Senators from New York. We believe from all that is before us that the elections were valid and ought to be so declared. We ask, therefore, that the committee be discharged from the further consideration of the subject."

[Forty-ninth Congress—First Session.]

HENRY B. PAYNE,

of Ohio.

March 4, 1885, Henry B. Payne qualified and took his seat in the Senate as a Senator from the State of Ohio. April 26, 1886, the report of a special committee of the house of representatives of Ohio, appointed to investigate charges of bribery against four of its members, together with the evidence taken by that committee, was presented in the Senate, and on May 11 referred to the Committee on Privileges and Elections. May 20, a memorial of the Republican State central committee of Ohio, charging that Mr. Payne's election was secured by bribery and fraud, and urging that the Senate investigate these charges, was referred to the same committee, and on the 25th of May memorials were received from the two branches of the legislature of Ohio to the same effect. A similar memorial from a convention of Republican editors of Ohio was presented July 13, together with a petition of citizens of Ohio on the same subject. All these petitions and memorials were referred to the Committee on Privileges and Elections as presented. While the case was pending in committee, Messrs. Little and Butterworth, members of Congress from Ohio, appeared before the committee and offered to produce certain additional evidence of bribery. July 15, three reports were submitted by the members of the committee. Two of these, signed respectively by four and three of the Senators composing the committee, reached the conclusion that there was not sufficient evidence offered to warrant the Senate in proceeding with an investigation, while the third, signed by two of the committee, held that an investigation should be made.

It was not questioned by any member of the committee that to deprive a member of his seat it must be shown by legal evidence that he was personally guilty of the corrupt practices charged or that the corruption took place with his sanction and encouragement, or else that a sufficient number of votes was changed by the fraud or corruption charged to affect the result and to secure an election which otherwise would not have been obtained.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Journal of the Senate, 1st sess. 49th Cong., and the report of the Committee, Sen. Rep. No. 1490, 1st sess. 49th Cong. The reports of the committee of the Ohio legislature, with the testimony on which they were founded, are to be found in Sen. Mis. Doc. 106, 1st sess. 49th Cong. The reports are printed below.

[Special session of the Senate, March 4, 1885.]

MARCH 4, 1885.

The credentials of the following named Senators having been heretofore presented to the Senate, the oath prescribed by law was administered to them by the Vice-President, and they took their seats in the Senate.

[Among those named]

Henry B. Payne, from the State of Ohio.

[First session, Forty-ninth Congress.]

TUESDAY, *April* 27, 1886.

The president *pro tempore* laid before the Senate a letter of the clerk of the house of representatives of the legislature of Ohio, transmitting a report of a special committee of said house of representatives appointed to investigate certain charges touching the election of Hon. Henry B. Payne to the United States Senate; which, together with the accompanying papers, was ordered to be printed and referred to the Committee on Privileges and Elections.

[At the same time Mr. Payne made a personal statement, which will be found at page 3861, Congressional Record, first session, Forty-ninth Congress.]

TUESDAY, *May* 4, 1886.

Mr. Hoar presented a letter of the secretary of the investigating committee of the house of representatives of the legislature of Ohio, calling attention to certain matter interpolated in the report of the investigation by said committee touching the election of Hon. H. B. Payne to the United States Senate and printed by order of the Senate; which was referred to the Committee on Privileges and Elections; and *Ordered*, That the further distribution of the said report be discontinued, and that the same be reprinted under the direction of the Committee on Privileges and Elections.

[The letter is printed at page 4118, Congressional Record, first session, Forty-ninth Congress.]

TUESDAY, *May* 11, 1886.

Mr. Hoar presented a memorial of the Republican central committee of Ohio, praying an investigation into the charges touching the election of Hon. Henry B. Payne to the Senate; referred to the Committee on Privileges and Elections.

THURSDAY, *May* 20, 1886.

The President *pro tempore* laid before the Senate a resolution of the house of representatives of the legislature of Ohio, in relation to the election of the Hon. Henry B. Payne to a seat in the Senate; which was referred to the Committee on Privileges and Elections and ordered to be printed.

TUESDAY, *May* 25, 1886.

The President *pro tempore* laid before the Senate a memorial of the legislature of Ohio in favor of an investigation by the Senate of the United States into the election of Hon. Henry B. Payne to that body; which was referred to the Committee on Privileges and Elections.

MONDAY, *June* 7, 1886.

Mr. Hoar submitted the following resolution, which was considered by unanimous consent, and agreed to:

Resolved, That the Committee on Privileges and Elections, to whom were referred sundry memorials from the State of Ohio in regard to the recent election of a Senator in that State, be authorized to employ a stenographer, to be paid out of the contingent fund of the Senate.

TUESDAY, *July* 13, 1886.

The President *pro tempore* laid before the Senate a memorial of the convention of Republican editors, held at Columbus, Ohio, July 8, 1886, praying an investigation into the charges touching the election of Hon. Henry B. Payne to the United States Senate, which was referred to the Committee on Privileges and Elections and ordered to be printed.

[Printed as Sen. Mis. Doc. No. 141, 1st sess., 49th Cong.]

The President *pro tempore* laid before the Senate two petitions of citizens of Ohio, praying an investigation into the charges touching the election of Hon. Henry B. Payne to the United States Senate; which was referred to the Committee on Privileges and Elections.

THURSDAY, *July* 15, 1886.

Mr. Pugh, from the Committee on Privileges and Elections, to whom were referred several memorials praying an investigation into the election of Henry B. Payne as United States Senator from the State of Ohio, submitted a report (No. 1490) thereon.

Mr. Evarts asked and obtained leave to submit the views of a minority of three members of the Committee on Privileges and Elections on the foregoing subject; which were ordered to be printed as Part 2 of the Report No. 1490.

Mr. Hoar asked and obtained leave to submit the views of a minority of two of the members of the Committee on Privileges and Elections on the foregoing subject; which were ordered to be printed as Part 3 of the Report No. 1490, accompanied by the following resolution for consideration:

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the charges affecting the title to the seat of Hon. Henry B. Payne, and to send for persons and papers, administer oaths, and employ a clerk and stenographer, and to sit during the recess of the Senate; and that the expenses of the investigation be paid out of the contingent fund of the Senate.

REPORT OF THE COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

JULY 15, 1886.—Ordered to be printed.

Mr. Pugh, from the Committee on Privileges and Elections, submitted the following report:

(1) On April 27, 1886, the Senate referred to your committee—

"The testimony taken from the select committee of the house of representatives of Ohio, and the report of said committee as to charges against the official integrity and character of certain members of said house of representatives in connection with the election of Hon. Henry B. Payne as United States Senator."

(2) On May 20, 1886, the Senate also referred to your committee the following copy

of the resolutions of the house of representatives of the State of Ohio in respect to the election of the Hon. Henry B. Payne as a Senator from that State, viz:

"Whereas it is the precedent in the United States Senate that charges of bribery must be directly made to warrant a committee of said body in proceeding to investigate the title of any United States Senator to his seat: Therefore,

"*Be it resolved by the house of representatives of Ohio,* That in the investigation made under house resolution No. 28 ample testimony was adduced to warrant the belief that the charges heretofore made by the Democratic press of Ohio are true, to wit, that the seat of Henry B. Payne in the United States Senate was purchased by the corrupt use of money; and

"*Further resolved,* That the honor of Ohio demands, and this house of representatives requests, that the said title of Henry B. Payne to a seat in the United States Senate be rigidly investigated by said Senate."

(3) The Senate also referred to your committee the following resolution of the Senate of Ohio:

"Whereas by common report, suggested and corroborated by the public press of the State without respect to party, and by a recent investigation of the house of representatives, the title of Henry B. Payne to a seat in the United States Senate is vitiated by corrupt practices and the corrupt use of money in procuriug his election; and

"Whereas it is deemed expedient, in order to secure a thorough investigation of his said election as Senator by the United Senate, that the belief of the general assembly in this regard be formulated in a specific charge: Therefore,

"*Be it resolved,* That in the opinion of the general assembly, and it so charges, the election of Henry B. Payne as Senator of the United States from Ohio in January, 1884, was procured and brought about by the corrupt use of money paid to or for the benefit of divers and sundry members of the sixty-sixth general assemby of Ohio, and by other corrupt means and practices, a more particular statement of which can not now be given.

"*Resolved,* That the Senate of the United States be, and the same is hereby, requested to make a full investigation into the facts of such election, so far as pertains to corrupt means used in that behalf."

(4) The Senate also referred to your committee the following resolutions of the Republican State central committee of Ohio:

"REPUBLICAN STATE COMMITTEE ROOMS,
"*Columbus, Ohio, May* 5, 1886.

"Whereas it has been shown to our satisfaction by the testimony taken by the committee of the Ohio house of representatives, under house resolution No. 28, and from other sources, so strongly as to induce us to believe and charge that the election of Henry B. Payne to the Senate of the United States was secured by bribery, fraud, and corruption; and

"Whereas the testimony so taken has been by the house of representatives reported to the Senate of the United States, for such action as that body may see fit to take on account thereof; and

"Whereas the facts so established reflect upon the good name of the State of Ohio, and affect in morals, as well as in law, the validity of the title of Mr. Payne to his seat in the Senate: Now, therefore,

"*Be it resolved by the Republican central committee of Ohio,* That in the name of all honest people in the State of Ohio, and for the credit of the hitherto-unsullied name and reputation of our State, the Senate of the United States be, and hereby is, respectfully requested to prosecute such investigation into the matters suggested by said report and the charges herein preferred, and to take such action thereon as may be necessary to relieve our State from the disgrace which it now rests under, and to do equity and justice to all concerned; and

"*Resolved further,* That the chairman of this committee is directed to forward an authenticated copy of this resolution to Hon. George F. Hoar, chairman of the Committee on Privileges and Elections of the United States Senate.

"We hereby certify the foregoing to be a true copy of the preamble and resolution adopted by the Republican State central committee of Ohio at a regular meeting held in the city of Columbus, Ohio, this 5th day of May, 1886.

"JAS. E. LOWRY,
"*Chairman.*

"JOSHUA K. BROWN,
"*Secretary.*"

The testimony given before the select committee of the house of representatives of Ohio was taken under the authority of the following resolution, adopted by the house January 13, 1886:

"Whereas the Cincinnati Commercial-Gazette of January 12, 1886, contains a

printed statement, on the authority of S. W. Donavin, alleging grave charges against the official integrity and characters of members of this house, namely, Hon. D. Baker, Hon. P. Hunt, Hon. W. A. Schultz, and Hon. Mr. Ziegler, so definite and precise in statement as to call for immediate action in order to vindicate the reputation of members of this house: Therefore,

"*Resolved*, That a select committee of five be appointed to inquire into all the facts of the charges so alleged, and report their conclusions to this house at as early a date as possible; and in the prosecution of this inquiry said select committee are empowered to send for persons and papers and to examine witnesses under oath."

The extent and character of the investigation made by the select committee, under the above house resolution, is described by the select committee in their report as follows:

"Although but four persons, and they members of the present house, are named in the resolution, and the committee is required by its terms to investigate and report concerning them only, it was found necessary to extend the inquiry beyond this limit, in order to gain something like a comprehensive view of the situation pertaining to said election.

* * * * * * *

"Whenever our attention was called to anything which indicated the probable employment of improper means to gain support, we followed the clews presented, on the theory that we were not only authorized, but in duty bound, to pursue any matter that promised, even remotely, to show the use of such means in connection with the election, because the discovery of one important fact, although having no immediate bearing upon the charge against the person named in the resolution, might lead to the discovery of facts having such bearing. And furthermore, and upon the same theory, our inquiries were not confined to the technical rules of legal proof, but the committee availed itself of any source of information—admitted hearsay statements, and even the opinions of witnesses. But we consider in making this report no facts should be stated which are not sustained by testimony upon which a legislative body might base further action."

* * * * * * *

The conclusion reached by the select committee, after the examination of the fifty-five witnesses, is also stated in their report, as follows:

"Although, as stated in the outset, the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry, we believe that circumstances surrounding the election of Henry B. Payne as one of the Senators to represent the State of Ohio in the Congress of the United States, as presented by the testimony, are such as to warrant us in recommending that an authenticated copy of the testimony and report be transmitted to the President of the United States Senate, for the information of the body of which Senator Payne is a member, and for such action as it may deem advisable."

Upon the presentation of the above report the house of representatives of Ohio adopted the following resolution, on the 16th of April, 1886:

"*Resolved by the house of representatives of the sixty-seventh general assembly of the State of Ohio*, That the clerk of the house be, and he is hereby, directed to transmit a copy, duly authenticated, of the testimony taken by the select committee appointed in pursuance of house resolution No. 28, and of the report of said committee, to the President of the United States Senate, to be by him presented to that body."

The testimony taken by the select committee is contained in Senate Miscellaneous Document No. 106. It is not denied that the investigation was had, and the testimony taken in secret session of the select committee with closed doors, and that the house of representatives refused to print the testimony. If any examination was made of the testimony by the members of the house, except those on the select committee, no expression of any opinion, conclusion, or judgment thereon was made by the house, by resolution or otherwise, and it was resolved by the house, in accordance with the recommendations of the select committee, to transmit the testimony to the senate for its consideration and action *without the formulation of any charge*.

On May 18, 1886, over a month after the adoption of the resolution directing the transmission of the testimony without any conclusions thereon, and requesting nothing but the consideration of the senate and such action as it thought proper, the *same* house of representatives, composed of the *same* members, after reciting that—

"Whereas it is the precedent in the United States Senate that charges of bribery *must be directly made to warrant a committee of said body in proceeding to investigate the title of any United States Senator to his seat:*

"*Resolved*, That in the investigation made under house resolution No. 28 *ample testimony* was adduced to *warrant the belief that the charges heretofore made* by the Democratic press of Ohio, that the seat of Henry B. Payne in the United States Senate was purchased by the corrupt use of money, *are true.*"

The select committee who had confronted and examined the fifty-five witnesses

failed to discover that the testimony was "ample" or strong enough to create the "belief" that any such charges were true; and all the committee could say, and all the house could concur in saying, *on the testimony when it was fresh in their recollection* (if it had ever been read by any member), was, "we believe that *circumstances surrounding* the election of Henry B. Payne as United States Senator, *as presented by the testimony*, are such as to warrant us *in transmitting to the Senate* an *authenticated copy of the testimony*, without recommendation, or the expression of any opinion or belief as to what the testimony established.

The charge made by the house for the first time on the 18th of May, 1886, *nearly two years and a half after the election* of Senator Payne, that his seat was purchased by the corrupt use of money, is founded *expressly* and *solely* on the testimony taken under house resolution No. 28.

The resolution of the senate of Ohio adopted on May 14, 1886, states:

"That in the opinion of the general assembly, and it [the general assembly] so charges, the election of Henry B. Payne as Senator of the United States from Ohio, in January, 1884, was procured and brought about by the corrupt use of money paid to or for the benefit of divers and sundry members of the sixty-sixth general assembly of Ohio, and by other corrupt means and practices, a more particular statement of which can not now be given."

The above resolution was not a "joint," but a "senate," resolution, although it undertakes to express the opinion of the general assembly of Ohio four days prior to the passage by the house of its own resolution on the same subject. The resolution of the Ohio senate is based *expressly* and *solely* on "common report suggested and corroborated by the public press of the State without respect to party, and by a recent investigation of the house of representatives." It nowhere appears that the testimony taken by the select committee of the House was ever reported to the Senate, or otherwise subjected to its examination.

The Republican State central committee of Ohio, at a regular meeting held in the city of Columbus on the 5th day of May, 1886, preferred the charge "that the election of Henry B. Payne to the Senate of the United States was secured by bribery, fraud, and corruption," and such charge is made on "the testimony taken by the committee of the Ohio house of representatives under house resolution No. 28, and from *other sources*."

Your committee are fully aware of the transcendent importance of throwing around the Senate of the United States the highest safeguards against seating or allowing any man to occupy a seat in that body whose title thereto was procured by bribery, fraud, or corruption. It is an undeniable public fact, causing general and serious apprehension among patriotic and thoughtful people, that in all representative governments founded on popular suffrage the indiscriminate and frequently the corrupt use of money by political parties, without exception, and their candidates, has become one of the most powerful and dangerous instrumentalities in elections. In the United States especially the power inseparable from great wealth in the hands of individuals and corporations has been, and we fear will always be, improperly and often corruptly exerted to produce successful results in elections. All parties invite, and as a rule demand, the contribution of money to control elections, and its influence has been found to be so potential that its use is generally accepted by public opinion as being indispensable and permissible to insure the success of parties and their candidates.

The charge in the case before us is made by the two houses of the general assembly of Ohio, acting separately, and by the Republican State central committee of Ohio, that Henry B. Payne obtained the seat he now occupies in the Senate of the United States by the corrupt use of money, or, to be more specific, by bribery of members of the legislature. The gravity of the charge and the respectability and responsibility of those who make it are conceded, and your committee are deeply sensible of the obligation they are under to examine and decide the question referred to them as one of momentous public importance.

It is manifest that the charge as it comes to the Senate has its origin and support in the testimony taken by the Ohio house, under resolution No. 28, and forwarded to the Senate and printed in Mis. Doc. No. 106.

It is equally manifest to a majority of your committee that no consideration of duty, law, justice, public policy, or propriety requires the Senate to authorize an examination into the title of a Senator to his seat upon the naked charge of the legislature of his State that his election was procured by bribery of the members by whom he was elected, without informing the Senate of any fact or evidence or witness to establish or create reasonable ground to support the charge.

It would be unprecedented and inexplicable if any legislature were to make such a grave charge without any preliminary examination into its truth or justification, and your committee feel constrained to believe that it is absolutely certain that no such charge will ever be made by any legislature without an investigation and without evidence to verify the charge; and that it is equally certain that no legislature

would request the Senate to enter upon such examination without furnishing the facts and witnesses to create a reasonable belief that the charge could be established by legal evidence if the Senate were to order an investigation. The sitting member was seated on credentials under the seal of his State showing that he had been legally and regularly elected by the legislature of his State. These credentials were read in the hearing of the Senate and remained on the files of the Senate sufficient time to allow those who now assail the validity of the election to make their charges and ask for an investigation by the Senate.

The main facts and circumstances to which so much importance has been attached to create belief and excite suspicion that money was corruptly used in the election, and that the Senate should make the investigation, were as public and well known when Senator Payne was seated as they are to-day. Why were two years and over allowed to pass without question or action by those who seem now to be so confident and persistent in charging foul play in the election of Senator Payne? The legislature of Ohio exercised its constitutional power of electing Henry B. Payne to the Senate of the United States. The legislature that elected him had unquestioned jurisdiction of that subject, and when the evidence of that election in the manner prescribed by the law and the Constitution is presented in the credentials under the seal of the State every presumption in favor of the validity of the election must be indulged by the Senate.

But it may be, and has been, urged that the two houses, acting separately, of another legislature of Ohio, send us resolutions, passed in due form, in which the specific charge is made that the members of the legislature that elected Mr. Payne, or some of them, were bribed with money by his friends, and that his election was procured by the corrupt use of money. It must be conceded that the two houses of the sixty-seventh general assembly of Ohio had no power or authority over the election or the title of Henry B. Payne as United States Senator. The two houses having no jurisdiction over the subject, it is manifest that as a matter of right or authority they had no more claim upon the consideration of the Senate as to the charge contained in their resolutions than the State Republican central committee. The only difference is in the number and position of the members of the several bodies who present the charge and request an investigation. The sixty-sixth general assembly of Ohio had power and jurisdiction to confer upon Henry B. Payne his title as a United States Senator. The only power that exists anywhere to try the validity of that title and to annul it is vested in the Senate of the United States. Would the Senate order an investigation of the title of a Senator to his seat on a charge made by any body of men, whatever might be their dignity or respectability, wholly unsupported and unaccompanied by any fact, evidence, or reason to make out the charge or to create a reasonable belief that the charge can be established and the sitting member deprived of his seat by an investigation?

A majority of your committee are constrained to believe that if such naked, unsupported charges by one man or any number of men could involve the Senate and any Senator in a trial of his right to his seat, such a precedent and practice would become an agency of persecution by the political and personal enemies of any Senator, and seriously impair the independence and standing of the Senate. No expectation was entertained by those who make the chargee in the present case that they would receive a moment's consideration if presented without being accompanied by the testimony upon which the charge is founded. Then the question is, has enough proof been adduced to justify the Senate in going into a trial of the right of Senator Payne to his seat?

In the case before your committee an investigation was ordered as to charges against four members of the Ohio house of representatives, and although the authority of the select committee was limited to the four inculpated members, yet the select committee enlarged the scope of its examination and explored the whole field of inquiry the Senate is now requested to enter for the discovery of evidence of which your committee has no information upon which they can act, as having any real existence or legality, to make out reasonable ground for belief that the charge can be sustained by authorizing another investigation.

Your committee are of the opinion that to deprive a sitting member of the Senate of his seat, the Senate must be satisfied by legal evidence that he was *personally* guilty of bribery, or that he was *personally* connected with the bribery or the corrupt use of money to procure his election, or that he had *personal* knowledge of such corrupt use of money and personally sanctioned or encouraged such use thereof to insure his election. The legal effect of such personal guilt of the sitting member on his election your committee do not decide, some members being of opinion that whether it extended to the corruption of the majority of the nominating caucus or the majority of the legislature of the State which secured his election is immaterial on the trial of the validity of his title or on the question of his expulsion, as the single personal act of bribery or other corrupt use of money by the sitting member as stated, to procure his election, would be sufficient in the opinion of some of us to

invalidate the title he claims to have acquired, and would justify his expulsion from the Senate.

Your committee are also of the opinion that, if the evidence fails to show that the sitting member was guilty of the bribery of any member of the caucus or the legislature, or had any personal knowledge or agency in the bribery, or the corrupt use of money to secure his election, then the Senate must be satisfied by legal evidence that a sufficient number of the members of the legislature were bribed by the friends of the sitting member to secure the votes of enough members of the legislature to insure his election, and that without the votes thus corruptly obtained the sitting member would not have been declared elected.

It is conceded that the Democrats had a majority in the sixty-sixth general assembly of Ohio of thirty-six members, and that Henry B. Payne was the only Democrat voted for by the members of the legislature when he was elected to the Senate.

The charge was preferred against Henry B. Payne by the senate and house acting separately in the sixty-seventh legislature of Ohio, which was a different legislature from that which elected Henry B. Payne, and was composed at the time the charges were made of a majority of Republicans in each house.

It is also conceded that prior to the day when the law required the sixty-sixth general assembly of Ohio to vote for the election of a United States Senator a caucus of the Democratic members of the legislature was held to nominate some person for whom the Democratic members were to vote in the general assembly, and that in such caucus Henry B. Payne received 46 votes, Durbin Ward received 17, and George H. Pendleton received 15 votes; and that, Mr. Payne having received over a majority of the 79 Democrats in the caucus, he was declared nominated. The charge is that money was corruptly used by being paid to or for the use of divers members of the caucus to secure their votes, *in the caucus*, for Mr. Payne's nomination.

When your committee met to consider the matter referred to them, the first act of the committee was to comply fully with the first request of the Ohio house, and that was to make an examination of all the testimony taken by the select committee of the Ohio house of representatives under its resolution No. 28, the report of that select committee being all that was then before your committee. After several days' examination of the testimony the chairman of your committee, at our next meeting, made his report as copied in the minority report, which is, in effect that after careful reading of the testimony contained in Mis. Doc. No. 106, no evidence, opinion, or statement whatever was found personally inculpating Henry B. Payne in anyway in any bribery or the corrupt use of money in his election to the Senate. Neither did such examination show that enough had been found in the testimony to justify the charge that the election of Mr. Payne was procured by the corrupt use of money, or that there was anything in the testimony taken under the Ohio house resolution No. 28 to justify your committee in reporting in favor of a further investigation by the Senate. On the contrary, it was agreed that the testimony was insufficient to support the charge, and insufficient to justify the committee in reporting to the Senate that the title of Senator Payne to his seat ought to be investigated. This action met the entire demand first made by the Ohio house of representatives. About the time that your committee considered its labors terminated the supplemental resolutions of the two houses of the Ohio legislature and of the Republican State central committee made their appearance in the Senate and were referred to your committee, and soon after this last reference a request was made by the Hon. Mr. Little, an able and distinguished lawyer and representative of Ohio in Congress, that he be permitted to appear in person before your committee in behalf of the State Republican central committee to make known to your committee by argument and evidence that the title of Senator Payne to his seat in the Senate ought to be investigated. Permission was granted and full time allowed for the hearing of Mr. Little. Then came another request, from the Hon. Mr. Butterworth, another able and distinguished lawyer and representative from Ohio in Congress, that he be permitted to appear before your committee for the same purpose, which was granted, and full time given for the hearing of Mr. Butterworth. These distinguished Representatives explored all the sources of information that promised any supply of fact, argument, or speculation, whether the evidence was legal or mere rumor or hearsay, found in the report of the special committee or elsewhere, to convince your committee that another investigation of the right of Senator Payne to his seat should be authorized by the Senate.

The able and plausible arguments of Mr. Little and Mr. Butterworth were founded confessedly and almost entirely upon the evidence taken by the select committee of the Ohio house of representatives, which had been pronounced by the select committee itself as wholly insufficient to establish in the least degree any charge that had been made against the four members of the Ohio house named by the correspondent of the Cincinnati Commercial-Gazette, and which your committee had also decided was insufficient to support the charges preferred by the two houses of the Ohio legislature on that testimony, notwithstanding the confident opinion expressed

in their supplemental resolution that the testimony taken by their select committee was "ample" to establish the charge as to how Senator Payne's election was procured.

A majority of your committee report that the testimony taken by the select committee under resolution No. 28 was not supplemented or strengthened by any additional legal evidence, and no new information, not contained in Mis. Doc. No. 106, was brought to the attention of your committee that any court would not hold to be merely cumulative and speculative and of like character with that taken by the select committee of the Ohio house, and insufficient by itself, or in connection with the other testimony, and all treated as true, just as it might be shown to be if another investigation were ordered by the Senate, to justify your committee in reporting in favor of directing a trial by the Senate of the right of Mr. Payne to his seat.

Your committee, having made a protracted and exhaustive examination of the matters referred to them, report:

First. That Henry B. Payne has not been charged with having anything to do personally, or with having any personal knowledge of, connection with, or participation in, any act, or anything that may have been done, or charged as having been done, that was wrong, criminal, immoral, or reprehensible in his election; that no member of your committee, and no witness, Representative, or other person, has expressed the opinion or intimated any belief or suspicion that Henry B. Payne is or was connected in the remotest degree, by act or knowledge, with anything that was or may have been wrong, or criminal, or immoral in his election.

Second. A majority of your committee report that on the whole case as presented to them they recommend that the Senate make no further investigation of the charge involving the right of Henry B. Payne to his seat.

Your committee ask to be discharged from further consideration of the matters referred to them, and that the whole subject be indefinitely postposed.

JAMES L. PUGH.
ELI SAULSBURY.
Z. B. VANCE.
J. B. EUSTIS.

VIEWS OF MR. TELLER, MR. EVARTS, AND MR. LOGAN.

Upon undisputed facts it appears that of the general assembly of Ohio, as in session and constituted in January, 1884, each house contained a majority of members of the Democratic party; that at a joint caucus of that party held on Tuesday, January 8, upon the first ballot, votes were cast—for Mr. Booth, 1 vote; for Mr. Pendleton, 15 votes; for Mr. Ward, 17 votes; and for Mr. Payne, 46 votes; thus showing a majority in the caucus of 13 for Mr. Payne over the united vote of all the other candidates. In regular conduct of the election of Senator by the legislature Mr. Payne was elected, and his credentials were received by the Senate of the United States at the session of March, 1885, and Mr. Payne since then has held, and now holds, a seat as Senator from Ohio in this body. No action was taken by or before the legislature which elected Mr. Payne calling in question the validity of his election or the conduct of the same in the canvass, the caucus, or the legislature itself.

A new legislature, as in session and constituted in January in the present year, showed a majority of the general assembly of the Republican party, and on the 13th day of January the house of representatives adopted the following resolution:

"Whereas the Cincinnati Commercial-Gazette of January 12, 1886, contains a printed statement, on the authority of S. K. Donavin, alleging grave charges against the official integrity and characters of members of this house, namely, Hon. D. Baker, Hon. P. Hunt, Hon. W. A. Schultz, and Hon. Mr. Zeigler, so definite and precise in statements as to call for immediate action in order to vindicate the reputation of members of this house: Therefore,

"*Resolved*, That a select committee of five be appointed to inquire into all the facts of the charges so alleged, and report their conclusions to this house at as early a date as possible; and in the prosecution of this inquiry said select committee are empowered to send for persons and papers and to examine witnesses under oath."

The select committee commenced the taking of testimony under this inquiry on the 20th January, and concluded the same on the 6th April last. Two reports were made to the house, one presented by a majority of three, and the other by the minority of two. On April 16 the house adopted the following resolution:

"*Resolved by the house of representatives of the sixty-seventh general assembly of the State of Ohio*, That the clerk of the house be, and he is hereby, directed to transmit a copy, duly authenticated, of the testimony taken by the select committee appointed in pursuance of house resolution No. 28, and the report of said committee, to the President of the United States Senate, to be by him presented to that body."

The President *pro tempore* of the Senate laid before the Senate the testimony and reports, and the same were referred to the Committee on Privileges and Elections.

The majority report of the committee of the Ohio house presented as their "conclusion" the following statement:

"Although, as stated in the outset, the testimony developed nothing of an inculpating character concerning the members of this house named in the resolution of inquiry, we believe that circumstances surrounding the election of Henry B. Payne as one of the Senators to represent the State of Ohio in the Congress of the United States, as presented by the testimony, are such as to warrant us in recommending that an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member, and for such action as it may deem advisable."

The minority report presented as their conclusion the following statement:

"The minority of your committee, therefore, find, in conclusion, that there has been no testimony going to show that any unusual or improper methods were resorted to by any person with any member of the Sixty-sixth general assembly to induce them to support, or that any member was unduly influenced to support, Hon. Henry B. Payne for either his nomination or election to the United States Senate."

It appears that when the select committee of the Ohio house of representatives was entering upon the inquiry before them the following correspondence took place between Mr. Payne and Mr. Cowgill, the chairman of the select committee, and that Mr. Payne was never advised by the committee that "any testimony tending to inculpate him in any degree with any questionable transaction" had been received, or any opportunity was afforded him of appearing before the committee:

"UNITED STATES SENATE,
Washington, D. C., January 22, 1886.

"Hon. THOMAS A. COWGILL,
"Chairman, Columbus, Ohio:

"SIR: As one branch of the general assembly has appointed a special committee, of which you are the chairman, to investigate the conduct of the Democratic caucus which in January, 1884, nominated a candidate for United States Senator, and as the matter is thus raised to the plane of respectability and placed in charge of intelligent and honorable gentlemen, I propose to give it appropriate attention. For myself, I invite and challenge the most thorough and rigid scrutiny. My private correspondence and books of account will be cheerfully submitted to your inspection if you desire it. I only insist, in case any testimony is given which in the *slightest degree* inculpates me, I may be afforded an opportunity of appearing before the committee.

"I am, very respectfully, your obedient servant,

"H. B. PAYNE."

"COLUMBUS, OHIO, *January 25, 1886.*

"Hon. H. B. PAYNE,
"United States Senate, Washington, D. C.:

"SIR: I acknowledge the receipt of your favor of the 22d instant, wherein you note the fact that a special committee of the Ohio house of representatives has been appointed to investigate the conduct of the Democratic caucus which in January, 1884, nominated a candidate for United States Senator, and you also declare that you propose to give the investigation appropriate attention.

"In reply, I have to say that the resolution to which you refer recites the fact that allegations of bribery, published on authority of S. K. Donavin, are of so grave and positive character as to call for immediate action in order to vindicate the reputation of members of the present general assembly. It directs the special committee to 'inquire into all the facts of the alleged bribery, and report their conclusions thereon to the house.'

"If in the prosecution of this inquiry any testimony tending to inculpate you in any degree with any questionable transaction be received, I assure you that your request to appear before the committee in such event will be most cordially and fully acceded to.

"Very respectfully,

"THOMAS A. COWGILL,
Chairman.

Instead of attempting a selection or summary of the testimony transmitted to the Senate by the Ohio house of representatives, for the illustration or support of our views and conclusions as to the proper disposition of the matter referred to the Committee on Privileges and Elections, we have thought it eminently just to accept as

the basis of our observations the two careful and intelligent presentations of the testimony to the Ohio house of representatives by the majority and minority reports of the select committee.

Your committee were addressed by two honorable members of the house of representatives from Ohio, Mr. Little and Mr. Butterworth, in exposition and enforcement of the testimony and of the just rules and principles which should govern your committee in their disposition of the matter before them. Subsequently, and while the committee was deliberating upon the case as submitted to them, these honorable gentlemen placed before your committee certain suggestions in the nature of corroborative or cumulative evidence, which we append, with the majority and minority reports to which we have referred, to accompany our report. These supplementary suggestions we have justly given this prominence to, as indicating in nature, if not in substance, what might be shown in testimony if an investigation should be entered upon by the Senate.

The only constitutional rights, powers, and duties which can sustain, or properly induce, an investigation such as is presented for the consideration of the Senate by the honorable house of representatives of the State of Ohio, arise from two separate and independent clauses of the Constitution:

By the first clause of section 5 of Article I of the Constitution, each House of Congress is made "the judge of the elections, returns and qualifications of its own members."

By the second clause of the same section each House may, "with the concurrence of two-thirds, expel a member."

As these two ends alone limit the basis and object of any investigation proposed, either for invalidating the election of a Senator or expelling from the Senate a duly elected and qualified member of it, a scrutiny of the grounds, in fact, upon which such action is demanded, in any case arising, from the Senate, requires an ascertainment whether the scope of the proposition and the testimony presented, or reasonably assured, would justify the ultimate action of the Senate under one or the other of these clauses of the Constitution. We do not understand that the house of representatives of Ohio presents any case upon the testimony taken or imagined to be accessible to any investigation by the Senate, or upon any allegation of the existence of facts suspected, though not probable, as would affect Mr. Payne with such personal delinquency or turpitude as would invite or tolerate his expulsion from the Senate for his participation in the transaction which resulted in his election. The examination of the testimony suggests no support for such an imputation, and the course of the select committee in not giving Mr. Payne an opportunity to be heard before them precludes any intimation that such a notion was entertained for a moment by that committee or the Ohio house of representatives.

We do not understand that any member of the Committee on Privileges and Elections has harbored or expressed the idea that the testimony taken, or suggested as accessible or possible, touches the subject of this personal inculpation of Mr. Payne. We shall, therefore, confine our further discussion of the matter, as presented for the investigation or action of the Senate, to the question arising upon the validity of Mr. Payne's election, and the declaration of his seat in the Senate vacant for such cause.

It is, no doubt, supposable that an election may be vitiated by fraud, corruption, and bribery without the member unseated being accused even of personal participation in the fraud, corruption, or bribery by which his election was compassed. If the election is thus vitiated, the member's seat cannot be saved by his personal exculpation and vindication. The integrity of the election, and not of the member, is in question under this clause of the Constitution.

But, on the same reason, the investigation, which now deals with the election as vitiated, and not the member as innocent, must reach the proof that the fraud, corruption, or bribery embraces enough in number of the voting electors to have changed, by these methods, the result of the election. If these corrupted votes gave the innocent member his seat, the deprivation of these corrupted votes vacates his seat, however innocent he is. But, if the uncorrupted votes were adequate to his election, and he is purged from complicity in the fraud, corruption, or bribery, his seat is not exposed to any question of validity in the election.

Upon a reference to the testimony presented by the Ohio house of representatives, and sifted and emphasized by the select committee's majority and minority reports, we are able to ascertain the number of members of the general assembly of Ohio that have been brought into inculpation, the degree and weight of evidence affecting each of them, and the conclusions of these two committees as to what had been proved, or could be expected to be proved, as bearing upon each of these members.

As to four members, viz, Messrs. Baker, Hunt, Schultz, and Ziegler, being the members of the house of representatives of 1886 upon charges against whom the general investigations were set on foot, we find the committee, by the majority report, declare that "the testimony developed nothing of an inculpating character concerning the

members of this house named in the resolution of inquiry." The minority report express their conclusions to the same effect, as follows:

"That there has been absolutely nothing found in any way compromising the four members charged, and they are wholly exonerated from the charges made, and stand to-day without the shadow of a suspicion attaching to them in regard to conduct unbecoming members of this house."

As to two members of the house, viz, Mr. Kahle and Mr. Hull, the majority report names them as "two instances in which attempted bribery in the Senatorial canvass was reported by members of the sixty-sixth general assembly," and sets forth, as the report expresses it, "the testimony taken as to what those members reported" "in brief." Both Mr. Kahle and Mr. Hull were active and earnest supporters of Mr. Pendleton in the canvass, and so continued to the end, voting for Mr. Pendleton in the caucus and in the legislature. The evidence respecting these two members, as given or commented upon by the majority and minority reports, we refer to, conformably to our declared purpose, without attempting any observations of our own upon the testimony. For the immediate consideration now presented, it is sufficient to say that no diversion from Mr. Pendleton's support to Mr. Payne's was effected as to these two electors.

The select committee names in the majority report two senators and two representatives, and speaks of them as follows:

"Rumors as to suspected bribery with which were connected the names of Messrs. Mooney and Roche, members of the house, and Messrs. White and Ramey, members of the senate, of the sixty-sixth general assembly, all of whom voted in caucus for Henry B. Payne for United States Senator, were traced by the committee until developments, which were regarded as important, were reached, as follows"—
giving the testimony bearing upon each, as viewed by the majority of the committee. The minority report takes up the case of each of these members, and comments upon the evidence which it adduces from the testimony, and declares as to each of them that the testimony justifies no imputation upon any one of them. We again, without any observations of our own on the evidence, refer to the majority and minority reports on this topic.

It is proper that we should call the attention of the Senate to the very explicit and candid statement of the majority report as to the reach and scope which were given to the investigation, and of the distinction drawn between the *testimony* at large and the *report* itself, as the latter containing "no facts" "which are not sustained by testimony upon which a legislative body might base further action." This report says:

"Whenever our attention was called to anything which indicated the probable employment of improper means to gain support, we followed the clews presented, on the theory that we were not only authorized, but in duty bound, to pursue any matter that promised, even remotely, to show the use of such means in connection with the election, because the discovery of one important fact, although having no immediate bearing upon the charge against the persons named in the resolution, might lead to the discovery of facts having such bearing. And furthermore, and upon the same theory, our inquiries were not confined to the technical rules of legal proof, but the committee availed itself of any source of information—admitted hearsay statements, and even the opinions of witnesses. But we consider that in making this report no facts should be stated which are not sustained by testimony upon which a legislative body might base further action."

The minority report thus speaks of the completeness of the investigation instituted by the committee:

"Your committee, in its anxiety that nothing, however trivial and remote, that might have, either directly or indirectly, any possible bearing on the matter under consideration, have exercised the greatest liberality possible in the taking of testimony, which has extended the scope of its inquiry far beyond the limits that could be given the most liberal construction of the resolution."

As the result of this wide investigation it does not appear that the select committee recommended any action by the legislature looking to a further investigation, or to the incrimination or punishment in the courts of law of any persons named in the report, nor that the legislature itself has proposed any action in such directions, or either of them. Indeed, the whole recommendation of the committee to the house of representatives is in these words:

"That an authenticated copy of the testimony and report be transmitted to the President of the United States Senate for the information of the body of which Senator Payne is a member, and for such action as it may deem advisable."

In pursuance of this recommendation the house of representativs communicated to the senate the testimony taken and the reports of the committee, which are before the Committee on Privileges and Elections. The only action taken by either house of the general assembly of Ohio since, that has been brought to the attention of the

Senate or of its committee, is shown in a resolution of the senate of Ohio and one of the house of representatives, as follows:

"*Senatorial election in Ohio.*

"[Senate resolution—Mr. Hardacre—No. 58.]

"Whereas by common report, suggested and corroborated by the public press of the State without respect to party, and by a recent investigation of the house of representatives, the title of Henry B. Payne to a seat in the United States Senate is vitiated by corrupt practices and the corrupt use of money in procuring his election; and

"Whereas it is deemed expedient, in order to secure a thorough investigation of his said election as Senator by the United States Senate, that the belief of the general assembly in this regard be formulated in a specific charge: Therefore, be it

"*Resolved*, That in the opinion of the general assembly, and it so charges, the election of Henry B. Payne as Senator of the United States from Ohio, in January, 1884, was procured and brought about by the corrupt use of money, paid to or for the benefit of divers and sundry members of the sixty-sixth general assemby of Ohio, and by other corrupt means and practices, a more particular statement of which can not now be given.

"*Resolved*, That the Senate of the United States be, and the same is hereby, requested to make a full investigation into the facts of such election so far as pertains to corrupt means used in that behalf.

"*Resolved*, That the governor be, and is hereby, requested to forward a copy thereof to the President of the Senate of the United States.

"I hereby certify that the foregoing is a true and corrupt copy of said resolution, as the same appears upon the senate journal of Friday, May 14, 1886, after being changed from a "joint" to a "senate" resolution, and adopted by the senate.

"C. N. VALLANDIGHAM,
"*Clerk Ohio Senate.*"

"[H. R. No. 89.—Mr. Brumback.]

"Whereas it is the precedent in the United States Senate that charges of bribery must be directly made to warrant a committee of said body in proceeding to investigate the title of any United States Senator to his seat: Therefore,

"*Be it resolved by the house of repvesentatives of Ohio*, That in the investigation made under house resolution No. 28, ample testimony was adduced to warrant the belief that the charges heretofore made by the Democratic press of Ohio are true, to wit: That the seat of Henry B. Payne in the United States Senate was purchased by the corrupt use of money; and

"*Further resolved*, That the honor of Ohio demands, and this house of representatives requests, that the said title of Henry B. Payne to a seat in the United States Senate be rigidly investigated by said Senate; and

"*Further resolved*, That the governor of Ohio be requested to forward a copy of this resolution to the President of the United States Senate.

"IN HOUSE OF REPRESENTATIVES.

"Adopted May 18, 1886.
"Attest:

"DAVID LANNING,
"*Clerk.*"

Upon the whole matter as presented, in evidence and argument, to the Committee on Privileges and Elections, we are of opinion that there is no evidence which purports to prove that fraud, corruption, or bribery was employed in the election of Mr. Payne affecting the votes, given either in the caucus or in the legislature, whereby the election was carried by corrupt votes to the effect of his election. Nor, in our opinion, is there any allegation that proof exists or would be forthcoming to the extent that would vitiate the election of Mr. Payne by reason of the necessary votes, in caucus or in the legislature, for his election, having been obtained by fraud, corruption, or bribery.

We are of opinion, therefore, that under the first clause of the fifth section of Article I of the Constitution the testimony and other considerations placed before the Senate do not warrant the Senate in instituting by itself an investigation looking to the unseating of Mr. Payne as a member of the Senate.

We have, in our conclusions, made no distinction between the use of fraud, corruption, or bribery in a caucus vote or in the legislative vote, for a Senator. Although a caucus, or what proceeds in it, has no constitutional or legal relation to the election of a Senator, yet, by the habit of political parties, the stage of determination as to who is to be elected Senator, and the influences, proper or improper,

that produce that determination, is that which precedes and is concluded in the caucus. So far as the question of personal delinquency or turpitude is concerned, no moral distinction should be taken between corrupt proceedings in caucus and those in the legislature. How far any such distinction would need to be insisted upon in any case, on the question of unseating a Senator, where he himself was not affected with any personal misconduct, or complicity with the misconduct of others, we have no occasion, in the immediate case or attitude of the subject, to consider or suggest.

At the outset of our observations we stated the limits which properly should control the action of the Senate under the applicable clauses of the Constitution, and by the same reason the ends which should be proposed in its investigations and to which they should be confined. It is obvious that the province and duty of a State in its investigations of fraud, corruption, and bribery in an election of Senator are much more extensive. A State is not confined at all to the question whether the actual election brought in question involves the Senator personally in misconduct, or whether enough votes for him were effected by fraud, corruption, or bribery that would require his seat to be vacated, although himself free from imputation.

The State should execute its laws respecting the purity of Senatorial elections by the indictment and conviction of a single person who bribes or is bribed, whether the election is affected or not. The State should investigate as well to the end of better laws and surer execution of the laws. The State, too, is charged with the maintenance of "the honor of Ohio," and its vindication rests with its own legislation, its own judiciary, and its own people; but it can not demand this vindication at the hands of the United States Senate, except as that may flow from investigations by that body within the limits of its constitutional powers and duties.

That State has conducted and concluded its investigations into the election of Mr. Payne, and has placed the result before the Senate of the United States. It has attempted no further investigations either by the plenary power of its legisture or through the functions of the courts of law. If, upon further examinations made by the State, through its legislature or its courts, a case should be presented for renewed consideration by the Senate, within the rules and principles we have stated as governing the action of the Senate, the further action of the Senate will be governed by what may then appear. As the whole matter now stands before the committee, we concur in its judgment that an investigation should not be instituted by the Senate, and the committee be discharged from the further consideration of the subject, and for the reasons which we have thus given.

H. M. TELLER.
WM. M. EVARTS.
JOHN A. LOGAN.

[The report of the select committee appointed by the house of representatives of the sixty-seventh general assembly of Ohio to investigate the charges of bribery in connection with the election of Mr. Payne and the views of the minority of that committee, together with a letter from Senator Thurman and the letter of Messrs. Little and Butterworth offering evidence, which follow in the report, are omitted. These documents may be found in Senate Reports, 1st sess., 49th Cong., vol. 11, No. 1490, pp. 16–32. The letter of Messrs. Little and Butterworth is printed below, p. 619.]

VIEWS OF MR. HOAR AND MR. FRYE.

The undersigned cannot concur with the report of the majority.

The senate and house of representatives of the State of Ohio, and the Republican State committee, representing the political party which for much the larger portion of the last thirty years has contained a majority of the voters of that State, have each addressed a memorial to the Senate charging that the election of the sitting member was procured by bribery and corruption, and praying the Senate to cause an investigation into said charges. Two gentlemen of high character and position, Messrs. Little and Butterworth, both now members of the other House from the State of Ohio, the former lately attorney-general of that State, appeared before the committee, declared their personal belief in the truth of the charge, asserted that in their opinion the belief is entertained by a large majority of the people of Ohio of both political parties, and asked to be permitted to lay before the committee evidence to support it. Besides Messrs. Little and Rutterworth eight of the Ohio delegation in the House add their earnest request to the same effect, affirm that the investigation is demanded by a large majority in number and influence of the press of the State, say that additional testimony is in the possession of Messrs. Little and Butterworth, and express their belief that "if opportunity is offered, the charges of the Ohio senate will be sustained by testimony to your full satisfaction."

Before the memorials above referred to were presented, there had been presented to the Senate for its information the evidence taken by a committee of the house of representatives of Ohio, who were directed to investigate charges of corruption in said election against four members of the present house of representatives of Ohio, being the only members of the legislature who made the election against whom allegations of bribery were made who have been continued in the public service, and the conclusions of the committee upon said evidence. Messrs. Little and Butterworth also produced certain affidavits and letters stating confessions of persons implicated, and pointing out other sources where evidence would probably be obtained if lawful authority should be given by the Senate to procure it.

We think this presents a case where it is the duty of the Senate to permit the petitioners to present their evidence and to authorize the issue of proper process to aid them in procuring the attendance of witnesses.

The Constitution declares that "each house shall be the judge of the elections, returns and qualifications of its own members." The Senate is the only court which has, or under the Constitution possibly can have, jurisdiction of this question. There can be no trial, inquiry, or adjudication anywhere else to which this inquiry is not totally foreign and immaterial." The courts in Ohio may exercise jurisdiction of the offense of bribery of or by an individual. But the question whether the result of an election of Senator was thereby changed can never be before those courts. Either house of the legislature may inquire as to the personal turpitude of its own members. But the action which may result from such investigation must be precisely the same, whether other persons also were or were not corrupted, and whether the choice of Senator were or were not affected.

As the Senate is the only court that can properly try this question, so the change is made, if not in the only way it can be made, yet certainly in the way beyond all others in which it can be made with most authority. The legislature of Ohio is the representative of the dignity, interest, and honor of the State. It appoints the Senators of the United States, and if a vacancy in the office exist, it must fill it. It is supported in this charge by the committee who are, under our political customs, the organ of more than half the voters of the State concerned.

For the Senate to refuse to listen to this complaint, so made, would, it seems to us, be, and be everywhere taken to be, a declaration that it is indifferent to the question whether its seats are to be in the future the subject of bargain and sale, or may be presented by a few millionaires as a compliment to a friend. No more fatal blow can be struck at the Senate or at the purity and permanence of republican government itself than the establishment of this precedent.

But the case does not rest alone upon the charge and character of the parties who make it, and who ask to be permitted to produce evidence in its support. If it did, it, in our judgment, would be enough. It is surely a strange answer to be given by a court to a suitor to say that it has already considered the question and decided the case before it is presented.

But the petitioners adduce strong reasons to show probable cause that they can establish their case. The testimony taken by the committee in Ohio has been referred to us. Our attention has also been called to evidence pointing to a large mass of additional testimony. The committee of the Ohio house has power only to inquire into the conduct of four members of that body. They report that—

"A number of clews furnished were not followed, because we were convinced that they could lead only to points at which further pursuit would become necessary, but which could not be passed without authority to reach beyond the limits of the State for witnesses, and much anonymous information was ignored by the committee chiefly for the same reason."

We have examined the evidence taken by that committee. It does not support the charges as to the four members implicated; it does not connect Mr. Payne with the transactions; it does not show that the result was changed or effected by corrupt means. But it does show that Mr. Payne's name was not publicly suggested as a candidate for Senator until after the State election; that it was not very prominently suggested until shortly before his election in January; that many persons who had been supposed to favor Pendleton voted for Payne; that there was a widespread belief that corrupt means were used to procure the result; that one member was offered a large sum of money by another member to vote for Payne; that there were hearsay statements charging corruption as to several others; that two members of the legislature received large sums of money about the time of the election, of which they, being called as witnesses, gave no satisfactory account; that the prominent managers of Mr. Payne's canvass, viz, Paige, McLean, Huntington, and Oliver H. Payne, did not testify before the committee. There was no evidence tending to show the bribery of any particular member, except as above stated.

When we say it was not shown that the result was changed or effected by corrupt means, we are speaking of direct testimony. But the consideration should not be forgotten that where persons familiar with the whole case would be quite sure to

know whether such means were needful to change the result, or whether their candidates would be elected without it, if they are found expending large sums of money corruptly the fact alone affords strong reason for the inference that the result was thereby controlled. But the result of the investigation in Ohio seems to the undersigned absolutely unimportant. That committee, while they took a wider range of inquiry than the matter committed to them, neither had, nor conceived they had, any power to inquire into Mr. Payne's title to his seat. They issued no process extending beyond the limits of Ohio. They report no conclusion, except as to the four members. When witnesses refused to answer, they did not press them. They went beyond the scope of the resolution appointing them only, as they say, "to gain something like a comprehensive view of the situation."

The Ohio senate of 1883-'84 contained 33 members. Of these 22 were Democrats and 11 Republicans. The house contained 105 members, of which 60 were Democrats and 45 Republicans. The members entitled to vote on joint ballot were 138 in all, 82 Democrats and 56 Republicans. Eighty-two persons were entitled to vote in the Democratic caucus, of whom 42 were a majority. Seventy-nine persons actually attended that caucus, of which 40 were a majority. Is there fair reason for instituting an inquiry whether the result of the election was procured by bribery? We think that the character of the persons making the charge is of itself sufficient to require the Senate to listen to it. But they produce a great body of evidence all pointing in the same direction.

We are not now to consider whether the case is proved, or even whether there be a *prima facie* case. There has as yet been no evidence laid before us addressed to either of these considerations. That can not be done without the issue of process for the attendance of witnesses. Messrs. Little and Butterworth now offer, on their personal responsibility, to establish to the satisfaction of the Senate, largely by witnesses who were not within the reach of the Ohio committee, and partly by evidence which strengthens, supplements, and confirms that which was before that committee, the following among other propositions:

First. That of the Democratic members elected to the sixty-sixth general assembly more than three-fourths were positively pledged to Mr. Pendleton and General Ward, and more than a majority pledged to Mr. Pendleton. This they offer to prove by Mr. Pendleton himself, by Col. W. A. Taylor, and others.

Second. That in these pledges these members represented the opinion and desire of their constituents.

Third. That Mr. Payne was nowhere spoken of or known as a candidate during the popular election, or until a very short time before the appointment of Senator.

Fourth. That just before the legislative caucus, where the nomination was made, which was one week before the election, large sums of money were placed by Mr. Payne's son and other near friends of his at the control of the active managers of his canvass in Columbus. This they allege can be shown by the books of one or more banks.

Fifth. Mr. Payne's near friends declared that his election has cost very large sums. A gentleman whose name is offered to be given will testify that David R. Paige declared to him that he had handled $65,000.

Oliver B. Payne stated to the same person that it had cost him $100,000 to elect his father.

Sixth. That the members of the legislature who changed from Pendleton to Payne did so after secret and confidential interviews with the agents who had the disbursement of these moneys.

Seventh. That members of the legislature who so suddenly changed their attitude can be proved to have, at about the time of the change, acquired large sums of money, of which they give no satisfactory account.

Eighth. Respectable Ohio Democrats affirm that just before the caucus the room of Mr. Payne's manager, Paige, "was like a banking house;" that the "evidence of large sums of money there was abundant and conclusive;" that Paige's clerk declared in the presence of a gentleman of integrity that "he had never seen so much money handled in his life."

Ninth. That the public belief that the choice of Senator was procured by the corrupt use of money prevails almost universally in Ohio among persons of both parties, which finds very general expression in the press.

Tenth. That there is specific proof leading with great force to the conclusion that each of ten members will be shown to have changed their votes corruptly, and thereby that the result was changed.

The Senate has also recently referred to the committee certain resolutions adopted by a convention of the Republican editors of Ohio, held at Columbus, July 8, 1886, praying the Senate to investigate these charges. The newspaper reports of the convention show that the governor of the State was present at the convention, and declared his concurrence in said prayer. There have also been communicated to us extracts from the Democratic newspapers of Ohio, showing that a majority of those

papers have declared their opinion that the election was procured by corruption. Copies of these extracts are appended.

What is the effect upon an election of Senator of bribery of voters in a caucus of the legislators who are to make the choice is a question upon which we prefer not to form an opinion until the evidence is before us. The members of a caucus ordinarily deem themselves bound in honor to vote in the election for the person whom it nominates, by the vote of a majority, on condition that such person belong to their party, and is fit for the office in point of character and ability. Bribery, therefore, which changes the result in the caucus, would ordinarily determine the election.

If B, C, and D have promised to vote as A shall vote, if A be corrupted four votes are gained by the process, although B, C, and D be innocent. In looking, therefore, to see whether an election by the legislature was procured or effected by bribery, it may be very important to discover whether that bribery procured the nomination of a caucus whose action a majority of the legislature were bound in honor to support. Seventy-nine persons attended the Senatorial caucus and voted on the first ballot. Of these Mr. Payne had the votes of 46, Ward 17, Pendleton 15, Booth 1. If 6 only of Mr. Payne's votes in the caucus were procured by bribery, the result of the election of Senator was clearly brought about by that means. Now, Messrs. Little and Butterworth tender specific proof, part of which was before the Ohio committee and part here offered for the first time, directly and very strongly tending to create the belief as to each of 10 of the members of the Ohio legislature that his vote for Mr. Payne was purchased, and that proper process and inquiry will establish the fact by competent and sufficient evidence.

One member, after the caucus, deposited $2,500 in two amounts, and being charged that it was the price of his vote, did not persist in a denial.

Another, who changed to Payne, just before the caucus stated to a colleague that he was offered $5,000 to vote for Payne, and intended to accept it, and tried to induce his colleague to do the same. That person's wife just afterwards deposited $2,500 in a bank in Toledo, took a certificate therefor, which she transferred to her husband.

Another who is claimed to have changed suddenly from Pendleton to Payne is found making, soon after, expenditures amounting to $1,600 with his own money on land, the title to which was taken in the name of his father, who paid $2,000 for it about the same time. The father and son lived together in the same house. The son testified that he did not know where the father got the money to pay the $2,000. The father refused to state where he got his $2,000, and said he did not know where the son got the $1,600, and if he did he would not tell. The same member also made other large payments of money about the same time.

Another, who had to borrow money when he went to Columbus, and changed suddenly from Pendleton to Payne, was shown just after the election to be in possession of money to purchase property, refurnish his house, etc. He was denounced by another member as having sold his vote. He turned exceedingly sick, made no denial, and was taken away. Two others, elected as antimonopolists, became supporters of Mr. Payne and were heard discussing together the amount of money each had received. Another, who had before been for another candidate, but voted for Mr. Payne, received from Oliver B. Payne $3,500, which he said was a loan. Another, according to affidavits produced by Mr. Little, was declared by a fellow member to be claiming $3,500 for his vote. Another, who had been very earnest in support of Pendleton, visited the room of Mr. Payne's managers, where the large sums of money are alleged to have been seen, and immediately afterwards voted for Mr. Payne.

The committee received this communication from Messrs. Little and Butterworth in addition to the statements made by them at the hearing:

"Hon. GEORGE F. HOAR,
"*Chairman of the Committee on Privileges and Elections, United States Senate:*

"DEAR SIR: Since our appearance before your committee the last time, we have received information, deemed by us important, bearing upon the question of investigation, and desire to indicate its general character.

"First. We have information, regarded as trustworthy, that a member of the sixty-sixth general assembly, one of the sudden converts to Payne, with meager means and without financial credit prior to January, 1884, was able to and did deposit in bank to his own credit shortly after the election, to wit, February 13, 1884, $1,350, besides showing other signs of prosperity not accountable for in ordinary ways.

"Second. We can show by witnesses, whose credibility will not be questioned, that just prior to the meeting of the caucus at which Mr. Payne was nominated he (witness) was, in the interest of Payne, summoned by telegraph to Columbus. He went, and was asked by Payne's managers what sum of money would be required to withdraw the vote of the representative of his (witness's) county from Pendle-

ton and give it to Payne. The question was squarely and seriously addressed to witness: 'How much money does he (the representative) want?'

"Third. We have from reliable sources additional information of a convincing nature pointing to bribery, consisting of conversation, statements, and admissions of implicated members and others, which we are not at liberty to state more explicitly in this communication, owing to the conditions under which the information is imparted, but which, with the other matters referred to, we can verbally communicate to you in more particular form if desired.

"In the line of matter heretofore submitted we deem it worth while to give this additional instance:

"Fourth. We quote from a letter in our possession from a reponsible person in Ohio, omitting names:

'"Our representative, ———, had been elected as a Pendléton man, and had agreed ——— to support Pendleton. A few days before the caucus it was whispered that '——— *had been seen*,' and that he would vote for Payne. A telegram was at once sent from here to ——— (the member) by leading Democrats, warning him against such a course, and ——— and others at once went to Columbus and saw the member. He hooted at the idea that he would vote for Payne. ——— assured Pendleton that the member would support him. ——— then came home feeling confident that the member would not disappoint him."'

"This member was interviewed in the presence of a friend of Mr. Pendleton, and asserted his devotion to him, but was suspected and watched. As the hour of the caucus approached it was noticed that he was not present. The friend of Mr. Pendleton went to his room for him. We quote further:

'"He found him in company with one of the men who handled the 'boodle,' and he was much embarrassed by ———'s presence. But he went to the caucus with ———, and on the way again asserted his allegiance to Pendleton. If I remember correctly, ——— said they had printed ballots for both candidates, and that he gave ——— (the member) a Pendleton ticket. But when the vote was taken, ——— (Pendleton's friend) observed that ——— (the member) wrote something on a piece of legal cap and then tore it off. He afterwards discovered that ——— (the member) put in the hat the same piece of paper; and then ——— (Pendleton's friend) went to ———'s (the member's) desk and tore off a piece of the legal cap large enough to include the small piece torn off by ——— (the member). I think ——— (Pendleton's friend) was one of the tellers. At any rate, he got the ballot which fitted the piece of legal cap, and which ——— had voted, and found that *Payne's name was on the ballot.*"'

"This member was thereupon charged by the Democratic county paper of his county with betrayal, etc.

"We do not question that the facts can be shown substantially as indicated with repect to the member referred to.

"Should this information not be used, names and means of identity placed on record would or might lead to annoyances for no purpose. They are, therefore, not here given.

"Your committee, we will venture to add in conclusion, will not overlook the fact that our showing, made in the face of a most persistent and powerful opposition, of unlimited means and expedients, has been one for an *investigation*, and not final action following an investigation.

"Very respectfully,

"JOHN LITTLE,
"BENJ. BUTTERWORTH."

It is said that much of this is hearsay and that taken together it is insufficient to establish a case which will overcome the presumption arising from the certificate of election. We are not now dealing with that question. The Senate is to determine whether there is probable cause for an inquiry. Any man who lays a claim to any property, real or personal, may institute his process at pleasure, and compel the courts to hear and try the cause. Even a criminal accusation requires only the oath of the accuser, who is justified, if he have probable cause.

It will not be questioned that in every one of these cases there is abundant probable cause which would justify a complaint and compel a grand jury or magistrate to issue process and make an investigation. Is the Senate to deny to the people of a great State, speaking through their legislature and their representative citizens, the only opportunity for a hearing of this momentous case which can exist under the Constitution? We have not prejudged the case, nor do we mean to prejudge it. We sincerely trust that the investigation, which is as much demanded for the honor of the sitting member as for that of the Senate or the State of Ohio, may result in vindicating his title to his seat and the good name of the legislature that elected him.

But we can not consent to be accomplices in denying justice to either. We do not believe the American people will be satisfied that the Senate should refuse to

hear this case either on the ground that some other tribunal has tried some other case, or on the ground that it has already been decided without hearing or evidence, or on the ground that a bribe paid for a vote in a legislative caucus is not understood by both parties to include a vote in the legislature for the candidate of that caucus.

How can a question of bribery ever be raised or ever be investigated if the arguments against this investigation prevail? You do not suppose that the men who bribe or the men who are bribed will volunteer to furnish evidence against themselves? You do not expect that impartial and unimpeachable witnesses will be present at the transaction. Ordinarily, of course, if a claim like this be brought to the attention of the Senate from a respectable quarter that a title to a seat here was obtained by corrupt means the Senator concerned will hasten to demand an investigation. But that is wholly within his own discretion, and does not affect the due mode of procedure by the Senate. From the nature of the case the process of the Senate must compel the persons who conducted the canvass and the persons who made the election to appear and disclose what they know; and until that process issue you must act upon such information only as is enough to cause inquiry in the ordinary affairs of life.

The question now is not whether the case is proved—it is only whether it shall be inquired into. That has never yet been done. It can not be done until the Senate issues its process. No unwilling witness has ever yet been compelled to testify; no process has gone out which could cross State lines. The Senate is now to determine, as the law of the present case and as the precedent for all future cases, as to the great crime of bribery—a crime which poisons the waters of republican liberty in the fountain—that the circumstances which here appear are not enough to demand its attention.

It will hardly be doubted that cases of purchase of seats in the Senate will multiply rapidly under the decision proposed by the majority of the committee. The first great precedent to constitute the rule under this branch of law is to be this:

Held, by the Senate of the United States, that a charge made by the legislature of a State, and by the committee of the political party to which the larger number of its citizens belong, and by ten of its representatives in Congress, that an election of Senator was procured by bribery, accompanied by the offer to prove the fact, does not deserve the attention of the Senate, and this, although it also appear—

That there is a general and widespread public belief in the truth of the charge; that there was a sudden and unexpected and unaccounted-for change to the sitting member from another candidate, to whom a majority of the electing body had been previously pledged; that large sums of money were brought to the place of election just before the choice by the managers of the canvass for the person elected; that there is evidence tending to show the bribery of several members, and the acquisition by others, who so changed their support, of considerable sums of money, immediately after such change, affect at least 10 members of said legislature; that a change by corrupt means of the votes of 6 persons would have changed the result in a legislative caucus, and thereby bound and committed the vote in the legislature of 82 persons, who were a large majority of such legislature;

Provided it also appear that one branch of a subsequent legislature of the same State have, in investigating charges against four of their members, incidentally inquired into charges against other persons, so far as they could without compelling unwilling witnesses to answer, without use of process extending beyond their State, and "without following out many clews, which they did not follow because they were convinced that they would lead only to points of which further pursuit would become necessary."

We recommend the adoption of the accompanying resolution:

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the charges affecting the title to the seat of the Hon. Henry B. Payne, and to send for persons and papers, administer oaths, and employ a clerk and stenographer, and to sit during the recess of the Senate; and that the expenses of the investigation be paid out of the contingent fund of the Senate.

GEORGE F. HOAR.
WM. P. FRYE.

[Appended to the report of Messrs. Hoar and Frye were the statements of Messrs. Little and Butterworth before the committee, as well as certain comments of Democratic newspapers and leading Democrats on this case. They are omitted here, but may be found in Senate Reports, 1st sess., 49th Cong., vol. 11, Rep. 1490, pp. 40–48.]

WEDNESDAY, *July* 21, 1886.

The President *pro tempore* laid before the Senate resolutions of the Franklin County, Ohio, Republican central committee, praying an investigation into the charges in relation to the election of Henry B. Payne to the United States Senate.

Ordered, That they lie on the table.

On motion of Mr. Pugh,
The Senate proceeded to consider the report of the Committee on Privileges and Elections on the memorials asking an investigation into the charges affecting the election of Henry B. Payne to the Senate.

[The debate will be found on pp. 7251 to 7272, Cong. Record, 1st. sess., 49th Cong.]

THURSDAY, *July* 22, 1886.

On motion of Mr. Pugh,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the memorials asking an investigation into the charges affecting the election of Henry B. Payne to the Senate.

[For the debate see pp. 7308 to 7329, Cong. Record, 1st sess. 49th Cong.]

FRIDAY, *July* 23, 1886.

On motion of Mr. Pugh, the Senate resumed the consideration of the report of the Committee on Privileges and Elections on the memorials asking an investigation into the charges affecting the election of Henry B. Payne to the Senate; and the question being on agreeing to the resolution submitted by Mr. Hoar as a substitute for the recommendations of the committee, viz:

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the charges affecting the title to the seat of the Hon. Henry B. Payne, and to send for persons and papers, administer oaths, and employ a clerk and stenographer, and to sit during the recess of the Senate; and that the expenses of the investigation be paid out of the contingent fund of the Senate,

It was determined in the negative, { Yeas ..... 17 / Nays 44

On motion of Mr. Harris,
The yeas and nays being desired by one-fifth of the Senators present,
Those who voted in the affirmative are,
Messrs. Blair, Conger, Dawes, Edmunds, Frye, Hale, Harrison, Hawley, Hoar, McMillan, Mahone, Manderson, Mitchell of Oregon, Palmer, Platt, Sherman, Wilson of Iowa.
Those who voted in the negative are,
Messrs. Beck, Berry, Blackburn, Brown, Butler, Call, Camden, Cameron, Chace, Cockrell, Coke, Colquitt, Cullom, Eustis, Evarts, Gibson, Gorman, Gray, Hampton, Harris, Hearst, Ingalls, Jones of Arkansas, Jones of Nevada, Kenna, Logan, Maxey, Miller, Plumb, Pugh, Ransom, Riddleberger, Saulsbury, Sawyer, Sewell, Stanford, Teller, Vance, Van Wyck, Vest, Voorhees, Walthall, Whitthorne, Wilson of Maryland.
So the resolution was not agreed to. On the question to agree to the recommendations of the committee in its report that the Senate make no further investigation of the charge involving the right of Henry B. Payne to his seat; that the committee be discharged from the further consideration of the matters referred to them; and that the whole subject be indefinitely postponed,

It was determined in the affirmative, { Yeas ..... 44 / Nays 17

On motion of Mr. Hoar,
The yeas and nays being desired by one-fifth of the Senators present,
Those who voted in the affirmative are,
Messrs. Beck, Berry, Blackburn, Brown, Butler, Call, Camden, Cameron, Chace, Cockrell, Coke, Colquitt, Cullom, Eustis, Evarts, Gibson, Gorman, Gray, Hampton. Harris, Hearst, Ingalls, Jones of Arkansas, Jones of Nevada, Kenna, Logan, Maxey, Miller, Plumb, Pugh, Ransom, Riddleberger, Saulsbury, Sawyer, Sewell, Stanford, Teller, Vance, Van Wyck, Vest, Voorhees, Walthall, Whitthorne, Wilson of Maryland.
Those who voted in the negative are.
Messrs. Blair, Conger, Dawes, Edmunds, Frye, Hale, Harrison, Hawley, Hoar, McMillan, Mahone, Manderson, Mitchell of Oregon, Palmer, Platt, Sherman, Wilson of Iowa.
So the recommendations in the report were agreed to, and the subject postponed indefinitely.
[See pp. 7350 to 7361, Cong. Record, 1st sess., 49th Cong.]

[Forty-ninth Congress—second session. Fiftieth Congress—first session.]

DAVID TURPIE, *of Indiana.*

February 10, 1887, the Vice-President presented a memorial of the legislature of Indiana contesting the validity of the election of David Turpie as Senator, and on the 16th Mr. Turpie's credentials for the term beginning March 3, 1887, were presented. Both papers were referred to the Committee on Privileges and Elections, which, on May 14 was discharged from further consideration of them. December 5, 1887, Mr. Turpie appeared and was sworn and took his seat in the Senate. On the same day Mr. Turpie's credentials, together with a memorial from a committee appointed by the joint convention of the legislature of Indiana and the papers in relation to the matter on the files of the Senate, were referred to the Committee on Privileges and Elections. May 14, 1888, the committee reported that the remonstrants offered to show that Alonzo G. Smith usurped the office of presiding officer of the senate of Indiana, and was supported in the usurpation by the majority of that body; that after this usurpation the senate, without debate or hearing, declared two duly-elected members not entitled to their seats, and seated in their stead two other persons not duly elected; and that the senate, under this presiding officer and with these two members in joint convention with the house, elected Mr. Turpie, and the votes of the two members wrongfully seated were necessary for his election. The committee held that these facts, if proved, would not justify a declaration that the sitting member was not entitled to his seat; that the presiding officer was recognized as such by the senate, and the senate recognized as the lawful senate by the house and by the governor, and that these facts required the Senate of the United States to consider it the lawful senate so far as concerned its right to take part in the election of a United States Senator; that as to the two members seated by the senate so organized, the judgment of the senate of Indiana was conclusive on the Senate of the United States, and that the latter body could not inquire into the motive of the former. The committee therefore asked to be discharged from the further consideration of the case. May 15 the committee were discharged in accordance with their recommendation.

The history of the case here given consists of a transcript of the proceedings in relation to it from the Journal of the Senate, 2d sess., 49th Cong. and 1st sess., 50th Cong., together with the report of the committee, Sen. Rep. No. 1291, 1st sess., 50th Cong.

[Second session, Forty-ninth Congress.]

THURSDAY, *February* 10, 1887.

Petitions, memorials, etc., were presented and referred as follows:

By the President *pro tempore:* Resolutions of a joint convention of the legislature of Indiana, contesting the validity of the election of David Turpie as United States Senator from that State—to the Committee on Privileges and Elections and ordered to be printed.

[The resolutions are printed in full on p. 1564, Cong. Record, 2d sess., 49th Cong.]

WEDNESDAY, *February* 16, 1887.

The president *pro tempore* laid before the Senate a paper purporting to be the credentials of David Turpie, certifying to his election as a senator by the legislature of Indiana for the term of six years commencing March 4, 1887; which was read.

On motion by Mr. Hoar,

Ordered, That it be referred to the Committee on Privileges and Elections.

TUESDAY, *March* 1, 1887.

On motion by Mr. Hoar,

Ordered, That the Committee on Privileges and Elections be discharged from the further consideration of the credentials of Francis B. Stockbridge, a paper purporting to be the credentials of David Turpie, and a resolution of the joint convention of the legislature of Indiana contesting the validity of the election of David Turpie, as United States Senator from that State.

In response to a question from Mr. Platt as to the effect of the foregoing order, Mr. Hoar made the following statement:

Mr. HOAR. Under the rules of the Senate all papers committed to any committee are to be returned to the files of the Senate at the expiration of the Congress, and the function of the committee itself expires with the Congress. If the credentials of Mr. Turpie had been retained by the Committee on Privileges and Elections without action until noon on the 4th day of March, under the operation of that general rule precisely the thing would have happened then that has happened this morning; that is, the paper would have gone back to the files of the Senate and the committee would have been discharged from its consideration. The only alternative to that course would have been an assumption by the committee or by the Senate at the present session to deal with the credentials of a gentleman claiming to be a Senator-

elect before the time had arrived for the beginning of his term, and before he had presented himself to be heard upon the subject.

The Senate is a continuing body which was organized at the beginning of the Government in 1789, and that organization is to continue, as we fondly hope, until time shall be no more, certainly until the destruction of the American Constitution. It is therefore possible that it might be within the constitutional power of the Senate to determine in advance the right of a Senator to a seat upon this floor, and it would be a violation of all constitutional precedent, and it would be, in my judgment, a violation of the sense of justice and propriety of the Senate and of the American people.

The effect, therefore, of this report is simply to remand to the action of the Senate to be taken after the 4th of March without prejudice—without being in the least affected by any action now (on) any question which any person may see fit to raise, and that is all. No prejudice, for no prejudice against any person who may conceive himself entitled to a seat on this floor hereafter will arise or has arisen in consequence of the report of the committee or of the Senate in accepting it. (Congressional Record, second session Forty-ninth Congress, p. 2474.)

THURSDAY, *March* 3, 1887.

Mr. Harrison presented a memorial of the members of the senate and house of representatives of the State of Indiana protesting against the alleged election of David Turpie as a Senator from that State.

Ordered, That it lie on the table.

[First session—Fiftieth Congress.]

TUESDAY, *December* 6, 1887.

The credentials of the following-named Senators having been presented to the Senate, the oaths prescribed by law were administered to them by the President *pro tempore*, and they took their seats in the Senate:

* * * * * * *

Mr. David Turpie, from the State of Indiana.

* * * * * * *

Mr. Hoar presented a memorial of the committee appointed by the joint convention of the general assembly of the State of Indiana in relation to the election of Hon. David Turpie as United States Senator from that State; which, together with the papers touching said matter on the files of the Senate, was referred to the Committee on Privileges and Elections when appointed.

MONDAY, *May* 14, 1888.

Mr. Hoar, from the Committee on Privileges and Elections, to whom were referred sundry resolutions, memorials, etc., in relation to the election of Hon. David Turpie as United States Senator from the State of Indiana, submitted a report (No. 1291), with the recommendation that the committee be discharged from the further consideration of the subject.

TUESDAY, *May* 15, 1888.

On motion by Mr. Hoar that the Committee on Privileges and Elections be discharged from the further consideration of the several resolutions and memorials concerning the election of Hon. David Turpie as United States Senator,

After debate,

It was determined in the affirmative.

[The debate will be found on pp. 4145 to 4147 Cong. Record, 1st sess. 50th Cong.]

REPORT OF THE COMMITTEE.

IN THE SENATE OF THE UNITED STATES.

MAY 14, 1888.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred certain resolutions of the joint convention of the two houses of the State of Indiana concerning the election of Hon. David Turpie as United States Senator, and a memorial signed by F. Winter and 17 others, members of the legislature of said State, protesting and remonstrating against the admission of Mr. Turpie as a member of the Senate of the United States from the State of Indiana, and a communication signed by F. Winter and John M. Griffiths in behalf of a committee appointed by the joint convention of

said assembly of said State for the purpose of presenting to the Senate of the United States the facts attending the election of David Turpie as aforesaid, have considered the same and respectfully report:

Mr. Turpie received a certificate of his election from the governor of Indiana, which constitutes a *prima facie* title to his seat, and has been admitted thereupon to take the oath.

The two houses of the legislature of Indiana, having failed to concur in the appointment of a Senator, met in joint convention, and after sundry ballotings, in which no person had a majority of the votes cast, a ballot was had in which Mr. Turpie received 2 more votes than all others. A quorum of said joint convention and a quorum of each house was present and voted. The proceedings were in all respects regular, and resulted in a valid election of Mr. Turpie, unless the facts which the remonstrants offer to prove constitute a valid objection.

They offer to show, first, that, there being a vacancy in the office of lieutenant-governor, the Hon. Robert S. Robertson was duly elected to fill such vacancy, and thereby became entitled by the constitution and laws of Indiana to preside over the senate; but that, on the meeting of the senate on the 6th day of January, 1887, being the first day of the session of the legislature at which said alleged election of Mr. Turpie took place, one Alonzo G. Smith usurped the office and function of such presiding officer, was supported and maintained in such usurpation by a majority of said body, excluded Mr. Robertson from said office and function, and continued so to preside and so to exclude Mr. Robertson during all the sessions of said senate, including its attendance on said joint convention, until after the said alleged election of Mr. Turpie.

Second. That before said alleged election the senate wrongfully, and for the purpose of obtaining a majority for said Turpie in said joint convention, declared two members, who had been duly and lawfully elected members thereof, not entitled to their seats, and declared two other persons, who had not been duly and lawfully elected, to be entitled to such seats, and thereupon seated such persons, and that this was done without right, without evidence, and without hearing or debate; and that said persons so seated thereafter were present and voted for Mr. Turpie in said convention, and that without such votes said Turpie would not have received a majority.

The committee are of opinion that the facts offered, if proved, will not warrant the Senate in declaring the sitting member not entitled to his seat. There can be no doubt that the body in question was the constitutional senate of Indiana. The journals of both houses of the legislature of the State have been submitted to us. It appears that the body was recognized as the senate by the governor and by the house of representatives. Statutes, to which its constitutional assent was necessary, were enacted and have become part of the law of the State.

It seems to us that, without entering upon the question whether there was a vacancy in the office of lieutenant-governor which Mr. Robertson was duly elected to fill, the recognition of Mr. Smith by a majority of the senate as its lawful presiding officer, and the recognition of the senate as a lawfully-organized body by the other house as well as by all its own members who remained and took part in its legislative proceedings, and by the executive department, require us to consider it as the lawful senate, lawfully organized so far as to be entitled to take part in the joint convention which elected a Senator of the United States.

We also think that the judgment of the senate of Indiana as to the title of Messrs. Branahan and McDonald, the two members in question, to their seats is binding upon the Senate of the United States. This body is made by the Constitution the judge of the elections, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceeding of the electors. But who sustain the character of electors is to be determined by the legislative body of the State. We can not inquire into the motive which controlled its judgment. In rendering that judgment, whether it shall give a hearing to parties, permit debate, examine witnesses, act upon evidence or without evidence, are matters within its own discretion. If that discretion were exercised in the manner charged by the remonstrants, a majority of the committee think that a great public crime was committed, for which the offenders are responsible to the people of Indiana. But we can not try the question.

A majority of the committee do not mean to be understood as now committing ourselves to an opinion upon the question whether the Senate can not refuse to admit to a seat a claimant who owes his election to a legislative body which is itself the result of fraud or crime, which has overcome the true will of the people, even if it have possessed itself of legislative authority, and of the technical evidence of a rightful character, or whether the judgments of such a body as to the title to seats of its individual members are entitled to any respect whatever. If that question shall hereafter unhappily arise it will be dealt with on its own merits. The committee ask to be discharged from the further consideration of the several memorials.

[Fiftieth Congress—First session.]

DANIEL B. LUCAS *vs.* CHARLES J. FAULKNER,

of West Virginia.

December 5, 1887, papers purporting to be the credentials of Daniel B. Lucas, appointed a Senator by the governor of West Virginia, and of Charles J. Faulkner, elected Senator by the legislature of West Virginia, in special session, and also the protest of Mr. Lucas against the administration of the oath to Mr. Faulkner, were presented to the Senate. Objection was made to the admission of the oath to Mr. Faulkner, and the question of his admission was postponed. December 12 the matter was referred to the Committee on Privileges and Elections, which reported on the 14th.

The committee found the following facts: The legislature of West Virginia, whose duty it was to elect a Senator for the term beginning March 4, 1887, adjourned without making a choice. The governor was by the State constitution empowered to convene the legislature in special session to transact business mentioned in the call, and no other. March 5 the governor appointed Mr. Lucas in the recess of the legislature, and on the same day issued his proclamation convening the legislature in special session to consider and act upon eight subjects named in the call, no one of which was the election of a United States Senator. The legislature met and duly elected Mr. Faulkner, if it had power to do so. The committee held that the constitution required the legislature to fill the vacancy at its next meeting; that the body convened by the governor's proclamation was the "legislature," and this its next meeting, and that the prohibition of the State constitution must be taken to apply to business transacted under that constitution and not to "duties imposed upon [the legislature] by the supreme authority of the Constitution of the United States." The committee further held that the fact that Mr. Faulkner held a judicial office at the time of his election, and that the State constitution made him, "during his continuance therein, ineligible to any political office," did not invalidate his election, because "no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States." The committee therefore reported that Mr. Faulkner was entitled to the seat. The resolution reported by the committee was agreed to on the same day, the 14th, and Mr. Faulkner appeared, took the oath of office, and took his seat in the Senate. December 20 Mr Faulkner offered a resolution for the compensation of Mr. Lucas for all expenses, etc., as contestant, which was referred to the Committee on Privileges and Elections. That committee reported on the 12th of January, 1888, a resolution to pay Mr. Lucas $1,000 in full of all claims. This resolution was referred to the Committee to Audit and Control Contingent Expenses, which reported it without amendment on the 25th, and on the same day it was agreed to by the Senate.

The history of the case here given consists of a transcript of the Journal of the Senate (1st sess. 50th Cong.) relating to this subject and the report of the committee.

MONDAY, *December* 5, 1887.

The President *pro tempore* laid before the Senate the credentials of Daniel B. Lucas, appointed a Senator by the governor of the State of West Virginia to fill the vacancy occasioned by the expiration of the term of Johnson M. Camden, March 4, 1887, the legislature of said State having adjourned *sine die* without having chosen a Senator to fill said vacancy as prescribed by law; which were read.

The President *pro tempore* laid before the Senate the credentials of Charles J. Faulkner, elected a Senator by the legislature of West Virginia, in special session, for the term of six years, commencing March 4, 1887; which were read.

* * * * * * *

The President *pro tempore* laid before the Senate a protest of Daniel B. Lucas against the administration of the oath to Charles J. Faulkner, claiming to be elected Senator from the State of West Virginia.

Ordered, That it lie on the table.

[A copy of the credentials of Mr. Faulkner, which embody the proclamation of the governor convening the legislature in special session and a transcript of the proceedings of the legislature in relation to the election, are printed on pp. *1 to 3 Cong. Record, 1st sess. 50th Cong.* The protest of Mr. Lucas may be found *ibid.*, p. 3, as well as Mr. Faulkner's resignation of the office of judge of the thirteenth judicial circuit.]

Mr. Charles J. Faulkner, whose credentials were this day presented, having appeared,

Mr. Hoar objected to the administration of the oath to him at present; and

The question of his admission was postponed to to-morrow.

MONDAY, *December* 12, 1887.

On motion by Mr. Hoar,

Ordered, That the credentials of Mr. Faulkner as a Senator from the State of West Virginia, the memorial of Mr. Lucas, and all other papers on the files of the Senate relating to the title to the seat from the State of West Virginia, be referred to the Committee on Privileges and Elections.

WEDNESDAY, *December* 14, 1892.

Mr. Hoar, from the Committee on Privileges and Elections, to whom were referred the credentials of Charles J. Faulkner, the credentials of Daniel B. Lucas, and the protest of Daniel B. Lucas against administering the oath to Charles J. Faulkner as Senator from the State of West Virginia, submitted a report (No. 1), accompanied by the following resolutions; which were considered by unanimous consent, and agreed to:

Resolved, That Daniel B. Lucas is not entitled to a seat in the Senate from the State of West Virginia.

Resolved, That Charles J. Faulkner has been duly elected Senator from the State of West Virginia for six years, commencing on the 4th day of March, 1887, and that he is entitled to a seat in the Senate as such Senator.

Mr. Faulkner appeared, and the oath prescribed by law having been administered to him by the President *pro tempore*, he took his seat in the Senate.

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Hoar (chairman), Frye, Teller, Evarts, Spooner, Saulsbury, Vance, Pugh, Eustis.]

IN THE SENATE OF THE UNITED STATES.

DECEMBER 14, 1887.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, to whom were referred the credentials of Charles J. Faulkner, the credentials of Daniel B. Lucas, and the protest of Daniel B. Lucas against administering the oath to Charles J. Faulkner as Senator from the State of West Virginia, submitted the following report:

The Constitution of the United States, Article I, section 3, provides:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; * * * if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

"SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The Revised Statutes of the United States, Title II, section 14, provide:

"The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress."

Section 15 prescribes the manner of such election. Section 16 is as follows:

"Whenever, on the meeting of the legislature of any State, a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after the meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term."

The Constitution further provides, Article I, section 5:

"Each house shall be the judge of the elections, returns, and qualifications of its own members."

Of course the opinion of any other tribunal can have no weigh as an authority in determining any question as to the validity of the election of a Senator. But it may be proper to note that the constitutional authority of Congress to prescribe the time and manner of electing Senators, although it may not exhaust the whole subject, but still leaves in force the regulations of a State, in regard to the same subject, not in conflict with its own, is expressly affirmed by the Supreme Court of the United States in *Ex parte* Seibold, 100 U. S., 371.

The constitution of West Virginia provides that—

"The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the governor. The first session of the legislature, after the adoption of this constitution, shall commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter on the same day. (Article VI, section 7.)"

Article VII, section 7, is as follows:

"The governor may, on extraordinary occasions, convene, at his own instance, the

legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together."

The term of Mr. Camden as a Senator from West Virginia expired on the 4th day of March, 1887. The regular biennial session of the legislature began on the second Wednesday of January in pursuance of the provisions of the constitution cited.

At that session the legislature proceeded to ballot for a successor to Mr. Camden, but no person obtained a majority of the ballots and it adjourned without making a choice. Thereafter, on the 5th day of March, the governor appointed Mr. Lucas, in the recess of the legislature, and issued to him a certificate declaring his appointment as Senator in the Senate of the United States "until the next meeting of the legislature having authority to fill such vacancy." Mr. Lucas accepted the appointment.

On the same 5th day of March the governor issued the following proclamation:

"PROCLAMATION.

"STATE OF WEST VIRGINIA,
"EXECUTIVE DEPARTMENT,
"*Charleston, March 5, 1887.*

"I, E. W. Wilson, governor of the State of West Virginia, under and by virtue of section 7 of article VII of the constitution of said State, which provides that—

"'The governor may, on extraordinary occasions, convene, at his own instance, the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together'—

"Do issue this, my proclamation, to convene the legislature of said State, at the seat of government, at Charleston, on the third Wednesday in April, A. D. 1887, to consider and act upon the following subjects of legislative business, to wit:

"I. To make appropriations of public money to pay general charges upon the treasury.

"II. To make appropriations of public money to pay members of the legislature, and for salaries of the officers of the government, in pursuance of the forty-second section of the sixth article of the constitution.

"To protect the public treasury against unnecessary expenditures by—

"1. Regulating the costs, charges, and proceedings in criminal cases before justices of the peace and circuit courts.

"2. Providing for and limiting the allowances for the maintenance of lunatics in jail.

"IV. To carry into effect section nine of article XI of the constitution, which provides that—

"'Railroads heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law, and the legislature shall, from time to time, pass laws applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freights and passenger tariffs, and the protection of the just rights of the public, and shall enforce such laws by adequate penalties.'

"And to provide for securing such relief to the people of this State as may be had from the act recently passed by Congress entitled 'An act to regulate commerce.'

"V. To prohibit railroad companies from carrying or conveying public officers over their roads free of charge, or at a less charge than the usual rate for other persons, and to abolish, absolutely, the free-pass system.

"VI. To prohibit railroad companies from carrying or conveying delegates to political conventions over their roads free of charge, or at a less charge than is made for all other such delegates to such conventions, and to define what shall constitute a political convention.

"VII. To prohibit the use of money and all other improper, fraudulent, and corrupt means to secure nominations, by political parties, or election to public office.

"VIII. To provide for the acceptance and confirmation of the reports of the joint boundary commission on the boundary lines between West Virginia and Pennsylvania."

The legislature met in special session, pursuant to said call, and duly elected Mr. Faulkner to fill the existing vacancy in the Senate of the United States, if it had authority so to do.

The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any State are void and of no effect unless they can be so construed as not to conflict with its provisions.

The Constitution of the United States expressly provides that the vacancy which

happens during the recess of the legislature of any State shall be filled by the legislature at its next meeting. The statute of the United States merely prescribes the time and manner in which, at such meeting, the constitutional mandate shall be obeyed. The only question, therefore, which can possibly arise, is whether the body which sat in pursuance of the call of the governor was a legislature in the constitutional sense.

It is claimed by Mr. Lucas, that, as this body was not permitted to enter upon any legislative business, except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi executive function, something like that which is exercised by the Senate in giving its assent to the nominations of public officers.

But it seems to us that this view can not be supported. In the first place, the body is expressly declared by the constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. Among them, under Articles I and II, is the making appropriations of public money; under Article III, the regulating of procedure in criminal cases; under Articles V, VI, and VII would exist the power to declare certain high crimes and misdemeanors; and under Article VIII, to give the assent of the State to the establishment and confirmation of its boundary lines.

It is difficult to conceive of any definition of the word "legislature" which would not include a body capable of passing and actually passing such enactments as these. They can be binding on the people of the Commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

But it seems to the committee that the construction of the State constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions "should enter upon no business except that stated in the proclamation by which it was called together," the people must be presumed to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

We can not see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

We are therefore clearly of opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid.

It is insisted that Mr. Faulkner was ineligible to the office of Senator by reason of the provision of the constitution of West Virginia:

"No judge during his term of office shall practice the profession of law or hold any other office, appointment, or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office. *Nor shall he, during his continuance therein, be eligible to any political office.* (Article VIII, section 16.)"

But we are of opinion that no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States. (See the debates on the case of Mr. Trumbull, *supra* p. 148.)

This provision, according to the settled rule of construction, must be so construed as to attribute to it a meaning not inconsistent with the constitution of West Virginia. This can well and properly be done by holding it to mean "eligible to office under the constitution of West Virginia."

We therefore find that Mr. Faulkner has been constitutionally elected to the seat in the Senate made vacant by the expiration of the term of Mr. Camden and that he is entitled to take the oath.

We report the following resolutions:

Resolved, That Daniel B. Lucas is not entitled to a seat in the Senate from the State of West Virginia.

Resolved, That Charles J. Faulkner has been duly elected Senator from the State of West Virginia for the term of six years, commencing on the 4th day of March, 1887, and that he is entitled to a seat in the Senate as such Senator.

EXPENSES OF MR. LUCAS.

TUESDAY, *December* 20, 1887.

Mr. Faulkner submitted the following resolution, which was referred to the Committee on Privileges and Elections:

Resolved, That the sum of dollars be paid out of the contingent fund of the United States Senate to D. B. Lucas in full of all expenses, etc., incurred by him as a contestant for a seat in the Senate as a Senator from the State of West Virginia.

THURSDAY, *January* 12, 1888.

Mr. Hoar, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

Resolved, That there be paid to Daniel B. Lucas, of West Virginia, out of the contingent fund of the Senate, as compensation for expenses incurred in contesting the seat of Hon. Charles J. Faulkner in the United States Senate, $1,000, the same to be in full for all claims for such expenses, and also for any claim for salary as Senator.

WEDNESDAY, *January* 25, 1888.

Mr. Jones, of Nevada, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted by Mr. Hoar on the 12th instant, to pay Daniel B. Lucas $1,000 for expenses incurred by him in contesting for a seat in the Senate, reported it without amendment.

The Senate proceeded, by unanimous consent, to consider the said resolution; and

Resolved, That the Senate agree thereto.

[Fifty-first Congress—First session.]

CLARK AND MAGINNIS vs. SANDERS and POWER,

of Montana.

January 16, 1890, papers purporting to be the credentials of Messrs. Sanders and Power as Senators from the State of Montana, were presented and referred to the Committee on Privileges and Elections. January 23, papers purporting to be the credentials of Messrs. Clark and Maginnis were also presented, and were referred to the same committee. March 24 the committee reported and on the next day the views of the minority were submitteed. The reports agree in finding the facts to be as follows: Messrs. Sanders and Power were elected by a joint assembly composed of one-half of the senate of Montana and a body calling itself the house of representatives made up of twenty-five persons of whose right to sit and act in the house there was no question, and five persons claiming the right to sit and act as members from the county of Silver Bow. Messrs. Clark and Maginnis were elected by a joint assembly composed of one-half of the senate, and a body claiming to be the house of representatives and made up of twenty-four persons whose title to seats was undisputed, and five persons claiming to be members from Silver Bow County.

The question which of these two bodies was the lawful house depended upon the question which of the two delegations of five members from the county of Silver Bow was entitled to sit in the house of representatives until their title was adjudicated by the house. The decision as to which delegation was so entitled to sit depended upon the question who was lawfully entitled to give credentials to the representatives elect, and the decision of the body entitled to give the credentials depended upon the question whether the vote of precinct 34 of Silver Bow County should be admitted or rejected. The majority of the committee held that, under the law applicable to this election, it was the duty of the State canvassing board to receive the returns, declare the result, and give the credentials in accordance with such declaration, and that as that board had given the lawful certificates of election to the first-named five persons, they were lawfully entitled to take part in the organization of the house and to sit until the house adjudicated the title to their seats and to take part in its proceedings and in the joint convention for the election of Senators of the United States.

The minority of the committee contended that the county commissioners were the proper canvassing board, the clerk of the county the proper authority to issue certificates of election, and that, as the county commissioners had counted the vote of precinct 34, under mandamus from the district court of the Territory, and the clerk of the county had issued certificates accordingly to the second five persons above mentioned as claiming to represent Silver Bow, the body in which they sat, was the lawful joint assembly of the senate and house of representatives of Montana, and Messrs. Clark and Maginnis the lawfully elected Senators from that State. The minority further contended that in any event the powers of the State or county canvassing board were merely ministerial, and that, therefore, the vote of precinct 34 must be counted and the persons certified by county clerk accepted as members of the house until the house itself had passed on their title.

April 16 the case was decided in accordance with the majority report and Messrs. Sanders and Power were seated.

The history of the case here given consists of a transcript of the Journal of the Senate, 1st sess., 51st Cong., in relation to it and the reports of the committees from Sen. Rep No. 538, 1st sess., 51st Cong.

The provisions of the constitution of Montana and of the acts of Congress and of the Territory upon which the decision depended appear in the report of the committee below.

THURSDAY, *January* 16, 1890.

Mr. Teller presented a paper purporting to be the credentials of Wilbur F. Sanders, chosen a Senator by the legislature of Montana, and also a paper purporting to be the credentials of Thomas C. Power, chosen a Senator by the legislature of the same State; which were read and referred to the Committee on Privileges and Elections.

THURSDAY, *January* 23, 1890.

Mr. Vest presented a paper purporting to be the credentials of William A. Clark, and also a paper purporting to be the credentials of Martin Maginnis, elected Senators by the legislature of the State of Montana; which were read and referred to the Committee on Privileges and Elections.

On motion by Mr. Vest, and by unanimous consent,

Ordered, That pending the settlement of the contested-election cases of Senators from the State of Montana, Messrs. Wilbur F. Sanders, Thomas E. Power, William A. Clark, and Martin Maginnis be admitted to the privileges of the floor of the Senate

[The motion was agreed to without objection and without discussion.]

MONDAY, *March* 24, 1890.

Mr. Hoar, from the Committee on Privileges and Elections, to whom were referred the papers purporting to be credentials of Wilbur F. Sanders, Thomas C. Power, William A. Clark, and Martin Maginnis, severally claiming seats in the Senate from

the State of Montana, submitted a report (No. 538) accompanied by the following resolutions:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Martin Maginnis is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Wilbur F. Sanders is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Thomas C. Power is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Mr. Gray asked and obtained leave to submit at some future day the views of a minority of the Committee on Privileges and Elections on the foregoing cases.

TUESDAY, *March* 25, 1890.

Mr. Gray, in pursuance of leave granted, submitted the views of the minority of the Committee on Privileges and Elections on the contested seats in the Senate from the State of Montana, accompanied by the following resolutions intended to be proposed as amendments to the resolutions reported by the committee; which were ordered to be printed, to accompany the report No. 538:

Resolved, That William A. Clark is entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Martin Maginnis is entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Wilbur F. Sanders is not entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Thomas C. Power is not entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

FRIDAY, *March 28, 1890.*

On motion by Mr. Hoar,

Ordered, That 1,500 additional copies of the reports of the majority and minority of the Committee on Privileges and Elections in the Montana contested-election case be printed for the use of the Senate.

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Hoar (chairman), Frye, Teller, Evarts, Spooner, Vance, Pugh, Gray, Turpie.]

IN THE SENATE OF THE UNITED STATES.

MARCH 24, 1890.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred sundry documents purporting to be, respectively, the credentials of Messrs. Wilbur F. Sanders, Thomas C. Power, William A. Clark, and Martin Maginnis, each claiming to be entitled to a seat in the Senate from the State of Montana, have considered the same and respectfully report:

No distinction exists between the cases of Messrs. Sanders and Power, and no distinction exists between the cases of Messrs. Clark and Maginnis. The cases on each side have been presented and argued upon the merits of the title, and not merely upon the question presented by the certificate of the governor or of the secretary of the State. The committee, therefore, have considered and report upon the whole case upon its merits.

The claimants on both sides seem to be agreed that a lawful joint convention was held in Montana by the members of the two houses of the legislature, and elected Senators by due proceedings. The dispute is which of two bodies claiming to be the lawfully-organized house of representatives of Montana was entitled to that character.

There was no election of Senator by concurrent vote on the Tuesday appointed for that purpose by the statute of the United States (Rev. Stat., sections 14, 15). On the following day one-half the members of the senate met in joint assembly with a body which had assembled and organized in a room called the Iron Hall, which body was known as the Iron Hall or Republican house, whereupon, a ballot for Senator being had, Mr. Sanders had a majority of all the votes cast, and was declared duly elected. No other person having such majority, the convention was adjourned until the day following, when, a ballot for Senator being held, Mr. Power had a

majority of all the votes cast and was declared duly elected. If this body were the lawful house of representatives of Montana, these two gentlemen were duly chosen Senators.

On the same day the other half of the members of the senate met in joint assembly with a body which had assembled and organized in the court-house, which body was known as the court-house or Democratic house, voted for Senators by separate ballotings, adjourned from day to day, and continued balloting until Messrs. Clark and Maginnis had a majority of all the votes cast and were declared duly elected. If this body were the lawful house of representatives of Montana these two gentlemen were duly chosen Senators.

These two bodies were composed as follows: By the constitution of Montana the house of representatives consists of fifty-five members, of whom twenty-eight are a quorum. Twenty-five persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five persons claiming to be entitled to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the Iron Hall, at the time fixed by the constitution for the meeting of the legislature, and organized there. The auditor, who is required by the constitution to preside at the organization of the house, called them to order and presided till a speaker was chosen. Twenty-four other persons of whose title to sit in the house of representatives and take part in its proceedings no question is made, together with five other persons claiming to be entitled so to sit and take part as representatives from the county of Silver Bow, met, as above stated, at the court-house, at the time fixed by the constitution for the meeting of the legislature, and organized there.

The whole case, therefore turns upon the question which of these two sets of five persons was entitled to sit in the house of representatives from the county of Silver Bow, take part in the organization and other proceedings down to and including the time of the election of Senators. It is not claimed that there was any adjudication of the house itself affirming or denying such title.

To determine this question the committee have been led to consider three others, the decision of which, in our judgment, disposes of the whole case.

First. Which of the two sets or groups of five members claiming to sit for the county of Silver Bow had credentials from the officer or board entitled to canvass the vote and declare the result?

Second. If one group of five had the lawful credentials, but the other group were in fact elected, which was legally entitled to sit in the house at its original organization, and remain and take part in all subsequent proceedings until the house itself had adjudicated their title, there being in existence two bodies each claiming to be the true house?

Third. Is there evidence which warrants the Senate in finding that the persons who had the credentials were not, in fact, duly elected?

There was another view of the case which in the opinion of one or two only of the committee rendered the foregoing questions immaterial. We will refer to it before closing the report. But the foregoing statement presents the whole matter to be inquired into, as understood by the large majority of the committee.

First. Who had the lawful credentials? It appears from the record of the body which met at the Iron Hall that "the roll of the members elected and holding certificates of the State canvassing board was called," and that thirty members answered to their names, including Messrs. A. F. Bray, P. R. Dolman, F. H. Hoffman, J. H. Monteath, and William Thompson, claiming to be members from Silver Bow; that these persons took the oath of office, took part in the organization, and remained members of said body until after the election of Messrs. Sanders and Power, in which they took part. The certificate of the State canvassing board will be found in the appendix, marked A.

It appears from the records of the body which met at the court-house that the roll of the members elected was called and twenty-eight persons, holding certificates of election from the clerks of their respective counties, appeared and answered to their names, including Messrs. Thomas F. Courtney, A. H. Day, A. M. Dusseault, John W. Gilligan, and Joseph Hogan, claiming to be members from Silver Bow; that these persons took the oath of office, took part in the organization, and remained members of said body until after the election of Messrs. Clark and Maginnis, in which they took part. As our decision does not depend upon any question as to the form of the certificate of the county clerk, it is not necessary to annex a copy of his certificate.

The enabling act, which authorized a constitutional convention for Montana, was approved by the President February 22, 1889. It provided (section 24)—

"The constitutional convention may, by ordinance, provide for the election of officers for full State governments, including members of the legislature."

It is also provided (section 8):

"And the constitutional conventions which may assemble in North Dakota, Mon-

tana, and Washington shall provide, in like manner, for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection, at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor, and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a constitution, articles, propositions, and ordinances."

The constitutional convention of Montana passed the following ordinance:

"[Ordinance 2—Elections].

"*Be it ordained by the convention assembled to form a Constitution for the State of Montana:*

"First. That an election shall be held throughout the Territory of Montana on the first Tuesday of October, 1889, for the ratification or rejection of the constitution framed and adopted by this convention.

"Second. At said election the constitution framed and adopted by this convention shall be submitted to the people of the Territory for their ratification or rejection, and all persons who are then qualified under the laws of this Territory shall be qualified to vote for the ratification or rejection thereof.

"Third. Said elections shall be held at the several polling places and precincts throughout the Territory appointed for the holding of elections under the laws of this Territory, and shall be conducted in the manner prescribed by the laws of the Territory regulating elections. The boards of county commissioners of the several counties of the Territory shall appoint judges and clerks of such elections in each of said polling places and precincts in the same manner as is now required by law for the appointment of judges and clerks of general elections in the Territory.

"Fourth. Each elector voting at said election shall have written or printed upon the ticket he may deposit in the ballot box, the words 'For the constitution,' or 'Against the constitution.'

"Fifth. The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner if the returns from all the precincts shall have been received, and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at general elections in said Territory, and the returns of said election shall be made to the secretary of the Territory, who, with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the Territory on or before the thirtieth day after the election and canvass the votes so cast and declare the result.

"Sixth. That on the first Tuesday in October, 1889, there shall be elected by the qualified electors of Montana a governor, a lieutenant-governor, a secretary of state, an attorney-general, a State treasurer, a State auditor, a State superintendent of public instruction, one chief justice and two associate justices of the supreme court, a judge for each of the judicial districts established by this constitution, a clerk of the supreme court, and a clerk of the district court in and for each county of the State, and the members of the legislative assembly provided for in this constitution. The terms of officers so elected shall begin when the State shall be admitted into the Union and shall end on the first Monday in January, 1893, except as otherwise provided.

"Seventh. There shall be elected at the same time one Representative in the Fifty-first Congress of the United States.

"Eighth. The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the Territory and canvassed in the same manner and by the same board as is the vote upon the constitution, except as to clerk of the district court.

"Ninth. There shall also be elected at the same time the following county and township officers: Three county commissioners, one clerk of the board of commissioners and *ex officio* recorder, one sheriff, one county treasurer, one county superintendent of common schools, one county surveyor, one county assessor, one coroner, one public administrator, one county attorney, two justices of the peace, and two constables for each township. The terms of office for the above-named officers shall begin upon the admission of the State and end upon the first Monday in January, A. D. 1893, except as to county treasurer, whose term shall begin on the first Mon-

day in March succeeding his election and end on the first Monday of March, A. D. 1893, and also as to county commissioners, whose terms are otherwise provided for in this constitution.

"Tenth. The votes for the above county and township officers and for clerk of the district court shall be returned and canvassed, and certificates of election to said officers issued as is now provided by law.

"Eleventh. Notice of the election for the adoption or rejection of this constitution, and for State, district, county, and township officers shall be given by the clerks of the several boards of county commissioners, in the same manner as notice of general elections for Delegate to Congress and county officers is required to be given by the existing laws of the Territory.

"Twelfth. That the provisions of this ordinance shall apply only to the election and to the officers elected on the first Tuesday of October, 1889."

The provisions of the general laws of the Territory of Montana in reference to elections will be found in Appendix B, as also the provisions of statute (1889) requiring five judges of elections instead of three.

It will be seen that by the Territorial law there were to be at each precinct three judges of elections; this number afterwards was required to be five by statute of 1889, and two clerks.

As each voter presented himself, his name and number were to be entered on the poll book, his ballot delivered to one of the judges, who, without inspecting it, was to deposit it in the box. When the polls closed, the judges were to canvass the vote, as follows: First, the several poll lists to be compared, and mistakes, if any, corrected, till they were found to agree. Next, the ballot box was to be opened, the ballots counted, and if they were found to exceed the number on the poll lists, they were to be placed again in the box and the excess drawn out. Then the board was to ascertain the whole number of votes cast, and the clerks to set down in their poll books the name of every person voted for, the office for which he received votes, and the number of votes he received. This result being certified by the clerks and attested by the judges, one of the two poll books was to be sent by mail to the clerk of the board of county commissioners.

After the fifteenth day from the election, or sooner if all the returns were received, the chairman of the board of county commissioners was to open the returns and make abstracts of the votes. It was then the duty of the clerk of said board to issue certificates of election to the persons having the highest number of votes for members of the legislature, county and township officers, and to send to the auditor of the Territory a copy of such abstracts. The marshal and treasurer of the Territory were then to canvass the votes for Delegate to Congress, and the governor to give the person elected his certificate. The constitution provides that—

"All laws enacted by the legislative assemby of the Territory of Montana and in force at the time the State shall be admitted into the Union, and not inconsistent with this constitution or the Constitution or laws of the United States of America, shall be and remain in full force till altered or repealed."

We are then to see whether the Territorial law providing that the county board shall make abstracts of the results and the county clerk issue certificates of election in the case of representatives was still in force, or superseded by the provisions of the ordinance in respect to the election in question.

Article 5 of such ordinance is as follows:

"Fifth. The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner if the returns from all of the precincts shall have been received and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at general elections in said Territory, and the returns of said election shall be made to the secretary of the Territory, who with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the Territory on or before the thirtieth day after the election, and canvass the votes so cast and declare the result."

The sixth article of the ordinance enumerates all of the State officers and fixes the time of their election. Within this list is included representatives, and clerks of district courts, who, though chosen for each county, are officers of a court whose jurisdiction extends over several counties.

The seventh article fixes the same time for the election of Representatives in Congress.

The eighth article then provides that the votes for the above officers, except clerks of the district courts, shall be returned and canvassed as is provided by law; that returns shall then be made to the secretary of the Territory, "and canvassed in the same manner and by the same board as is the vote upon the constitution, except as to clerk of the district court."

The ninth article provides for the election of county and township officers.

The tenth declares that the votes for these officers and the clerk of the district court shall be returned and canvassed, and certificates of election to said officers issued as is now provided by law.

Here is an explicit enumeration, first, of the officers, votes for whom are to be canvassed by the same board as the votes on the constitution in which representatives are included, and an explicit enumeration of the officers, votes for whom are to be returned to and canvassed by the county board, and to whom certificates are to be issued by the county clerk, from which the representatives are excluded.

It seems to us that this is an express enactment that the votes for representatives are to be canvassed by the State board and a clear implication that they are to declare and certify the result. It could not have been intended that the returns should be made to the State board by a tribunal who had already ascertained and declared the result, and given an official certificate which should clothe the person found elected with the title to the seat feasible only by the judgment of the house itself, and that the State board should be required thereafter to make a new canvass, the result of which they had no authority to declare or certify, and which could serve no lawful purpose whatever. It is suggested that there is no express direction in the ordinance that the State board shall ascertain or certify the result, but we think this is included in the duty to make the final canvass.

The provisions of the Territorial law, so far as they might otherwise have been applicable, are repealed by the ordinance which makes an entire provision for the whole subject.

It is further suggested that effect may be given to all the language of the ordinance, by supposing that the Territorial board are required to canvass and ascertain the result, but that the county clerk is still to give the certificate of the result. But this officer is the officer of another and inferior tribunal. The State board has no authority over him. He has no custody of their records, and, unless by implication, no right of access to them. His duties are performed at a distance from the place where those records are kept, in some cases, we are told, a distance of more than 400 miles, a distance which the clerk must travel to get at these records without compensation for his service or his expense. He is "immediately" to forward the returns to the State board. The board whose action he has so certified will before that have performed its entire duty and become *functus officio*.

But further, and more decisive. The State officers mentioned in section 6, except representatives, are officers whose election was not provided for in the Territorial election law at all. Some of them did not exist in the Territory. The others were appointed by the President or governor. Now, if the claim under discussion be sound, there is no provision in the ordinance whatever for declaring the result and giving certificates in the case of these officers. The old law did not apply to them, for they did not then exist. The ordinance does not apply to them unless the final canvass, which is to be made by the State board, involves ascertaining and certifying the result. If it involve this in their case it involves it in the case of the representatives, who are comprehended with them in the same provision. How can it be said that when articles 6 and 8 of the ordinance enact that the returns for members of the legislative assembly "shall be canvassed in the same manner and by the same board as the vote upon the constitution," it means one thing as to one branch of that assembly, the senate, a body then provided for the first time, and another thing as to the house of representatives?

We hold, then, that Mr. Bray and his four associates who went to the Iron Hall with the certificate of the State board that they were duly elected from Silver Bow, had the lawful credentials. By the universal law governing the organization of parliamentary bodies, these persons were clothed with the right to sit in the house, and perform all the functions of membership, until it had passed its own judgment upon their title. And this is conceded to be the general rule. But it is said, that this rule does not apply to the case of a contest between two bodies which is the rightful house, and the quorum in one is made up partly of persons who have lawful credentials, and the quorum in the other is made up partly of persons who have no credentials but were really elected. This raises the question:

Second. Does the rule hold when there are two rival bodies, each claiming to be the true house, one made up of a number less than a quorum, of persons unquestionably elected, with the addition of enough who have proper certificates, but are found by the senate not to have been elected, to make with them a quorum, the other made up of a number less than a quorum of persons unquestionably elected, with the addition of enough who have no certificates, but are found by the senate to have been elected to make with them a quorum?

It will hereafter appear that it is unnecessary to decide this question for the purposes of the present case. We believe, for reasons hereafter stated, that the certificates of the State board declared the true will and choice of the people, as expressed by a majority of the votes actually and lawfully cast. But, as the matter has been discussed, it is proper to say that we are unable to see any distinction in principle

between the case of a person claiming title to a seat in an assembly whose character is disputed by some other body, and in an assembly whose character is undisputed. The majority of persons having a right to seats in the house of representatives have a right to organize that house and to transact all its lawful business, including the enactment of laws and the election of Senators. Persons who have the certificates of election have such right to seats. Every act of the assembly in which they take part, and to which their consent is necessary, has as absolute validity as if their title had been affirmed by an adjudication of the house itself. Their title is not, as is sometimes carelessly said, a prima facie title. It is an absolute title, continuing until the house itself has adjudicated that some other person be admitted to their place. This adjudication is only operative for the future, and has no retroactive effect whatever. When the house makes the inquiry on the merits, it may treat the credentials as prima facia evidence upon that question. But until the house tries the case, the credential is conclusive as to all the world.

If this be true, how can an attempted usurpation by another body of the functions of the house, to which they belong, in the least affect their right? If four certified members had come over from the court-house to the Iron Hall, according to this argument, these men, who had no title to their seats before, would at once become entitled to them. If the men who went to the court-house had never gone there or made any claim to the seats, in that case, according to this theory, the five certified members from Silver Bow would have been all right. It seems to us impossible to believe that the right of these gentlemen to sit and vote, the validity of any laws they might have helped to enact, or of the choice of any officer they might help to elect, should depend on the acts of other persons.

This question may be raised at the beginning of any session of Congress. If the certificate of the proper officer of the State give no title, surely the act of the clerk in placing the claimant's name on a roll can give none. It would be competent, if the claim we are dealing with be sound, to organize the House of Representatives of the United States with a quorum partly made up of persons having credentials and partly of persons having none, and thereby put upon the Senate, when called upon to determine whether it will recognize such a body, the necessity of going into evidence of what occurred at the popular elections and of trying the right of the members of the House to their seats. The President must make for himself a like inquiry, and perhaps the courts a third. It might be that these bodies would come to different conclusions upon the voluminous and conflicting evidence in a contested election case, and thus the whole Government would be thrown into confusion. We suppose that there has been more than one occasion in recent years when a majority of the Senate firmly believed that enough of the members of the House who held credentials were not duly elected to change the political majority. If this doctrine be accepted, the party in the minority in the House may at any time associate with themselves persons enough claiming to have been chosen to make a quorum, and disregard the certificates of the executives of the States and the Clerk's roll. The Senate may then take evidence of what occurred at the polls, thereby determine who were lawfully elected, recognize the body so organized, and thereby give the persons it finds so elected the seats to which neither credentials nor judgment of the House have ever given a title.

The report in Sykes *v.* Spencer, decided by the Senate in 1873, is relied upon as supporting an opinion contrary to that which we have stated. If so, we dissent from it. But it is to be remarked that in that case, which was upon an election held less than seven years after the close of the war, the doctrine of the report is not relied upon in the debate. It is further to be observed that that case is to be distinguished from this by the fact that there it was conceded that the persons who had not certificates were duly elected. The distinction from the general rule is expressly put by Mr. Carpenter, in his report, upon this concession. When the fact there conceded is, as in the present case, disputed, and to be proved, we think there are but two ways in which it can be proved to the Senate. One is the possession of lawful credentials. The other is the judgment of the House itself, not only the final, but the sole judge of the elections, qualifications, and returns of its members.

But we think the credentials of the five Republican members from Silver Bow are fully supported by the facts of the election as they are disclosed to us by the admissions of both sides, and by the undisputed and uncontrolled evidence taken in judicial proceedings in Montana and laid before us by Messrs. Clark and Maginnis.

The whole inquiry turns upon the honesty and fairness of the election at precinct No. 34 in the county of Silver Bow. If the vote of that precinct be rejected, the five Republicans were chosen. If it be counted, the five Democrats were chosen.

This precinct was a camp on the line of a railroad in process of construction, known as the Butte and Gallatin Railroad.

The returns of the precinct officers were required by the fifth article of the ordinance to be canvassed by the canvassing boards in the respective counties not later than fifteen days after the election, and their returns to be made immediately to the

State board, who were required to meet and canvass them on or before the thirtieth day after the election.

What purported to be returns from precinct 34 were, on the 11th of October, 1889, forwarded to the county board of Silver Bow, who excluded said returns for the alleged reason that all the votes therein reported as there cast and counted were false, fraudulent, and void. They originally made a table of the votes of the county of Silver Bow, including the precinct 34. During the progress of their canvass objections were made, on the ground of alleged fraud and irregularity, to the reception and counting of the returns of the votes cast at various precincts, including precinct 34. On the following day, after the table had been completed, the board met to hear arguments from opposing counsel upon the exceptions taken during the progress of the canvass. After consideration of the evidence and arguments the board decided by a majority vote, 14th October, to sustain the objections to receiving the vote of precinct 34, and directed the clerk to draw a line through the vote of that precinct upon the abstract sheet, which was done.

At once an alternative writ of mandamus issued from the district court of the second judicial district, directing the county canvassers to count the votes of precinct 34 and issue certificates to the persons who appeared to be elected, or show cause why they should not. November 7 a peremptory mandamus issued from said court, directing them to count said precinct, to which exceptions were saved. The court consisted of a single judge, who put his decision on the ground that the county commissioners had no authority but to tabulate the documents sent them as returns, declare the result, and issue certificates accordingly.

Meantime, the 31st of October, the State canvassing board, having received no certified returns from Silver Bow, sent a messenger to demand of the county clerk a properly certified copy of the abstract of the votes cast at said election as canvassed by the county canvassing board. This the clerk refused to give. But he gave them a statement dated October 31, 1889, signed by him, with the seal of the county, stating the number of votes cast at the different precincts, including No. 34, the decision of the county board to strike out that precinct, and the pendency of the proceedings in court. They took this statement into consideration, declared the result, and issued their certificate, which appears in Appendix A.*

We think that in this respect the State board did their duty as required by law, but we also think that the election held at precinct 34 was in fact irregular, illegal, and fraudulent, and that this appears from the records and from the undisputed facts furnished us by Messrs. Clark and Maginnis.

Some of the irregularities would not alone have warranted the house of representatives of Montana, when exercising its jurisdiction to judge of the election of its members, to set aside the real will of the duly qualified voters. But the whole history shows that the proceeding at precinct 34 had no relation whatever to the real will of duly qualified voters, but was fictitious, pretended, and without validity either in form or substance.

The statute required five judges of the election; there were but three. The statute required the clerks to perform certain important duties, deemed essential to secure the integrity of the election; among these were to keep the poll lists, enter upon them the name and number of each voter as he voted, and compare them when the voting was over and before the ballot box is opened. One of the clerks did not perform these duties at all. Only part of them, if any, were performed by the other. But they were performed in the clerks' stead by one of the judges.

The statute required that, as each voter cast his ballot, his name and number should be entered on the poll books, of which there are two. At the close of the poll these lists are to be compared with each other. If there be a mistake in either it is to be corrected and the books made to agree. When that is done the ballot box is to be opened and the ballots counted. If the number of ballots exceed the number of voters entered on the poll lists, one of the judges is to draw out ballots enough to remove the excess. The names of persons voted for and the number cast for each are then to be ascertained. One of the poll books is then to be forwarded to the county board and the other preserved with the ballots by one of the judges designated for that purpose, to be inspected by any person who desires. This preserves a record not only of the persons voting, but of the order in which they voted, so that any false or fraudulent voter can be identified by the persons who preceded and followed him, and better remembered by election officers and bystanders. Now, from the copy of the poll list furnished us the miraculous circumstance is disclosed that the 174 voters of precinct 34 voted in alphabetical order. The names on the poll list proceed regularly from A to Z, except that the election officers head the list. There are five election officers. No. 6 is John A. Anderson, and No. 174 is Robert Youngberg. The intermediate names, though numbered in regular progression, follow each other alphabetically. This seems to us conclusive evidence that the whole proceeding was manufactured.

* The appendices are to be found in Sen. Rep. No. 538, 1st sess. 51st Cong.

It is suggested that this document, though it shows that the law was not complied with, does not necessarily indicate a fraudulent return; that the election officers may have copied these names in advance from the registration, where they are entered alphabetically; and that this would only show a failure to understand the law. But if this were true the election officers would appear in their places in the list, and would not be found at the beginning. But the decisive answer to this suggestion is, that there were 182 persons on the registration and but 174 votes. If the suggestion were true, the names of those persons registered who did not vote would appear in their places on the list. They do not so appear, and there is not even a space where they should come in. In the registry, of which there is a copy, the Christian name follows the surname. In the poll list the Christian names come first. In some names in the registry the initial only of the Christian name is given, while in the same name in the poll list the Christian name is given in full. In other cases this is exactly reversed. The names are different in some cases where the same name is meant, *e. g.*, Bonison in the registry is Borjesson in the poll list. These instances of variation between the two, either in the Christian name or surname, are quite numerous. So that it seems clear that the poll list is not a transcript or copy of the registration.

We have also the extremely suspicious and unusual circumstance that while there were twenty-five different officers voted for, and also a vote for or against the constitution, every one of the 174 persons voted for every one of the officers and for or against the constitution.

We have the further remarkable and suspicious circumstance that while the proposed constitution was supported by both parties in Montana, the vote against the constitution was the same, within one, as the Republican vote on the officers, where the vote was on party lines.

It is also singular, and to us incredible, that while there were in the county of Silver Bow about 7,000 votes so evenly divided between the two political parties, that in the case of every one of the candidates a change of less than 80 votes would have changed the majority from one side to the other, the voters of this new community at precinct 34, who must have assembled from various parts of the country, whose names as they appear upon the poll list indicate their descent from various nationalities, should have divided, in any fair election, between the two political parties, in the proportion of 171 to 3.

Further, the statute requires the canvass to be public. Section 1027 is as follows:

"As soon as the polls of the election shall be finally closed, the judges shall immediately proceed to canvass the vote given at such election, and the canvass shall be public, and shall continue until completed."

An application was made to the district court for the second judicial district of Montana to test the title to the office of sheriff of the county of Silver Bow, which title depends on precisely the same facts as the election of representatives. The findings of the judge and the evidence before him are submitted to us by Messrs. Clark and Maginnis. It appears that from these findings that the election at 34 was held in a tent; that the officers adjourned for the canvass to a one-room house near by; that "at times" during the canvass the door of this room was locked; "that during a large part of the time no count was being made, some of the judges having gone to supper, and at the other times it was kept closed and locked to prevent drunken and semidrunken and boisterous individuals, who were searching for liquor, from obtrusively entering." There were two windows in this room. One had a shade or cover over it. The lower sash of the other was covered with paper. Persons could readily look into the latter, by looking through the upper sash, which was uncovered. This had been the condition of the windows for a good while before the election.

This was not, in our judgment, a public canvass within the meaning of the law.

There is another matter which, if it were alone to decide the case, would require further examination and, perhaps, the taking of further testimony, but which, as it is left on the finding of the judge of the second district and the evidence which accompanies it, is fatal to the claim of Democratic claimants to the disputed seats for Silver Bow. If the 171 votes from No. 34, Silver Bow, be counted for these claimants, and 3 votes from Silver Bow be counted for their competitors, the former would have majorities, comparing in each case the highest Democrat with the lowest Republican, respectively, of 120, 95, 83, 70, and 11. So that to subtract these numbers from the vote of each would defeat them all. But it seems by the judge's report, and the evidence therewith submitted, that 48 unnaturalized aliens voted at No. 34, Silver Bow, and that 126 such persons voted at precinct 26. At said latter precinct the Democratic candidates for representative received about 135 votes and the Republican received about 32 votes, varying slightly in the cases of different candidates, but not enough to affect the result. Now, supposing all the Republican votes to have been cast by unnaturalized persons, there would be left at least 94 votes of that class which were cast for the Democrats at No. 26, in addition to the 45 cast at

No. 34. This makes 139 such Democratic votes in all, or more than enough to change the result in all the disputed cases.

The ordinance, section 6, provides that these officers shall be elected by "the qualified electors" of the Territory. Now, it appears that these voters declared their intention to become citizens of the United States. But it does not appear that they ever took an oath to support the Constitution and Government of the United States. When it was sought to establish their title to vote before the district court, in the above-named case, the former fact was shown, but there was no offer to show the latter. The contestant offered to show that no such oath was taken before the clerk who received their declaration, but the judge excluded the evidence. In fact, we presume nobody seriously believed such an oath was taken. If the case were to turn on this point we might give a further opportunity to show the fact if either party desired it.

The Revised Statutes of the United States, section 1860, is as follows:

"At all subsequent elections, however, in any Territory hereafter organized by Congress, as well as at all elections in Territories already organized, the qualification of voters and of holding office shall be such as may be prescribed by the legislative assembly of each Territory; subject, nevertheless, to the following restrictions on the power of the legislative assembly, namely:

"First, the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath before a competent court of record their intentions to become such, and have taken an oath to support the Constitution and Government of the United States."

The enabling act, Statutes 1889, chapter 180, sections 3, 8, 9, provides:

"SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof are hereby authorized to vote for and choose delegates to form conventions in said proposed States.

"SEC. 8. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October.

"At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances.

"SEC. 9. And the Representatives to the Fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories."

The revised statutes of Montana, passed in 1888, reënacting the provision of the Montana statute of 1883, declares that all male persons of the age of twenty-one years who have declared their intention of becoming citizens, having other prescribed qualifications as to residence, etc., shall be entitled to vote. The constitution of Montana provides that no person but citizens of the United States shall vote, but that no person who has the right at the time of the adoption of the constitution shall be deprived of it.

It seems to us clear that the above-cited law of the United States, which provides that the right of suffrage shall only be enjoyed by aliens who have taken the oath to support the Constitution, was the law of Montana, and governed the election of State officers and the vote for or against the constitution. The opposing view is stated by the judge of the district court as follows:

"Counsel for contestant seems to think that the court was perhaps misled in making its ruling; that the oath provided by the laws of the United States relating to suffrage in the Territories, to be taken by an alien, in addition to his declaration, to make him a qualified elector, did not apply at the election held the first day of October, 1889. The court reiterates the opinion that Congress having delegated to the constitutional convention of Montana the right to provide for said election, and had prescribed the qualifications of voters thereat, that when such convention provided by ordinance for said election and "that the persons who are then qualified electors, under the laws of this Territory, shall be qualified to vote at said election," it referred

to the qualifications prescribed by the Territorial legislature, and not to those prescribed by any laws of the United States relating to the Territory."

We can not adopt this view, or suppose that the convention of Montana in its ordinance, when it speaks of the "laws of this Territory," refers to an act which the Territorial legislature had no authority to pass and which never took effect.

The suggestion has been made that, to elect a Senator, there must be in existence a legislature exercising, or at least capable of exercising, the law-making function; and that when this function is interrupted or abdicated, or has never been set in motion because either house refuses to recognize and act in concert with the other, or because the governor refuses to treat either as possessed of legislative authority, there is, in fact, no legislature in the constitutional sense, and, therefore, no body competent to appoint a Senator. In Montana, the governor declined to recognize the Iron Hall house, and the senate, which was evenly divided politically, did not recognize either Iron Hall or Court House.

The suggestion is ingenious, but we do not think it will bear examination. The governor is no part of the law-making power. The legislature may pass laws, if he do not assent to them. He has only the power to require the legislature to reconsider a bill or resolve they have once passed. On such reconsideration a two-thirds vote, instead of a bare majority, is essential to the enactment. (Constitution of Montana, Art. 5, Sec. 29.)

It would be a strange condition of things if the governor of a State, or the President of the United States, could, by a simple refusal of recognition, suspend all legislative functions, so that bills presented to him should not become laws through his inaction, or be passed over his veto. Such a theory, which rests wholly on implication, would, if adopted, neutralize plain provisions of the Constitution.

Neither house of the legislature, when once lawfully constituted, can abandon its own authority. Much less can it take away the authority of the other. Neither House of Congress can even adjourn for more than three days without the consent of the other. A like provision is in the constitution of Montana. This theory enables one house, or the executive, to overthrow at once all the constitutional securities for the preservation of the legislative power. It is utterly opposed to the act of Congress prescribing the manner of the election of Senators (Revised Statutes, sections 14 to 19). If no concurrent election be had, "the members of the two houses shall convene in joint assembly."

This is intended to put it out of the power of a majority of either house to prevent a choice of Senator. This provision we think clearly constitutional. It is in accordance with the legislative usage in the matter of electing officers whose choice may be prevented altogether if two distinct bodies must concur to produce a valid result.

It is said that the strife in Montana between these two rival bodies, and the conduct of some of the elected members in abandoning their seats is to be deplored and disapproved; and that it will be a useful lesson to the people of that State to refuse them representation in the Senate until it be claimed by persons whose election is not attended by such proceedings. We do not conceive that we have the right to deny their seats to persons lawfully chosen for the sake of teaching lessons to anybody, or for the sake of showing our disapprobation of the conduct of anybody. But we also think it would encourage such proceedings in future and hold out the prospect of reward to those who engage in them, if the lawful will of the majority could be defeated by the lawless and revolutionary methods which seem to have been resorted to by the minority.

We report the accompanying resolves:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Martin Maginnis is not entitled to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Wilbur F. Sanders is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

Resolved, That Thomas C. Power is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

VIEWS OF THE MINORITY.

The undersigned, a minority of the Committee on Privileges and Elections, do not concur in the result arrived at by the majority of the committee in the case of the disputed election of Senators from the State of Montana, as embodied in the resolution reported by them to the Senate, and they respectfully submit the following report:

The admitted or established facts of the case, and pertinent to its correct determination, are believed by the undersigned to be:

(1) That the act of Congress approved February 22, 1889, commonly called "an

enabling act," prescribing the conditions for the formation and admission of certain States into the Union, and applicable to the people of the Territory and State of Montana, provided, among other things, as follows:

"SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislature and Representatives in the Fifty-first Congress; but said State governments shall remain in abeyance until the State shall be admitted into the Union respectively as provided in this act. In case the constitutions of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed States shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories at the time of their admission into the Union shall be in force in said States, except as modified or changed by this act, or by the constitution of the States respectively."

Section 9 of the same act provides:

"SEC. 9. That until the next general census or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the governors and other State officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution, and the States respectively are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories."

And in section 8 of the same act, among other things, it is provided that:

"At the elections provided for in this section"—

that is the elections for the ratification or rejection of the constitutions proposed by the conventions of the several Territories embraced in the act—

"the qualified voters of said proposed States shall vote directly for or against the proposed constitution, and for or against any articles or propositions separately submitted. The returns of said election shall be made to the secretary of each of the said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same."

(2) That the constitutional convention of the proposed State of Montana, which was elected and convened pursuant to the provisions of said "enabling act," passed an ordinance as it was authorized to do, called "Ordinance 2," in which it provided for an election to be held throughout the Territory of Montana on the first Tuesday of October, 1889, for the ratification or rejection of the proposed constitution by the qualified electors under the laws of the Territory, and to be conducted by the same judges, and in the same manner and at the same polling places, as was provided by the laws of the Territory regulating elections, the fifth, sixth, and eighth sections of said ordinance being as follows:

"Fifth. The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner if the returns from all of the precincts shall have been received and in the manner prescribed by the laws of the Territory of Montana for canvassing the votes at general elections in said Territory, and the returns of said election shall be made to the secretary of the Territory, who with the governor and the chief justice of the Territory, or any two of them, shall constitute a board of canvassers who shall meet at the office of the Secretary of the Territory on or before the thirtieth day after the election, and canvass the votes so cast and declare the result.

"Sixth. That on the first Tuesday in October, 1889, there shall be elected by the qualified electors of Montana a governor, a lieutenant governor, a secretary of state, an attorney-general, a State treasurer, a State auditor, a State superintendent of public instruction, one chief justice and two associate justices of the supreme court, a judge for each of the judicial districts established by this constitution, a clerk of the supreme court, and a clerk of the district court in and for each county of the State, and the members of the legislative assembly provided for in this constitution. The terms of officers so elected shall begin when the State shall be admitted into the Union and shall end on the first Monday in January, 1893, except as otherwise provided.

"Eighth. The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the Territory and

canvassed in the same manner and by the same board as is the vote upon the constitution, except as to clerk of the district court."

(3) That the general laws of the Territory of Montana in regard to elections provide as to the qualifications of electors as follows:

"SEC. 1007. All male citizens of the United States above the age of twenty-one years, and all male persons of the same age who shall have declared their intention of becoming citizens, and who, under existing laws of the United States, may ultimately become citizens thereof, shall be deemed electors of this Territory, and be entitled to vote for Delegate to Congress and for Territorial, district, county, precinct, and municipal officers, provided they shall have resided in the Territory six months, and in the county where they may offer to vote, thirty days next preceding the day of election."

The judicial function of the judges of election is prescribed by section 1019 of the same laws, as follows:

"SEC. 1019. The judges to whom any ticket may be delivered shall, upon the receipt thereof, pronounce with an audible voice the name of the elector, and if no objections be made to him and the judges shall be satisfied that the elector is legally entitled to vote, he shall immediately put the ballot in the box, without inspecting the name thereon. The clerk of the election shall enter the name of the elector and number in the poll book."

The general election laws further provide:

"SEC. 1027. As soon as the polls of the election shall be finally closed, the judges shall immediately proceed to canvass the vote given at such election, and the canvass shall be public, and shall continue until completed.

"SEC. 1028. The canvass shall commence by a comparison of the poll lists from the commencement and the correction of any mistakes that may be found therein, until they shall be found to agree; the box shall then be opened and the ballots found therein counted by the judges, unopened, except to ascertain whether each ballot is single; and if two or more shall be found so folded together as to present the appearance of a single ballot, they shall be laid aside until the count of the ballot is completed, and if, on a comparison of the count with the poll lists and the appearance of such ballots, a majority of the judges shall be of the opinion that the ballots thus folded together were voted by one elector, they shall be rejected.

"SEC. 1029. If the ballots in the box should be found to exceed in number the whole number of votes in the poll lists, they shall be placed in the box (after being purged after the manner above stated), and one of the judges shall publicly draw out and destroy therefrom so many ballots unopened as shall be equal to such excess.

"SEC. 1030. The ballots and the poll lists agreeing, or being made to agree, the board shall then proceed to count and ascertain the number of votes cast, and the clerks shall set down in their poll books the names of every person voted for, and at full length, the office for which such person received such votes, and the number he did receive, the number being expressed at full length, such entry to be made, as near as circumstances will admit, in the following form, to wit:

"At an election held at the house of A B, in the township or precinct of ———, in the county of ——— and the Territory of Montana, on the ——— day of ———, A. D. 18—, the following-named persons received the number of votes annexed to their respective names for the following described offices, to wit:

"A B had —— votes for Delegate to Congress.

"J D had —— votes for member of the legislative council.

"R L had —— votes for member of the house of representatives.

"(And in like manner for any other person voted for.)

"Certified by us. Attest:

"A B		M N	
"and	*Clerks of election.*	O P	*Judges of election.*
"C D		Q R	

"SEC. 1031. The judges of election shall then inclose and seal one of the poll books, under cover, directed to the clerk of the board of county commissioners of the county in which such election was held, and the packet thus sealed shall within three days from the closing of the polls, be conveyed by one of the judges or clerks of election, to be determined by lot, to the post-office nearest the house in which said election for such precinct was held, and register and mail the same to the clerk of the board of county commissioners, and the other poll books, together with the ballot box, shall be deposited with one of the judges of election, to be determined by lot, if not otherwise agreed upon, and the said poll book shall be open to the inspection of any elector at any time thereafter who may desire to examine the same.

"SEC. 1032. If any judge or clerk, after being selected by the judges of election to convey the poll books of such election to the post-office nearest the house in which said election was held, and mail the same, as provided for in section 1031 of this chapter, shall fail, refuse, or neglect to convey and mail the said poll books, safe with seal unbroken, he shall for every such offense, when convicted thereof, pay the sum of $500, and be imprisoned in the county jail for a period not exceeding three years,

said fine to be recovered in a civil action in the district court in the name of the county commissioners.

"SEC. 1033. After the fifteenth day after the close of any election held under the provisions of this chapter, or sooner, if all the returns shall be received, the chairman of the board of county commissioners, or in his absence any other member of the board, shall, taking to his assistance the probate judge or a justice of the peace, and one other officer of the county, or any county officer, proceed to open the returns and make abstracts of the votes. Such abstracts of votes for Delegate to Congress shall be on one sheet; the abstract of votes for members of the legislative assembly shall be on another sheet; and the abstract of votes for Territorial and district officers shall be on another sheet; and the abstracts of votes for county and township officers shall be on another sheet. And it shall be the duty of the clerk of said board of county commissioners immediately to make up a certificate of election to each of the persons having the highest number of votes for members of the legislative assembly, county, and township officers, respectively, and to deliver such certificate to the persons entitled to them by mailing the same in 'registered' letters to the address of such persons, respectively: *Provided*, That when a tie vote shall exist between two or more persons for any district or county office, the clerk of the board of county commissioners shall immediately give notice of another election, giving at least ten days' notice. And it shall be the duty of the clerk of the board of county commissioners of such county, on receipt of the returns of any general or special election, to make out his certificate, stating therein the compensation to which the judges and clerks of the election shall be entitled for their services, and lay the same before the county commissioners at their next session, and the board of county commissioners shall order the compensation aforesaid to be paid out of the county treasury.

NOTE.—Last section preceding is from act of February 15, 1877.

"SEC. 1034. The clerk of the board of county commissioners, immediately after making out the abstract of votes given in his county, shall make a copy of each of said abstracts, and transmit the same by mail as a registered package to the auditor of the Territory at the seat of government, and it shall be the duty of the United States marshal and treasurer of the Territory, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be received, to canvass the votes given for Delegates to Congress: *Provided*, That in case the United States marshal and treasurer can not agree as to the number of votes that two or more persons are entitled to for Delegate to Congress, then in that event the governor shall decide who has the highest number of votes, and shall issue a certificate of election to such person, under his hand and the seal of the Territory, countersigned by the secretary. In case there shall be no choice by reason of two or more persons having an equal and highest number of votes, then the governor shall by proclamation order a new election."

The following provision is also important in this connection:

"SEC. 1325. The certificate of election from the clerk of the proper county shall be held and considered as prima facie evidence of the right to membership of the person certified therein to be elected for all purposes of organization of either branch of the legislative assembly."

That these laws were in force in the Territory of Montana, on the first Tuesday of October, 1889, unless repealed or superseded by the act of Congress or by the ordinances of the convention. That there was also a statute of said Territory then in force of March 8, 1889, to provide for registration of voters and prevent fraud, pursuant to the provisions of which the election of October 1, 1889, was held. This act provided, by section 6 of the same, that every voter when he registers, shall make oath before the registering agent specifically to each and every qualification required by law. As an additional safeguard sections 7 and 8 of the act require that when the voter seeking registry is not known to the register to be entitled to vote, in addition to the oath prescribed by section 6, the register shall, by investigation and by personal examination, specifically and separately ask certain questions to be answered by the voter under oath, set forth in these sections, which cover every qualification of a legal voter.

In the case of naturalized persons the facts necessary are required, at the instance of the register, to be proven by a witness in addition to a personal examination of the voter. The registry itself is a thorough challenge and examination of every voter whose name is entered thereon. This registry is publicly posted for seven days or more before the election for further challenge, if any cause for challenge be known to any one.

That in precinct 34 of Silver Bow County, as to which alone inquiry is material, all these requirements were fully complied with, and the registry list of 182 voters was perfected, filed, and placed in the hands of the election officers.

(4) That the election on the ratification of the constitution and for State and county officers and members of assembly was conducted in said precinct 34 on the first Tuesday of October, 1889, as elsewhere in said Territory, under the Territorial act of March 15, 1889, which is a carefully considered and revised form of the Australian

ballot system. The ballots were prepared at public expense, by the county clerk, with all the careful circumspection required by law. At the proper time he placed in the hands of the judge of the election authorized to receive them, 800 ballots, being 200 ballots for every 50 registered voters or fraction thereof. One hundred and seventy-four of these ballots were stamped and delivered by the proper officers of the election, 1 to each voter, as the act provided. Twenty-six of the ballots were used by the election board for posting up according to law and supplying such as were destroyed by the wind after they had been posted for public examination. Six hundred were returned after the election to the county clerk. In fact every requirement of the law was carefully and honestly carried out. Every precaution that human ingenuity has been enabled to devise to secure the freedom and purity of the ballot, and to exclude fraud or corruption, is shown by the evidence to have been vigilantly and carefully observed. The count of the ballots began at the proper hour in a tent where the election was held, in which there was no fire. About 11 o'clock p. m., the wind having arisen and the tent becoming very cold, the boxes and ballots were removed into a room in a house on the same lot and almost in contact with the tent in which the counting had been begun, and the count was there finished.

The poll list showed 174 names. The ballots deposited in the box showed 174 votes, and every ballot was regularly and officially stamped. The proper and truthful returns were prepared and executed. They were sealed up by the board, and by one of their number delivered personally, with seal unbroken, to the clerk of the board of county commissioners, there being no mail facilities nearer the place of election than the place of delivery to the clerk. The returns thus prepared and delivered were opened by the county canvassing board. When they were opened the vote cast for the candidates of one of the parties varied between 168 and 172 votes. The votes of the other party varied from 2 to 6.

That the effect of this majority was to produce a change in the result as to several of the county officers and as to the five representatives.

That the change of the five representatives was sufficient to give a legislative majority to the joint assembly which chose Messrs. Clark and Maginnis as United States Senators, and would make the body purporting to be a house of representatives, which assembled in the court-house at Helena, the true and lawful house of representatives of the State of Montana.

(5) That under the statutes of Montana the county clerks of the several counties are made *ex officio* clerks of the boards of county commissioners of their several counties.

That precinct 34 of Silver Bow County was duly and legally constituted by the board of county commissioners of said county; that all of said commissioners were of the Republican party, and that the registry agents appointed by them for all the election districts of said county, including precinct 34, were also of that party, as were also two out of the three judges of election appointed for every voting precinct in said county, including precinct 34. That in due time after the said election the county clerk of Silver Bow County, as *ex officio* clerk of the board of county commissioners, received the official returns of the election from all the voting precincts of said county, including said precinct 34, the returns of which precinct were delivered to said clerk by one of the judges of the election in a sealed envelope, together with all the official ballots which were not used at said election.

That afterwards, on the 11th day of October, 1889, the chairman of the board of county commissioners of Silver Bow County, calling to his assistance another county commissioner and a probate judge, and appointing the clerk of the board of county commissioners and another person clerks, proceeded to perform the duties required of them by law, that is, to open the returns from the several voting precincts of said county, all of which had been duly received and laid before them by the clerk of the board of county commissioners, as required by law, and to "make abstracts of the votes." That to open the returns so laid before them, and make abstracts of the votes, was the only duty imposed, and the only authority conferred upon said officers by law, unless the duty of making returns of said abstracts to the secretary of the Territory, prescribed by ordinance 2 of the constitutional convention be taken to belong to them instead of the clerk of the board of county commissioners.

That the canvass of said vote, or the making of the abstracts of the precinct returns, including precinct 34, was concluded about 5 o'clock p. m., Saturday evening, October 12.

That during the progress of said canvass, counsel representing the Republican party appeared before the board and objected on various grounds of alleged irregularity to the counting of the returns of the votes cast at various Democratic precincts, including precinct 34. That counsel for the Democratic candidates also appeared before the board and denied the jurisdiction of the board to change the abstract of the votes made by elimination of any of the precincts. The ballot box of precinct 34 was produced before the board by the proper custodian thereof, and the demand was made by the counsel of the Democratic candidates, under protest as to the right of the board to go behind the returns from said election judges of said precinct, that the same should be opened and the votes inspected

and counted. This the board refused to do, and on the evening of October 14, overruling the objections to all the returns from all the other precincts by a majority vote, ordered the returns from precinct 34 and the votes cast thereat to be excluded from the abstract, which had been previously made, and directed a red line to be drawn through the vote of said precinct so entered upon the abstract sheets.

That immediately after the decision thus excluding the returns and refusing to count the votes of said precinct 34, and before the adjournment of the board, and while the clerks were engaged in their work (see certificate and affidavit of C. F. Booth, clerk, etc.), alternative writs of mandamus in the name of the Territory of Montana—one at the relation of John J. McHatton, Democratic candidate for district judge for Silver Bow County, and the other at the relation of some of the Democratic candidates for the house of representatives, issuing from the district court of the Territory for said county having full jurisdiction in the premises—were duly and lawfully served on all the members of said canvassing board, commanding them to proceed and count the votes of said precinct 34, and make them part of the abstract of votes for the said county for all persons voted for at said election, or show cause to the court on the 28th day of October, 1889, at 10 o'clock a. m., why they had not done so.

That on the 21st day of October, 1889, C. F. Booth, the said county clerk, sent a communication to the secretary of the Territory, one of the Territorial board of canvassers, and which the said board admit they had before them at the time they made their finding as to the result of the election in Silver Bow County, in which, after reciting in substance the foregoing facts, he concludes as follows:

"That by reason of said order from the district court the abstract of votes for said county is incomplete, and by reason of the fact that said abstract of votes is not complete I am unable to forward the copy of such abstract as is required by law to the secretary of the Territory, and that I shall be unable to forward such copy until after the 7th day of November, 1889."

That after due proceedings, pleadings, and hearing of parties in the suit at the relation of John J. McHatton, a judgment for a peremptory writ of mandamus was made and entered on the 31st day of October, 1889, as follows:

"This cause coming on for hearing upon the relator's motion for judgment upon the petition, order, and writ, and answer and return of defendants: It is ordered, adjudged, and decreed that said motion be sustained, and that defendants had no power or authority to exclude said precinct No. 34, and that their action was illegal and void, and that the returns, including said precinct, constitute the true and correct result of said election, and that said relator have his peremptory writ of mandate, as prayed for in his petition, and recover his cost and disbursement in this behalf expended. This 31st day of October, 1889."

That in like manner, in the suit at the relation of Thomas F. Courtney *et al.*, was rendered and entered the following judgment on the 1st day of November, 1889:

"In the district court of the second judicial district of the Territory of Montana in and for the county of Silver Bow.

"The Territory of Montana *ex rel.* Thomas F. Courtney, A. M. Day, A. M. Dessault, John W. Galligan, and Jos. Hogan *v.* William M. Jack, W. E. Hall, and Caleb E. Irvine, constituting the board of canvassers of Silver Bow County, for an election held on the first Tuesday of October, 1889; and Charles F. Booth, clerk of the county commissioners for said county.

"JUDGMENT.

"Be it remembered that this cause came on for hearing upon the relators' motion for judgment upon the petition, order, and alternative writ and answer and return of the defendants, when it was

"Ordered, adjudged, and decreed by the court that said motion be sustained, and that defendants, William M. Jack, William E. Hall, and Caleb E. Irvine, the canvassing board aforesaid, had no power or authority to exclude the votes as shown by the returns from said precinct number 34, in said county, and that their action therein was illegal and void, and that the returns, including the said precinct, constitute the true and correct result of said election; and that said relators have their peremptory writ of mandate, as prayed for in their petition.

"And it is further ordered, adjudged, and decreed that it is the duty of the said clerk of the said county commissioners to issue a certificate to relators, as prayed for in said petition and affidavit, and that a peremptory writ of mandate issue to compel him to issue said certificates, and that said relators recover cost and disbursements in this behalf expended. This first day of November, 1889.

"S. DE WOLFE,
"*Judge Second Judicial District Court in*
"*and for Silver Bow County, Montana.*

(Endorsed:) "Filed November 1, 1889. Wellington Napton, clerk, by (signed) Will L. Clark, deputy clerk."

That notice of appeal was given by the counsel for respondents in both cases, but said appeals were not perfected, if at all, until the 7th day of November, 1889, by the filing of a bond or undertaking, and on that day peremptory writs of mandate in pursuance of said several judgments were issued and duly served by the proper officer on a majority of the members of said county board of canvass, one of said members, as appears by the return of the sheriff, being absent from the Territory.

(6) That the majority of said board, in obedience to the commands of said writs of peremptory mandamus, did, on the said 7th day of November, 1889, meet and proceed to canvass and count, and did in fact canvass and count, the votes cast at said precinct 34, as shown by the said returns thereof, for all the said relators, and made them a part of the abstract of votes for said county; and the clerk of said board of county commissioners did on the same day, in obedience to one of said writs, issue and deliver to the relators therein their certificates of election to the office of representative in said legislative assembly, and also, in obedience to the other of said writs, issue and deliver to the said John J. McHatton, the relator therein, his certificate of election to the office of district judge.

(7) It also appears by the affidavit of the said Charles F. Booth, county clerk, that after the rendition of the judgment of the court in said mandamus proceedings, adjudging that the rejection by the board of county canvassers of Silver Bow County, of the returns from said precinct 34, was illegal and void, he forwarded to the Territorial board of canvassers at Helena the abstract of the returns from all the voting precincts of said county, including said precinct 34, with a certified copy of said judgment attached thereto.

The following is a copy of said abstract, with the certificate of said Booth as county clerk attached:

Copy of correct returns from clerk of county board of canvassers.

Precinct—	For State senator.								
	Charles W. Goodale.	Daniel J. Hennessy.	Absalom F. Bray.	Joseph K. Clark.	Thomas F. Courtney.	A. M. Day.	Peter R. Dolman.	Alphonse M. Dusseault.	Henry L. Frank.
No. 1, Walkerville	217	214	213	241	194	199	224	203	214
2, Walkerville	87	116	96	116	100	103	97	103	104
3, Centerville	165	110	178	99	95	92	173	95	88
4, Centerville	203	430	205	422	405	404	208	408	407
5, Butte	164	113	162	115	106	107	169	102	112
6, Butte	115	241	122	244	223	229	122	225	226
7, Butte	154	150	154	156	143	129	163	127	146
8, Butte	72	135	74	128	124	120	72	120	121
9, Butte	185	227	188	227	206	197	199	193	202
10, Butte	155	240	157	236	216	221	157	219	229
11, Butte	123	109	124	113	97	93	124	92	102
12, Butte	215	253	224	244	222	231	217	243	234
13, Butte	179	201	170	206	187	180	189	174	198
14, Butte	96	101	104	99	86	86	107	92	85
15, Parrott	201	169	209	167	147	165	207	156	166
16, Meaderville	190	79	197	75	67	82	192	73	68
17, Meaderville	112	62	116	60	56	69	111	61	59
18, South Butte	142	176	161	161	144	157	163	150	151
19, Blacktail	28	32	31	33	24	26	23	45	29
20, Centennial Brewery	86	70	84	78	67	68	85	71	71
21, Rocker	93	25	89	27	26	25	82	27	26
22, Burlington	144	63	142	60	55	63	142	55	57
23, Silver Bow	11	23	13	22	19	18	11	18	19
24, Silver Bow Junction	11	22	18	17	20	17	14	17	18
25, Gregson's Springs*									
26, McCune's Wood Camp	29	153	28	157	136	148	27	146	144
27, German Gulch	3	10	3	12	9	9	2	8	10
28, Norton Gulch	16	3	16	14	5	2	17	3	3
29, Feeley	9	16	10	16	15	17	9	15	17
30, Divide	11	18	20	11	14	11	15	11	13
31, Melrose	34	28	34	28	19	27	35	24	25
32, Soap Gulch	7	3	8	3	3	3	7	2	2
33, Clipper Mine	6	5	6	5	5	5	6	5	5
34, Butte and Gallatin R. R., Camp No. 1	3	171	5	171	171	171	3	171	171
	3,266	3,768	3,361	3,753	3,406	3,474	3,367	3,454	3,522

* No polls held.

Copy of correct returns from clerk of county board of canvassers—Continued.

Precinct—	For members of the legislative assembly.														
	John W. Gilligan.	Frank H. Hofman.	Joseph Hogan.	James H. Monteith.	Albert G. Noble.	John J. O'Meara.	William Roberts.	Leopold F. Schmidt.	Newell J. Scott.	Thomas Sturtidge.	William Thompson.	Abraham N. Yoder.	Wm. C. Riley.	Wm. Scallon.	W. J. Penrose.
No. 1, Walkerville	202	225	206	227	216	195	222	199	213	213	225	212	1	1	193
2, Walkerville	160	96	109	94	92	98	93	105	96	91	97	90	....	....	105
3, Centerville	94	171	95	164	161	96	169	94	163	180	174	170	....	....	124
4, Centerville	407	210	407	203	195	399	204	401	195	211	200	191	....	....	437
5, Butte	105	169	104	169	152	100	161	100	160	155	163	153	....	....	112
6, Butte	232	119	222	123	114	227	121	231	120	119	123	112	....	....	233
7, Butte	129	154	129	166	140	123	158	135	152	140	165	150	....	....	123
8, Butte	117	76	122	77	76	115	74	121	75	74	77	72	....	....	112
9, Butte	202	190	190	209	179	186	192	204	188	184	208	183	....	....	194
10, Butte	224	156	219	158	142	215	153	229	143	136	155	141	....	....	218
11, Butte	88	126	92	130	125	87	129	100	128	121	131	127	....	....	86
12, Butte	228	230	220	216	205	222	227	229	219	211	223	213	....	....	230
13, Butte	178	180	171	175	172	175	174	184	173	148	185	161	....	....	167
14, Butte	89	106	84	105	96	86	101	90	97	96	103	105	....	....	89
15, Parrott	159	201	158	202	200	154	195	168	202	194	199	195	....	....	157
16, Meaderville	68	195	70	195	189	71	192	70	196	189	191	187	....	....	76
17, Meaderville	59	110	60	102	105	56	107	57	109	112	115	105	....	....	77
18, South Butte	147	187	149	158	149	151	164	150	156	149	159	148	....	....	146
19, Blacktail	27	30	27	28	22	29	28	28	22	23	25	22	....	....	28
20, Centennial Brewery	68	85	72	83	81	66	81	79	85	81	86	80	....	....	67
21, Rocker	28	83	28	80	82	27	89	31	79	81	81	82	....	....	21
22, Burlington	57	141	62	136	130	52	136	57	132	129	135	133	....	....	62
23, Silver Bow	21	11	20	15	13	17	13	23	11	15	11	14	....	....	22
24, Silver Bow Junction	17	15	18	16	12	17	16	17	12	11	14	11	....	....	15
25, Gregsons Springs*	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
26, McCanes Wood Camp	151	32	153	29	29	133	32	154	29	25	29	26	....	....	146
27, German Gulch	9	3	10	4	3	10	3	11	3	2	1	6	....	....	11
28, Norton Gulch	4	16	3	17	15	2	16	4	16	13	14	14	....	....	2
29, Feeley	15	9	15	9	10	16	8	17	9	9	8	9	....	....	16
30, Divide	10	17	12	14	15	12	16	11	16	16	16	15	....	....	12
31, Melrose	23	35	27	33	31	25	35	26	31	30	30	30	....	....	23
32, Soap Gulch	2	8	2	7	7	2	7	2	7	7	7	7	....	....	2
33, Clipper Mine	5	6	5	6	6	4	6	5	6	6	6	6	....	....	5
34, Butte and Gallatin R. R., Camp No. 1	171	3	171	3	3	171	3	171	3	3	2	2	....	....	171
	3,442	3,395	3,432	3,355	3,167	3,339	3,325	3,503	3,246	3,174	3,358	3,172	1	1	3,482

* No polls held.

"TERRITORY OF MONTANA,
"*County of Silver Bow, ss:*

"I, Charles F. Booth, county clerk of said county, do hereby certify that the above and foregoing is a true and correct abstract showing the result of the election and votes cast for State senator and members of the legislative assembly of Montana, in Silver Bow County, Mont., on the 1st day of October, 1889.

"In witness whereof I have hereunto subscribed my hand and affixed the seal of said county on the 31st day of October, 1889.

"[SEAL.]

"CHAS. F. BOOTH,
"*County Clerk of Silver Bow County, Montana.*"

"In addition to the evidence of Booth, we have the admission of the Territorial board of canvassers, in what purports to be their official finding of the result of the election, that this copy of the abstract of the returns from Silver Bow County, so certified to by the county clerk, was before the said board when they made their said finding, and that no other or different abstract of returns from said county was before them; and to said copy of said abstract was attached, according to the affidavit of Booth, as before stated, a copy of the judgment, of the court declaring the duty of the county board to include precinct 34 in the abstract of votes of said county to be absolute, "and that the returns, including said precinct, constitute the true and correct result of said election."

(8) That notwithstanding the premises, the Territorial board of canvass, consist-

ing of the governor, the secretary of state, and the chief justice of said Territory, all being of the same political party—the Republican—made their finding, dated the 4th of November, 1889, which, so far as concerns Silver Bow County, is as follows:

"TERRITORY OF MONTANA,
"*County of Lewis and Clarke, ss:*

"We, Benjamin F. White, governor, Henry N. Blake, chief justice, and Louis A. Walker, secretary of the Territory of Montana, the duly appointed and authorized canvassing board designated in the act of Congress approved February 22, A. D. 1889, providing for the admission of Montana as a State in the Union, and also under and by authority of ordnance number two, passed and enacted by the constitutional convention of the said Territory, do hereby certify that the above and foregoing is a full, true, and correct abstract of the votes cast in said Territory at the election held on the first Tuesday in October, A. D. 1889, as appears by the duly certified returns from the counties named, and as counted and canvassed by us this the 4th day of November, A. D. 1889.

"And we further certify that, having duly convened as such canvassing board on the 31st day of October, A. D. 1889, the same having been the thirtieth day after the close of said election, and having received no duly certified returns from the county of Silver Bow in said Territory, we duly appointed and commissioned Benjamin Webster a special messenger to proceed forthwith to the said Silver Bow County and to demand and receive from the county clerk of said county a properly certified copy of the abstract of the votes cast in said county at said election as canvassed and declared by the proper canvassing board.

"That the said messenger, Benjamin Webster, duly appointed as aforesaid, did proceed to the said Silver Bow County and did demand from the county clerk of said county the duly certified copy of said abstract of votes as aforesaid, and thereafter returned to Helena and made his sworn return that the demand for said abstract was by the said county clerk refused.

"Being, therefore, without any proper copy of the abstract of votes cast in Silver Bow County, and having exhausted the authority given by the statute in endeavoring to obtain the same, it now becomes our duty to ascertain and declare the same from the best sources of information obtainable.

"We have before us the official certificate of Charles F. Booth, county clerk of Silver Bow County, showing that a certain number of votes were cast for the different candidates in that county in the different precincts thereof, naming each of them and the number received by each candidate in each precinct, and including the 34th precinct as having voted at said election. We also have before us an official notice signed by Mr. Booth as county clerk of said county, stating in effect that the board of canvassers in said county met as such on the 14th day of October, 1889, and did then and there canvass and count the vote of Silver Bow County and declare the result thereof, and that they did not count, but did reject as false, fraudulent, and void, all of the votes reported as cast and counted in election precinct No. 34 in said county.

"No other or further action having been had by the canvassing board of said county in relation to the canvass of the vote therein, we conclude that the true result as canvassed and declared must be found by eliminating from the list of votes cast, as certified by County Clerk Booth, the vote of precinct 34, which was rejected by said canvassing board, as stated in the certificate of said county clerk, and which shows the true vote of Silver Bow County to be as follows:

	Votes.
For the constitution	3,962
Against the constitution	467
For Representative in Congress:	
Thomas H. Carter	3,566
Martin Maginnis	3,456
For governor:	
Thomas C. Power	3,444
Joseph K. Toole	3,610
For lieutenant-governor:	
John E. Rickard	3,559
J. H. Conrad	3,408
For secretary of state:	
Louis Rotwitt	3,445
Joseph A. Browne	3,458
For attorney-general:	
W. Y. Pemberton	3,521
Henri J. Haskell	3,381
For State treasurer:	
R. O. Hickman	2,502
Jerry Collins	3,404
For State auditor:	
Thomas D. Fitzgerald	3,453
Edwin V. Kinney	3,427
For superintendent public instruction:	
John Gannon	3,202
James R. Russell	3,650
For chief justice supreme court:	
Henry N. Blake	3,382
Stephen De Wolfe	3,495
For associate justice supreme court, seven-year term:	
W. M. Bickford	3,340
William H. De Witt	3,428

	Votes.
For associate justice supreme court, five-year term:	
Frank K. Armstrong	3,432
Edgar N. Harwood	3,346
For judge district court, second judicial district:	
Levi J. Hamilton	3,475
John J. McHatton	3,334
For clerk of the supreme court:	
George F. Cope	3,317
William J. Kennedy	3,454
For state senator:	
Charles W. Goodale	3,263
Daniel J. Hennessy	3,597
For members of the legislative assembly:	
Absalom F. Bray	3,356
Joseph K. Clark	3,582
Thomas F. Courtney	3,235
A. M. Day	3,303
For members of the legislative assembly—Continued.	
Peter R. Dolman	3,364
Alphonso M. Dusseault	3,283
Henry L. Frank	3,351
John W. Gilligan	3,271
Frank H. Hoffman	3,392
Joseph Hogan	3,261
James H. Monteath	3,352
Albert G. Noble	3,164
John J. O'Meara	3,168
W. J. Penrose	3,311
William H. Roberts	3,322
Leopoln F. Schmidt	3,332
Newell J. Scott	3,243
Thomas Sturtridge	3,171
William Thompson	3,356
Abraham S. Yoder	3,170
Wm. C. Riley	1
William Scanlon	1

"That the foregoing is, and the same is hereby found and declared to be the result and a true and correct statement of the votes cast at said election held on the first day of October, A. D. 1889, in Silver Bow County, Montana, according to and in strict conformity with the abstract of votes made and certified to by the duly and legally constituted board of canvassers of election returns for said county at said election."

* * * * * * *

That in obedience to the peremptory mandate of the court, and in conformity to the law declared by said court to be in force, the county clerk of said Silver Bow County issued to the relators, the five members of the house of representatives found to be elected by the abstract of votes made by the canvassing board of said county, their certificates of election. Like certificates of election had been, it is said, issued by the clerks of the several counties to those who appeared by the votes of their respective counties to have been elected members of said house.

(9) It is established by sworn testimony that has not been impeached or controverted that the election on the 1st day of October, 1889, at said precinct 34 was from beginning to end conducted in a public, open, peaceable, fair, and impartial manner, without intimidation, fraud, or undue influence exercised toward anyone, and that after the closing of the polls the counting of the votes was done fairly and correctly, and duly certified according to law upon the blank sheets furnished by the proper authority for that purpose; that the tally sheet and returns from said precinct contained a fair and correct report of the votes and ballots cast thereat; that these returns were duly delivered by one of the judges to the county clerk in a sealed envelope, and was by him laid before the county canvassing board; that they were regular and in due form upon their face appears by the copies in the printed record laid before your committee; that the frivolous character of the objections which were made by partisan counsel to the regularity of these returns is apparent when it is seen by the record that the first and principal objection insisted upon was that in signing the returns the names of the judges were not written opposite the word "Attest," printed on the blanks used, and that the names of the clerks were written after and below those of the judges, thus:

"Certified by us this 2d day of October, A. D. 1889.
"Attest:

"W. A. PENNYCOOK,
"JOHN MORRISON,
"WILLIAM O'REGAN,
"Judges of Election.
"THOMAS O'KEEFE,
"A. M. ANDERSON,
"Clerks of Election."

the law directing that the returns should be certified by the clerks and attested by the judges.

Another principal objection urged before said canvassing board to their receiving and counting said returns was that the sealed envelope containing the same was delivered to the county clerk by one of the judges in person, instead of being mailed at the nearest post-office, as directed by law.

The only other objection made to the returns on their face was that the lists of persons voted for and the entry of the number of votes received by each appeared to be in the handwriting of one of the judges, instead of in that of one of the clerks. After these objections to the regularity of the returns and apparently as an afterthought five or six *ex parte* affidavits were introduced as to certain alleged occurrences at the polls and the counting of the votes, none of which arose to the dignity of supporting even a suspicion of fraud or invalidity as to the conduct of said election at said precinct 34.

Reference is here made to the amazing character of these objections, not because, in the opinion of the undersigned, the Senate, in determining this case, is engaged in a discussion of the grounds of decision of a board or tribunal invested by law with a judicial function in the premises, for no such function, in the opinion of the undersigned, belonged to this county board of canvassers, but in order that the desperate nature of what seems to the undersigned to have been a conspiracy to thwart the expressed will of the people of Montana, by the suppression of votes honestly and lawfully cast, may be displayed to the Senate and the country.

(10) That by the constitution of the State of Montana the senate consists of sixteen members, and the house of representatives of fifty-five. In one representative district there was a tie vote, and no election was had to supply the vacancy, thus reducing the whole number of representatives to fifty-four and the total of the joint assembly to seventy. That in obedience to said constitution the governor of the State of Montana, on the 11th of November, 1889, issued his proclamation convening the legislative assembly to meet at Helena, the seat of government, on November 23, 1889, and by a subsequent proclamation, dated November 22, 1889, he designated the court-house in Helena as the place where the said legislative assembly, "comprising the persons holding and presenting certificates of election from said county clerks, shall meet." That the said court-house had been, under the laws of the Territory of Montana, the place for the meeting of the Territorial legislature. That on the said 23d day of November, the day for the convening of the legislative assembly, the governor, in a letter of instruction to the custodian of the said court house, directed him to admit to the same every person claiming to be a member of said assembly.

Pursuant to the said proclamations on the said 23d day of November, 29 persons claiming to be members of the house of representatives, and all having certificates of election from clerks of counties, met at the said court-house at the time fixed by the constitution, and, being a majority of the number of representatives prescribed by the constitution, proceeded to organize as the house of representatives. The title of 24 of these as members of the house is not disputed: the remaining 5 claimed to be lawfully elected and entitled to sit as members from Silver Bow County.

Thirty other persons, claiming to be members of the said house of representatives, on the finding of the Territorial board of canvass, but with what certificates thereof is not clear, met at a building called Iron Hall, in the said city of Helena, at the time fixed aforesaid, and also organized as the house of representatives. The title of 25 of these as members of the house is not disputed. The remaining 5 claimed to be lawfully entitled to sit as members from Silver Bow County. There is no dispute as to the membership or organization of the senate.

Two of the claimants for admission as Senators to this body, Messrs. Clark and Maginnis, were elected by a joint assembly of one-half of the members of the senate and all of the members of what may be called the "court-house" house of representatives, and their election is certified to the Senate by the governor of the State. But his certificate lacks the attestation of the secretary of state and the seal of the State, as required by the act of Congress. The other two claimants, Messrs. Sanders and Power, were elected by a joint assembly of one-half of the members of the senate and all of the members of what may be called the "Iron Hall" house of representatives. Their said election is certified to the Senate by the secretary of state, with the seal of the State attached. But there is no certificate of the governor, as required by the act of Congress, and the secretary of state is not authorized by said act to certify, but only to attest the certification of the governor.

The question, therefore, for the Senate to determine is which of these two sets of five persons claiming to be entitled to sit as members of the house of representatives were lawfully so entitled.

The undersigned believe that an unbiased consideration of the facts above stated will fully justify their dissent from the majority of the committee and should prevent the Senate from adopting the resolution reported.

The power conferred by the Constitution on the Senate to "judge of the elections, returns, and qualifications of its members" is exclusive and judicial, and in its exercise the Senate acts judicially.

The immediate constituency of a United States Senator is the legislature of the State which he represents. His credentials must purport to be a certificate that he was chosen by the legislature.

The act of Congress prescribes that this certification shall be made by the gov-

ernor of the State, under the seal of the State, and shall be countersigned by the secretary of state. Such a certificate is received by the Senate as prima facie evidence of the due performance by the legislature of its constitutional function to choose a Senator and of the title of the person named therein to a seat in this body.

In the absence of such certification the Senate, in pursuing further its judicial inquisition, must inquire for itself whether the claimant has been duly chosen by the legislature of the State. In so doing it must seek to satisfy itself, first, that the body assuming to choose a Senator is in fact the legislature of the State, and, second, that it has actually and lawfully chosen a Senator. In deciding the first branch of this inquiry in this case the Senate will be relieved of all difficulty in deciding the second.

A legislature must be taken to mean, for the purposes of such an inquiry and in the sense of the Constitution, "the law-making power of the State." The body capable of making laws for the State is the legislature, both in its literal and technical sense, as was decided by the Senate in the case of Potter *vs.* Robbins, Taft's Election Cases, page 83.

When the Senate finds such a body duly organized in both branches, capable of enacting laws and recognized as such in the State and by the other departments, further inquiry is useless and inappropriate. The body authorized to choose a Senator is found. The Senate can not in such a case make inquisition as to the title of the sitting members of such a body in order to invalidate its legal character or impinge in the slightest degree on the exclusive right of each branch to judge of the elections and qualifications of its own members.

It is not believed that there is any difference of opinion in the committee upon this proposition, or as to the doctrine announced by the majority of the committee in the Rhode Island case just alluded to and reaffirmed by the undersigned, that "when the sovereign will of the State is made known through its legislature, and consummated by its proper official functionaries in due form, it would be a dangerous exertion of power to look behind the commission for defects in component parts of the legislature or into the peculiar organization of the body for reasons to justify the Senate in declaring its acts absolutely null and void," and "that contested elections in the popular branch of Congress, where the people exert in their primary capacity the right of suffrage under various limitations and restrictions in the choice of Representatives from certain prescribed districts, open a much wider field of inquiry and investigation than a like contest for a seat in the Senate, which is a body wholly federative in its character and organization, and whose members hold their appointments from and represent the States as political sovereignties."

But the difficulty comes in cases like the present, where there are two bodies claiming to be the legislature of the State, or, to come more closely to the facts of the present case, when there is a single and legally organized State senate and a dual organization of the house of representatives, neither of the houses so organized having a quorum of members without counting those whose title is contested and right to sit denied by a like number in the other house, claiming to lawfully represent the same constituency.

If either house had a quorum outside of such disputed membership, then the Senate would be concluded from any attempt at further inquisition. Such an attempt on its part would be an interference with the highest judicial function in the premises, the exclusive jurisdiction of each branch of a legislature to judge of the election, etc., of its own members.

But as confessedly neither house has such a quorum, then, unless the Senate shall decide that none of the claimants before it come accredited by a body competent to act as a legislature, or so recognized as such by the other departments of the State government as to make it *de facto* the legislature of the State in the sense of the Constitution of the United States, from necessity the Senate must pursue its inquiry as to which is the true and lawful house, outside the doors of either.

In conformity to the doctrines already stated in this report, and to the safest precedents and best traditions applicable to the premises, the undersigned believe that the Senate in prosecuting its inquiry, after leaving the doors of both alleged houses, must, under the facts and circumstances appearing in this case, seek the first for an officer or body on whom the law devolved the duty of ascertaining the result of the election and of certifying the result, and then ask what action has been had by such within his or its legal duty and powers, and especially inquire for any judicial decision on the question of disputed powers and duties, made prior to the time fixed for the convening of the legislature, because the facts and circumstances of the case as they stand admitted in the record bring us to this position: That, conceding the proposition of the majority of the committee, that the Territorial board of canvass was the paramount authority to canvass the returns of the county board as to the votes cast for representatives, and that we must first look to see what credentials members of the legislative assembly, or those claiming to be such, have from this canvassing board, yet it seems uncontrovertibly true that the Senate must inquire and judicially

determine, first, what are the legitimate powers of the said board under the act of Congress and the ordinances made pursuant thereto, and the principles of law applicable in the premises; and, second, what this board has assumed to do (comparing its acts with its lawful authority); and, third, what binding effect its proceedings as set out in the record should properly have upon the Senate in determining the question before it.

Proceeding to this inquiry, we find that this Territorial board of canvass was constituted, by the eighth section of the enabling act and by the fifth section of ordinance 2 of the convention, to "canvass the votes so cast (for or against the constitution), and declare the result;" that while the said enabling act, in its twenty-fourth section, provides "that the constitutional conventions may by ordinance provide for the election of officers for full State governments, including members of the legislature and Representatives in the Fifty-first Congress," it is silent as to the manner in which said election shall be had, thereby authorizing the said conventions to prescribe the details as to manner and methods of conducting the same.

Accordingly, the said ordnance 2 of the convention, in its sixth section, provides that such an election for State officers, including members of the legislative assembly, should be held on the first Tuesday in October, 1889, and then in section 8 as follows:

"Eighth. The votes for the above officers shall be returned and canvassed as is provided by law [that is, law of the Territory], and returns shall be made to the secretary of the Territory and canvassed in the same manner and by the same board as is the vote upon the constitution."

It will be observed that while the said board are to canvass the votes cast for or against the constitution, and to declare the result, it is expressly directed, in the matter of the election of representatives, to canvass only the returns from the so-called county canvassing boards, and the express authority "to declare the result" is omitted.

Whatever view is taken of the extent of the implied authority asserted for said board to make some finding or statement of their transaction in the premises, the fact that express authority "to declare the result" was given in the one case and withheld in the other can not be without significance in considering the powers of said board in regard to the canvass of the returns from the county boards, of the abstracts made by them of the votes cast in their respective counties for representatives.

It is perfectly clear, in the opinion of the undersigned, that both the so-called county boards of canvass, under the general laws of the Territory, and the Territorial board of canvass, under the provisions of the ordinance prescribing its duties in regard to the election of representatives to the legislative assembly, had none but ministerial duties to perform, and was invested with no judicial functions whatever.

A judicial authority of so high and important a nature as to stand between the electors and the result of their ballots, ought never to be taken as conferred otherwise than by express enactment of law, and in the opinion of the undersigned it never has been. By the general laws of Montana the county boards of canvass (of whose powers and duties more hereafter) were only authorized to make abstracts of the votes cast in the several voting precincts, and the returns which alone the Territorial board is authorized to canvass, are these abstracts. So that it would seem too plain for argument that the only duty of the said board in the premises was to aggregate and tabulate as a matter of arithmetic these abstracts, where, as in the case of the office of representative of Silver Bow County, the vote of the county elects the officers, the only duty would plainly be to verify the arithmetical processes and thereby confirm the return.

When, however, the officer is voted for throughout the State, a large duty is devolved upon them, to aggregate the returns from the several counties that it may appear who of those voted for for the same office, has the larger number of votes. There is surely no authority here, allowing even the greatest latitude to the doctrine of implication, to canvass anything but returns from the county boards, or, more monstrous still, to omit to canvass some returns, or to canvass where there are no returns, or to canvass part of a return.

If authority were necessary for a conclusion so obvious, and so conformable to the practical common sense of a self-governing people, our judicial reports are full of decisions, commencing far back in our history and coming down to recent times, making an unbroken current of authority for the proposition, as stated by Judge McCrary in his work on elections, at section 226. He says:

"It is well settled that the duties of canvassing officers are purely ministerial, and extend only to the casting up of the votes and awarding the certificate to the person having the highest number; they have no judicial power."

At section 229 of the same book, he says:

"The doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power, is settled in nearly or quite all the States."

A long list of cases is cited in support of this, which need only thus be referred to.

In Attorney-General *vs.* Barstow (4 Wis. 749) the supreme court of the State says:

"The canvassing officers are to add up and certify by calculation the number of votes given for any office; they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated."

In State *ex rel vs.* Steers (44 Mo. 223), the court says:

"To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure is to infringe or destroy the rights of parties without notice or opportunity to be heard, a thing which the law abhors and prohibits. * * * The exercise of such a power is subversive of the rights of the citizen and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. * * * When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation."

The court goes on to say that it has examined, with a good deal of research, the authorities, and has "never been able to find a single one that held otherwise than that the canvasser acted ministerially; but they are unanimous and decisive in declaring him to be a ministerial officer and nothing else."

It is submitted that there can be no serious difference of opinion as to the correctness of the foregoing view of the legitimate powers of this Territorial board of canvass. Comparing these powers with what this board assumed to do, it will appear by their own showing that they have, in relation to the election of these five members from Silver Bow County, grossly transcended their lawful authority and wilfully neglected the duties imposed upon them by law—sins of commission and of omission.

The only evidence that the Senate has before it of what this board did do, or did not do, is in what purports to be an official deliverance made on the 4th day of November, 1889. And for the purposes of this case that is the best evidence.

We have recited above all of that deliverance that is material to this inquiry. The Senate can not close its eyes or ears to what is there found. It is acting judicially, by virtue of power which is conferred upon it by the Constitution, which power is judicial in its nature. As has been seen, a decision as to the election and return of these five members from Silver Bow County, by the highest judicial tribunal having jurisdiction, to wit, the house of representatives of Montana, is wanting, and in the nature of things can not be had. The Senate has been compelled to leave the doors of both contesting bodies to institute its judicial inquiry, and seek for the highest and best legal evidence of the title of these five members sitting in the "Iron Hall House," whom, the majority of the committee say, the Senate must find to be lawfully and duly elected by virtue of this said finding or deliverance of the Territorial board of canvassers.

To this the majority refer us as the first evidence to which we must turn, and as the best, and upon us conclusive, evidence. Admitting that this board was lawfully created, and that it can, within the scope of its lawful powers, announce the result of the election of representatives in Silver Bow County, and that we would be bound thereby, it is nevertheless true that not every pretended act of this board, no matter how unlawful or usurpatory in its character, is so binding. What is the act which has thus assumed the character of evidence conclusive (as claimed) upon the Senate? Not a simple certificate of result, such as was made in the famous and infamous Louisiana case in 1876; but a judicial finding, purporting at great length to set out the reasons which supported its decision to eliminate the votes of a whole precinct of Silver Bow County, which they admitted they had before them But we have seen how purely ministerial their duty in the premises was. How can the Senate recognize such an act of such a body? But again, in their judicial finding they tell us, with amazing inconsistency, that when they were assuming to canvass the returns from the different counties they had no proper returns from Silver Bow County before them, and yet they attempt to declare the result from that county. In one part of their finding they profess to have a return from said county from which they tell us they decided to "eliminate" the votes of a whole precinct, and in another they declare that there is no return from said county before them. By what principle of law or common sense is the Senate bound by such a finding or by such an act? Is it not the clearest duty of the Senate in the exercise of a judicial power to reject altogether such evidence?

The Territorial board of canvass has stated itself out of court. If it had been a body armed with judicial powers conferred by the ordinance, still it would have been necessary that the Senate should satisfy itself of the existence, at least the presumed existence, of the facts necessary to its jurisdiction. But no presumption, even, of jurisdiction can prevail against the statements of the record, which not only rebut that presumption, but disclose the baldest and most flagrant usurpation of a jurisdiction not conferred by ordinance or statute.

A suit on a judgment of a Federal or State court for the most insignificant amount

would be thrown out of any court in which it was brought if the record itself disclosed a want of jurisdiction of either the subject-matter or the parties. And this is true even if the judgment be of a court of general jurisdiction. But in the case of a judgment of a court of statutory and limited jurisdiction it must affirmatively appear in the record, in the language of Judge Cooley, "that the case was one which the law permitted the court to take cognizance of, and that the parties were subject to its jurisdiction."

No presumption in such a case exists in favor of jurisdiction. These are the elementary and well-understood principles applicable to judicial tribunals. But these Territorial canvassers, as we have seen and as must be admitted, are not a tribunal at all and are clothed with no judicial functions whatever; their duties are ministerial. *A fortiori*, then, must their said action in the matter of the election of representatives from Silver Bow County, to which we are referred as being the credentials of the five members sitting in the "Iron Hall" house, appear to have been taken under authority of law, to have been within the scope of their lawful authority, and not outside of it.

It is what the board may lawfully do, which, when done, may be evidence of title to sit as a member from Silver Bow County, and be called by the somewhat ambiguous name of a credential to such member. No mere usurpatory and unauthorized action can be so dignified. It is this finding of November 4, the character of which we have now sufficiently displayed, that is relied upon by the majority of the committee as the evidence of the right of the five "Iron Hall" representatives to sit as members from Silver Bow County. This is what is called their credentials. No other paper or document can be referred to as such.

It is submitted that this finding, showing on its face that it was one not within the scope of the authority of said board to make, so far as the election of representatives from Silver Bow County is concerned, is not a credential at all in any proper sense of that term, and must be disregarded by the Senate in its judicial inquiry as utterly void and of no effect. While to do otherwise would violate those rules of procedure which should govern the Senate as a judicial tribunal, it will appear further on that it would most seriously infringe the right of the people of Montana to free elections, and that technical law and the broadest principles of public morality and popular rights demand the same result. Far as the inherited tendencies and traditions of our race may compel us to go in paying the homage of our respect and obedience to the orderly and lawful though technical forms through which the principles of self-government have achieved their greatest triumphs, they will never compel us to stand uncovered in the presence of usurpation and fraud though masked in the forms of law.

If the Senate fail, as we think they must fail, to be judicially satisfied that the deliverance of the Territorial board of canvass of November 4, 1889, is sufficient as evidence of the title of the five Silver Bow members in the "Iron Hall" house of representatives, they must turn elsewhere and seek for such evidence under the limitations hereinbefore stated. This will bring us to the abstract of votes made by the county board of canvass of Silver Bow County, under the law as interpreted by the Territorial court, and in obedience to the lawful mandate of said court.

It is not necessary now to discuss the authority, under the law, of the county clerk to certify the result of the final canvass for representatives in the legislative assembly, or whether section 1325 of the general laws of Montana, quoted above, give the force of prima facie evidence to his certificate, was or was not repealed by the ordinances of the convention. For in the absence of any lawful act in the premises, by the board of final canvass, and in view of the fact certified to by them, that among the returns before them from the various county boards of canvass (which and which alone it was their duty to canvass) there were none from Silver Bow County, the Senate, unless it shall deem its duty to be to decline further inquiry, and to declare that there is no evidence of the existence of a legislative body competent to choose a United States Senator, must and properly should, ask for the abstracts of votes made by the board of canvass of Silver Bow County, the return of which was not before the Territorial board of canvass at the time they made their canvass of the returns from the other counties, or if before them was not lawfully canvassed.

If we can find these abstracts of the votes of the various voting precincts of Silver Bow County lawfully canvassed and certified by the officials of that county entrusted by law with that duty, we will have the very thing which the Territorial board was directed by the ordinance to receive as showing the state of the vote, and to canvass and certify, and under the circumstances of this case the same will, in the opinion of the undersigned, be binding on the Senate.

This makes it necessary to look at what was done by the said county board after the election on the first Tuesday of October.

It has already been recited briefly in the foregoing pages. Suffice it to recall now that the law constituting this board prescribed its duty to be, after the fifteenth day from the close of the election, or sooner if all the returns shall be received, to open

said returns and make abstracts of the votes. (See section 1033 of general laws of Montana above recited.) That after it had met on October 12 and had according to law opened the returns from all the voting precincts of said county and made abstracts of the votes, a majority of the board on October 14 determined to eliminate the vote of one of said precincts, viz, precinct 34, thereby changing the majority shown in favor of the five representatives, who afterwards sat in the court-house legislature, to one in favor of the five who afterwards sat in the Iron Hall legislature.

Soon thereafter, before they had adjourned or completed their work on said abstracts, alernative writs of mandamus were served upon all the canvassers, commanding them to include the returns from said precinct in the abstracts of votes of said county, or show cause to the contrary on the 28th of the said month of October. That on the 31st of October judgment awarding a peremptory writ of mandate was rendered by the court, in one of said suits, and on the 1st day of November a like judgment was rendered in the other, commanding the said board of canvass to count and include said precinct 34 in the abstracts of votes of said county, and the clerk of the board of county commissioners to deliver a certificate of election to each of the relators, the five Democratic candidates for representative. The said judgment of the court, and the opinion accompanying the same, and the said writ of peremptory mandamus issued in obedience to the same, are appended to this report as an appendix.

These judgments were delivered, and these peremptory writs of mandate were ordered to issue, while the Territorial board of canvass was in session before its alleged finding in regard to the vote of Silver Bow County. No reasonable man doubts that, as a matter of fact, the members of said board was cognizant of this judicial determination; and there is no declaration on their part, or other evidence, that they were not. The indecent haste with which they sought to anticipate, by their action, the reception of a lawful return of the abstract of votes of said Silver Bow County, made in obedience to competent judicial authority, is one fact, among many, that combine to establish the existence of a purpose, born of reckless partisanship, to disregard the votes of the people, in order to obtain results favorable to a political party and its ambitious leaders.

Ordinary respect for the laws of the society of which they were members should have constrained these canvassers to have postponed their adjournment till the abstracts which the court had ordered could be made, and which three days thereafter actually were made. But this palpable evasion of legal official duty can not alter the fact that in conformity to law as interpreted by a court of competent jurisdiction over this very case, and in obedience to a lawful mandate of said court, the county canvassers made abstracts of the votes from all the precincts of said Silver Bow County, including precinct 34, which were duly certified to the secretary of the said Territory. This return shows that the five persons sitting in the court-house house of representatives as members from Silver Bow County, were elected as such, and is, in the opinion of the undersigned, binding on the Senate, as, under the circumstances, the best evidence of title to sit as representatives from said county.

It was a board authorized and directed by law to canvass the returns of votes cast in said county. That it acted according to law is evidenced by the fact that what it did was in obedience and strict conformity to the mandate of the judicial department of the Government, lawfully issued in accordance with its interpretation of the law. What higher sanction can the Senate ask for official action? This is not the finding of an officer or board acting outside of the scope of his or its lawful authority, but the lawful act and law-directed performance of a duty to canvass, declared so to be by a competent judicial tribunal.

The undersigned believe that the Senate is bound by the act so performed, and by the judicial opinion indorsing it.

But it is said by the majority of the committee, to break the admitted force of this conclusion, that the execution of the judgment of the court referred to was superseded by an appeal. A sufficient answer would be, that the judgment was executed by the service of the peremptory mandate upon the county canvassers and that said mandate was obeyed by them. Another and independent answer is, that the alleged appeal was not perfected by filing the appeal bond or undertaking within the five days of the notice of appeal required by the statute of Montana, and was therefore under the express provision of said statute "unavailing for any purpose."

The undersigned therefore submit that, under the limitations, which they recognize as properly applicable to this judicial inquiry of the Senate, it is found and should be judicially determined by the Senate, that the five persons claiming to sit in the court-house assembly as representatives from Silver Bow County, are accredited by the act of the only officer or board that has lawfully canvassed the vote of said county. That this being so, it should be further found and determined by the Senate, that the joint assembly of the members of the senate and the members of the said court-house house of representatives, which chose Messrs. Clark and Maginnis as Senators of the United States from the State of Montana, contained a majority of

all the members elected to both houses, present and voting, and was competent to choose such Senator, and that the Messrs. Clark and Maginnis are entitled to be admitted to seats in the Senate as Senators as aforesaid.

It should be remembered that the governor of the State of Montana, constituting one of the three great departments of the government, has never recognized the body assembling in Iron Hall as the house of representatives of Montana, but that he has so recognized the body which assembled in the court-house.

It is well to notice here an objection urged by the majority to the conclusions we have based on the purely ministerial character of the duties imposed upon the Territorial board. It is this: That admitting that those duties are ministerial and not judicial, yet they say the board is required to judge whether what purport to be returns are properly returned or no.

Without pausing to comment, except thus briefly, on the exceeding refinement of the distinction, and how convenient a door it opens for the escape of tricky and unscrupulous officials from the obligations of their duties, we answer that in this case the canvassing board in their finding declare that though they have "judged," that no proper return was before them they afterwards in the same finding, "judge" that there is, and proceed to eliminate part of it. So that the proposition, even if true to the extent claimed, has no application or relevancy to the facts of this case.

But the unqualified proposition that such a board may judge and determine as pleases them, whether any paper purporting to be a return is such, is not true. The rule in this regard is, that what is contained on the face of the return must decide this question. McCreary, in his work on elections, already cited, says:

"The true rule is this: They must receive and count the votes as shown by the returns, and they can not go behind the returns for any purpose, and this necessarily implies that if a paper is presented as a return, and there is a question as to whether it is a return or not, they must decide that question from what appears upon the face of the paper itself."

There is an additional reason for the conclusion that the Senate must recognize the title to sit of the five members from Silver Bow County in the court-house legislature. It is quite independent of those already urged by the undersigned in this report. It is found in the fact that these five members have certificates of election, signed and issued by the county clerk of Silver Bow County, in conformity to the requirement of the statutes of Montana in that behalf, which it is submitted were in force at the time fixed for the convening of the legislature, and that such certificates are made by section 1325 of said statutes "prima facie evidence of the right to membership of the person certified therein to be elected, for all purposes of organization of either branch of the legislative assembly."

Section 9 of the enabling act provides that Territorial officers shall continue to discharge the duties of their respective offices until State officers are elected and qualified and the State is admitted into the Union. And section 24 of said act provides that all Territorial laws shall remain in force, except as modified or changed by said act, or by the constitution of the State. It is not claimed the law requiring the county clerk to certify the election of representatives and making such certificate of election prima facie evidence, etc., was repealed by any provision of the act of Congress, but it is claimed that the provision of the ordinance constituting the Territorial board of canvass worked a repeal by superseding the requirement of such a certificate from the county clerk. The argument of the majority of the committee in favor of such a repeal is founded partly upon a mistake as to fact, and is otherwise an argument *ab inconvenienti*. The former, of course, fails when the mistake is shown, and the latter can not avail against the express provision of the law.

There is no necessary inconsistency between the requirements that one set of officials should canvass and another official should declare the result. The fact that such requirements are often made in State laws would seem to settle the matter of their propriety and convenience. Indeed, a most conspicuous example of this is the provision of the act of Congress with which we are concerned in this case, that directs that the governor of the State shall make the certificate of the election by the legislature of a United States Senator. Under the Territorial laws of Montana the power to issue a certificate of election to a Delegate in Congress was given to the governor after the canvass was made by the Territorial board. So in this case there is no inconsistency between the power of the said board to canvass the returns of elections for State representatives and the direction to the county clerk of the county from which they were elected to issue to them certificates of such election.

The majority of the committee are mistaken when they say as a foundation for their argument that the county clerks can not be supposed to have official information of the result of the final canvass of the Territorial board, because they had no official relation to said board, while they did have such a relation to the county boards of canvass, whose action they were required to certificate. On the contrary, the law of the Territory, prior to the creation of this Territorial board of canvass, is an example of the provision for one set of officials to canvass and for another

official to certify the result, because the county clerk is not the clerk of the county board of canvass and has no *ex officio* relation to it.

If the county board of canvass appoint him a clerk of their board it is done precisely as they might appoint any other person, or as the Territorial board of canvass might appoint him. As the county clerk has a convenient opportunity to know the result of the election in his own county of representatives to the legislative assembly, there can be no great inconvenience in his acquiring the information as to the verifying and confirming of that result by the Territorial board; but whether it be convenient or inconvenient, can not determine the question of the implied repeal of express law by a subsequent enactment.

Finding, therefore, that the five members from Silver Bow County in the court-house house of representatives had certificates of election from the county clerk of Silver Bow County is, in this view of the law, sufficient to justify the Senate in recognizing their *de facto* title to sit as such, and thus bind us to the same conclusion as was arrived at above on independent grounds, viz, that Messrs. Clark and Maginnis were chosen United States Senators by a legally constituted joint legislative assembly of the State of Montana, and that Messrs. Sanders and Power were not so chosen.

In this connection it is interesting to observe that this question as to the validity and effect of these certificates of the county clerk arose before the convening of the legislative assembly. The opinion of the attorney-general of the State was asked upon the question, and after an examination of the law he decided, and announced his opinion in writing, that the clerk of the board of county commissioners was to issue the certificates. The question also came before Judge Blake, the present chief justice of the State of Montana (and who declined to sit in the case of Thompson *vs.* Kenney, auditor, etc.), in a case where a mandamus was prayed for, by a member of the legislature who claimed to be elected, on the county clerk of Jefferson County to issue the certificate to him. Judge Blake issued an alternative writ, and in obedience thereto the clerk issued the certificate as prayed.

Then the secretary of the Territory (a Republican) was asked the same question, and he responded unequivocally that the certificates of election must be issued to members of the legislature by the clerks of the boards of county commissioners of the several counties. Then the governor examined the question and reached the same conclusion, and so it was understood all over the Territory. The statements were made by the counsel for Messrs. Clark and Maginnis before the committee, and it is not known by the undersigned that they have ever been denied.

All, then, were of one mind, Republicans and Democrats alike, that notwithstanding these ordinances of the constitutional convention there was no inconsistency, and the officer who, by positive statute, was required to issue the certificates, would still issue them. This remarkable concensus of opinion would undoubtedly have governed the organization of the legislative assembly but for the fierce heat of the political ambitions which dissolved it. But it should be none the less impressive to the judicial mind of the Senate.

Basing its judicial finding on these two several grounds, either of which is sufficient therefor, the Senate will have kept within the lines of safe precedent, and has not lost sight of its own federative character and organization and of the fact that its members represent the States in their organized capacities as sovereignties under the Constitution.

The existence of this appropriate legal evidence of the election of these said five members, to which we have above referred, has not rendered it necessary that we should resort, as we might and must have resorted in its absence, to the finding of the only body clothed with judicial power, which by law stood between the electors of Silver Bow County and the announcement of the result of the election; that is, the judges of the election for precinct 34 of said county.

They were required by law to pass upon the qualifications of each elector as he presented his ballot. Behind their finding of the lawful right of each ballot to be in the box, to be counted, the Senate, in the opinion of the undersigned, is not permitted to go. In exercising its judicial function it is bound by that finding.

But, inasmuch as the aspersion of the integrity of the vote and the fairness of the poll at said precinct, made by interested parties before the committee, seems to have made some impression upon the majority thereof, the undersigned think it right in closing this report to say a word in regard thereto. That this aspersion is unfounded and unjust will abundantly appear by the affidavits of the judges who held the election, a majority of whom were opposed in politics to the majority of the voters. Copies of these affidavits are attached to this report as an appendix. Their substance has been hereinbefore recited, and need not be again quoted.

It is sufficient to say, referring to the sworn testimony in the record, that there is no proof that the election was not fairly conducted and the count honestly and publicly made according to the requirements of law. It seems like trifling with the Senate to dwell upon the *ex parte* affidavit of the Democratic judge, O'Reagan, as showing that the public were excluded from the room in which the count was made and that news-

papers were pasted over the lower sash of the window of said room, the fact being apparent that the affidavit was carefully and artfully framed for an illiterate man by the plotters for the suppression of the vote of said precinct.

On this point it will, we think, appear to be clearly established by the affidavits of other and less interested parties that the public were not excluded from the room during the count. That the door was locked only while the judges had adjourned the count that they might eat supper, or while it was necessary to exclude a drunken and disorderly person who was interfering with the conduct of the count. That the paper over the lower sash of the window was not put there by the said judges or officers of the election, but had been pasted there months before by the occupant of the store to which said room belonged. Trivial and technical as these objections to the regularity of the election and the returns appear, and far as they are from touching the honesty and fairness of the same, or from going to the point that the result was in any way affected by the matters objected to, they also for the most part fail to be supported by the facts or the law.

Some of these objections have already been alluded to and need not again be mentioned. Another on which much stress is laid by the majority of the committee, is that the poll list, which they allege was required to be kept of the voters as their votes were cast, and which was returned by the judges to the county board of canvass, appears to be in alphabetical order. The explanation is this, that the registry law of Montana passed, March 8, 1889, under which, for the first time, an election was held on the said first Tuesday of October, 1889, provided in its tenth section as follows:

"The registry agent shall prepare and complete, not later than two days next preceding that on which the election is to be held, in 'index books,' one for each election precinct, and which shall be known as the 'check lists,' lists of the names of all electors found on the official register, for such election precincts, alphabetically arranged (the surname first), with the number such name bears in the official register placed at the left of the name of the elector, and with a blank column at the right of the column of names, formed by two parallel perpendicular lines, in which the judges of election shall check the names of those voting by some particular character, thus: 'V' for voted; said blank columns last mentioned shall have written headings made by the registry agents, showing what particular election the said 'check lists' apply to, as, for instance, 'Voted at the general election, 1888.' The copy of the official register, together with the 'check lists' for election precinct, as herein provided, shall be carefully preserved and duly certified to by the registry agent, and delivered, togther with affidavits of objection, to some one of the judges of election in each election precinct, at a time not later than the day next preceding that on which such election is to be held, and such 'check lists' shall be carefully preserved, and any surrendered certificates which may have come into the hands of such registry agents pursuant to this act, and after election they shall be transmitted by the judges of election to the clerk of the board of county commissioners, in connection with and as a part of the 'election returns,' as provided by law."

A "check list," as provided by this section, was duly furnished to the judges of said election precinct 34, and the names of those who voted were "checked" or marked with a letter V, as their ballots were deposited. (A specimen page of their check list is attached to this report as an appendix.)

From this list, so marked, a copy was made of the names of those who were checked as voted and returned by the clerks and judges, as the poll list of the precinct, to the county canvassing board. This list was naturally in alphabetical order, but no suspicion can properly arise from that fact so explained. Even if it were not the exact poll list required by the old law prior to the recent registry law, it could not have affected in any way the integrity of the election or the count. Except that it did not give the order of voting, it gave as accurate and reliable information as to who, and how many voted, as a list of names written down as the votes were cast could possibly do.

The undersigned have before them duly certified copies of the check list furnished under the hand of the registry agent to the said judges of election of precinct 34, upon which the said marking or checking was done, and of the said poll list made as aforesaid and returned by said judges with their returns to the county clerk. The undersigned regret that the first of these papers, asked for by them, arrived too late to be included in the statement of facts made by order of the committee. They have also before them a certified copy of the poll book, or list, of precinct 17 of said Silver Bow County, returned by the judges of said election of October 1, 1889, to the county clerk of said county, on which appear 199 names of voters, and all in alphabetical order. So that it would seem that it was not an entirely unique impression that was made on the minds of the election officers of precinct 34, that the requirement of the registry law of 1889 as to a check list superseded and repealed the old provision as to a separate poll list, as each performed the same function. The certified poll list of said precinct 17 will be attached hereto as an appendix.

The fact that the "poll list" of this precinct 17 was in alphabetical order does not seem to have excited any suspicion on the part of these schemers in Montana to throw out the vote of precinct 34, and who were so hypercritical as to the regularity of all matters touching the returns from the same. Perhaps the alleged fact that the Republican votes on said last-mentioned list were as two to one of the Democratic votes may explain this want of zeal. Much stress is laid by the majority of the committee on the remoteness of the said precinct 34 from the settled part of the county, and the fact that quite a number of the 171 votes cast were by aliens and by men who were in that locality for the purpose of working in the construction of a railroad then being built.

Part of this objection is too illiberal and unAmerican for serious notice. Though it is worth while to remark, in passing, that these men lived only from 9 to 12 miles from Butte, the wealthiest and most populous town in the State, and county seat of Silver Bow County. The fact of their residence in the Territory and county for the period required by law was passed upon by the registry agent, and the opportunity for challenge on this or other grounds given under the law for an interval of seven days, and afterwards at the polls, together with the presumption in favor of the due performance of duty by these officers, and the utter absence of all proof to rebut such presumption, should, it seems to the undersigned, set at rest all question on these points. But, for the satisfaction of the Senate and of all who are inquisitive as to the legality and fairness of the election at these polls, it is interesting to know that the question of legal residence was recently passed upon by a court of the State of Montana of competent jurisdiction, in a suit in which the due election of the sheriff of said Silver Bow County was directly in issue, and to whose election the votes cast at precinct 34 were necessary. The court in its opinion and finding of fact says:

"The official returns, then, and this certificate which they support, make out a prima facie case for respondent, and uncontradicted and unimpeached would entitle him to judgment and the office. The inquiry, however, does not stop here, but contestant is permitted to go further and to show, if he can, that persons who were not qualified electors voted at said election for respondent, or that legal votes cast for contestant were by the election officers not counted for him, or were counted for respondent, or that they counted more votes for respondent than were cast for him, or any other legal cause why votes counted by the election officers for respondent should be rejected, or votes cast for himself should be counted and he declared elected. Contestant offered no proof of an illegal lack of qualification charged in statement against sixty-five persons who voted at precinct No. 34 for respondent, and whom he claimed had not been residents of Montana Territory for six months and of Silver Bow County for thirty days immediately preceding the date of said election, and he must be taken to have abandoned that cause of complaint in his statement altogether. He relies entirely on the lack of qualification of persons who voted at precincts Nos. 26 and 34, who were aliens, had never declared their intention before the clerk of a court of record, at his office, but had made their declaration of intention before deputy clerks, away from the office, which deputies, it is alleged, issued fraudulent certificates of election to said persons, being fraudulent for the alleged reason that no record of the declaration had been made; and the appointment of said deputies, it is contended, were invalid and their acts unauthorized, their appointment and official oaths not having been spread upon the journal of the court; and upon evidence to show fraud and impeach the returns of the election officers at precinct No. 24."

The court, in the sentences last above quoted, states the remaining objection made to the legality of some of the votes cast at precinct 34 and another precinct, and about which the majority of the committee seem greatly concerned. But in the same finding and opinion of the court in the case just stated this objection is elaborately considered and disposed of. The court decides that when the act of Congress was so changed as to prescribe that these sworn declarations of intention could be taken before the clerk instead of in the court, it permitted them to be taken in any place outside of the court that might be convenient and where the clerk might be. This was also the ruling of the supreme court of Michigan in a recent case, Andres *vs.* Judge of Circuit Court, decided October 25, 1889.

Campbell, J., in delivering the opinion of the court, says:

"There is no substantial reason why a clerk must be in his office or in court for this purpose, any more than for any other ministerial act not pertaining to court business. There is no law requiring him to be in any particular place to administer affidavits.

* * * * * * *

"There is no reason why an oath may not be taken before him at any place where he may happen to be, as well as before a judge, or notary, or commissioner. He is the person indicated by the law. When it dispenses with his action in open court, it dispenses with the only locality which is universally known for clerical action;

and we can not require his action under the naturalization laws to be held in any particular spot, or room, or building without adding to the law a qualification of our own not indicated by its language and not required by any of its purposes."

This is sound reasoning, and whatever we may think of the general question of propriety on the part of the clerk in leaving his office for this purpose, it will hardly do to say that the men so qualified voted illegally in this respect at said precinct 34. The Montana State court, in the case above referred to, say that it had been the habit in the Territory for aliens to make their declarations of intention in this manner. As this opinion is interesting and valuable on other points that concern this election, and contains a complete answer to all these objections, it is in part printed as an appendix hereto.

It is unnecessary to comment further on the character of these objections. They are not even plausible, and the undersigned think that the majority of the committee have been misled in indorsing them. It is not uncommon for a party who is prejudiced by a record to resort to some method of destroying it or impeaching it. And where the method is questionable and illegal this is not only recognized as criminative of the party making use of it, but as the strongest proof of the truth and genuine authenticity of the record so attacked. *Omnia presumuntur contra spoliatorum.* There is, in the opinion of the undersigned, no room to question that the election at said precinct 34 was fairly conducted; that the electors voted without intimidation or undue influence exercised toward them from any source; and the votes so cast were fairly counted and honestly returned.

Elections under our form of government must be conducted by the plain people of the country. That this should be so is one of the greatest securities to, as well as one of the chiefest glories of, our scheme of self-government. The officers and all the machinery of the elections are provided for by laws of their own making, and furnished from the vicinage of the election precinct.

It is essential to the working of such a system that substance and not form should be first regarded. This wholesome American doctrine is well laid down by Judge McCrary, quoting the language of the report of the election committee of the House of Representatives in an important case:

"Your committee feel constrained to adhere to the law as it exists and is administered in all the courts of the country, not only because of the very great authority by which it is supported, but for the further reason, as stated in the outset, that we believe the rule to be most wise and salutary. The officers of election are chosen of necessity from among all classes of the people; they are numbered in every State by thousands; they are often men unaccustomed to the formalities of legal proceedings. Omissions and mistakes in the discharge of their ministerial duties are almost inevitable. If this House shall establish the doctrine that an election is void because an officer thereof is not in all respects duly qualified, or because the same is not conducted strictly according to law, notwithstanding it may have been a fair and free election, the result will be very many contests, and, what is worse, injustice will be done in many cases. It will enable those who are so disposed to seize upon mere technicality in order to defeat the will of the majority."

In the opinion of the undersigned the Senate can not adopt the resolution reported by the majority of the committee without, practically, making itself a party to the sharp practices and questionable methods by which heated partisans have sought to suppress the votes honestly cast at said precinct 34. Nor can it adopt it without disregarding those safe rules of judicial action, established by high authority, adhered to in previous cases and which, we have endeavored to show, commend themselves to a sober judgment, by their consonance with sound reasoning and the genius of our political system.

The undersigned, therefore, respectfully submit, as an amendment to the resolutions reported by the committee, the following:

Resolved, That the word "not" be stricken out of the first two resolutions and that the word *not* be inserted between the words "is" and "entitled" in last two of the resolutions so reported by the committee, so that said resolutions shall read:

"*Resolved*, That William A. Clark is entitled to be admitted to a seat in the Senate from the State of Montana.

"*Resolved*, That Martin Maginnis is entitled to be admitted to a seat in the Senate from the State of Montana.

"*Resolved*, That Wilbur F. Sanders is not entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana.

"*Resolved*, That Thomas C. Power is not entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana."

Z. B. VANCE.
J. L. PUGH.
GEORGE GRAY.
DAVID TURPIE.

MONDAY, *March* 31, 1890.

On motion by Mr. Hoar,
The Senate proceeded to consider the report of the Committee on Privileges and Elections on the contested seats in the Senate from the State of Montana.

WEDNESDAY, *April* 2, 1891.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana; and
The question being on the first resolution reported by the committee, viz:
Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana.
[The debate appears on pp. 2906 to 2919, Cong. Record, 1st sess. 51st Cong.]

THURSDAY, *April* 3, 1890.

The Presiding Officer (Mr. Cockrell in the chair), at 1 o'clock p. m., laid before the Senate the unfinished business at its adjournment yesterday, viz, the report of the Committee on Privileges and Elections in the contested-election cases from the State of Montana; and
The Senate resumed the consideration of the report; and, after debate,
Ordered, That the further consideration thereof be postponed to Monday next.
[The debate will be found at pp. 2968 to 2997, Cong. Record, 1st sess. 51st Cong.]

MONDAY, *April* 7, 1890.

The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana.
[The debate will be found at pp. 3101 to 3114, Cong. Record, 1st sess. 51st Cong.]

TUESDAY, *April* 8, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana.
[For the debate see pp. 3136 to 3145, Cong. Record, 1st sess. 51st Cong.]

WEDNESDAY, *April* 9, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana.
[The debate may be found on pp. 3188 to 3200, Cong. Record, 1st sess. 51st Cong.]

THURSDAY, *April* 10, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana.
[For the debate see pp. 3228 to 3231 and 3232 to 3249, Cong. Record, 1st sess. 51st Cong.]

FRIDAY, *April* 11, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana,
[The debate will be found on pp. 3279 to 3292, Cong. Record, 1st sess. 51st Cong.]

TUESDAY, *April* 15, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested-election cases from the State of Montana.
[The debate will be found on pp. 3378 to 3394, Cong. Record, 1st sess. 51st Cong.]

WEDNESDAY, *April* 16, 1890.

On motion by Mr. Hoar,
The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested election cases from the State of Montana; and
Pending debate,
On motion by Mr. Butler, at 2 o'clock and 25 minutes p. m., that the Senate adjourn,

It was determined in the negative, { 1
..... 48

On motion by Mr. Paddock,
The yeas and nays being desired by one-fifth of the Senators present,

Mr. Hampton voted in the affirmative.

Those who voted in the negative are,

Messrs. Aldrich, Allen, Allison, Berry, Butler, Chandler, Cockrell, Colquitt, Cullom, Daniel, Davis, Dawes, Dixon, Dolph, Eustis, Evarts, Faulkner, Gorman, Gray, Hale, Harris, Higgins, Hoar, Jones of Arkansas, McMillan, McPherson, Mitchell, Moody, Morgan, Morrill, Paddock, Pettigrew, Platt, Pugh, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Turpie, Vance, Vest, Voorhees, Walthall, Wilson of Iowa.

So the motion was not agreed to.

After further debate,

On the question to agree to the first resolution reported by the committee, viz:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana,

On motion by Mr. Butler, that the question be recommitted to the Committee on Privileges and Elections,

It was determined in the negative, { Yeas ..... 26 / Nays ..... 32 }

On motion of Mr. Butler,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Barbour, Berry, Blackburn, Call, Coke, Colquitt, Daniel, Eustis, Faulkner, George, Gibson, Gorman, Gray, Hampton, Harris, Jones of Arkansas, Kenna, Morgan, Payne, Reagan, Turpie, Vance, Vest, Voorhees, Walthall, Wilson of Maryland.

Those who voted in the negative are:

Messrs. Allen, Allison, Blair, Casey, Cullom, Davis, Dawes, Dixon, Evarts, Frye, Hale, Higgins, Hiscock, Hoar, Jones of Nevada, McMillan, Mitchell, Moody, Morrill, Paddock, Pettigrew, Platt, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Washburn, Wilson of Iowa.

So the motion was not agreed to.

On motion by Mr. Hoar, and by unanimous consent,

Ordered, That the first two resolutions reported by the Committee on Privileges and Elections, viz:

Resolved, That William A. Clark is not entitled to be admitted to a seat in the Senate from the State of Montana;

Resolved, That Martin Maginnis is not entitled to be admitted to a seat in the Senate from the State of Montana, be treated as one question.

On motion by Mr. Gray to amend the resolution by striking out all after the first word "*Resolved*" and in lieu thereof inserting:

That Wilbur F. Sanders is not entitled to be admitted to a seat in the Senate from the State of Montana;

Resolved, That Thomas C. Power is not entitled to be admitted to a seat in the Senate from the State of Montana,

It was decided in the negative, { Yeas ..... 26 / Nays ..... 32 }

On motion by Mr. Gray,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Barbour, Berry, Blackburn, Call, Coke, Colquitt, Daniel, Eustis, Faulkner, George, Gibson, Gorman, Gray, Hampton, Harris, Jones of Arkansas, Kenna, Morgan, Payne, Reagan, Turpie, Vance, Vest, Voorhees, Walthall, Wilson of Maryland.

Those who voted in the negative are:

Messrs. Allen, Allison, Blair, Casey, Cullom, Davis, Dawes, Dixon, Evarts, Frye, Hale, Higgins, Hiscock, Hoar, Jones of Nevada, McMillan, Mitchell, Moody, Morrill, Paddock, Pettigrew, Platt, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Washburn, Wilson of Iowa.

So the amendment was not agreed to.

The question recurring on agreeing to the resolutions,

It was determined in the affirmative, { Yeas ..... 38 / Nays ..... 19 }

On motion by Mr. Hoar,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Allen, Allison, Barbour, Blair, Casey, Cullom, Davis, Dawes, Dixon, Evarts, Frye, George, Gibson, Hale, Higgins, Hiscock, Hoar, Jones of Nevada, Kenna, McMillan, Mitchell, Moody, Morrill, Paddock, Pettigrew, Platt, Plumb, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Walthall, Washburn, Wilson of Iowa.

Those who voted in the negative are:

Messrs. Berry, Blackburn, Call, Coke, Colquitt, Daniel, Eustis, Gorman, Gray, Hampton, Harris, Jones of Arkansas, Morgan, Reagan, Turpie, Vance, Vest, Voorhees, Wilson of Maryland.

So the resolutions were agreed to.

On motion by Mr. Hoar, and by unanimous consent,

Ordered, That the last two resolutions reported by the Committee on Privileges and Elections, viz:

Resolved, That Wilbur F. Sanders is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana;

Resolved, That Thomas C. Power is entitled, upon the merits of the case, to be admitted to a seat in the Senate from the State of Montana; be treated as one question; and

On the question to agree thereto,

On motion by Mr. Butler, to amend the resolutions by striking out all after the first word, "*Resolved*" and in lieu thereof inserting:

That it is the judgment of the Senate that there has been no choice of United States Senators from the State of Montana,

It was determined in the negative, { Yeas ..... 23 / Nays 30

On motion by Mr. Butler,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Barbour, Blackburn, Call, Coke, Colquitt, Daniel, Faulkner, George, Gibson, Gorman, Gray, Hampton, Harris, Jones of Arkansas, Kenna, Morgan, Payne, Reagan, Turpie, Vance, Voorhees, Walthall, Wilson of Maryland.

Those who voted in the negative are:

Messrs. Allen, Allison, Blair, Casey, Cullom, Davis, Dawes, Dixon, Evarts, Frye, Hale, Higgins, Hiscock, Hoar, Jones of Nevada, McMillan, Moody, Morrill, Pettigrew, Platt, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Washburn, Wilson of Iowa.

So the amendment was not agreed to.

The question recurring on agreeing to the resolutions,

It was determined in the affimative, { Yeas ..... 32 / Nays 26

On motion by Mr. Gray,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Allen, Allison, Blair, Casey, Cullom, Davis, Dawes, Dixon, Evarts, Frye, Hale, Higgins, Hiscock, Hoar, Jones of Nevada, McMillan, Mitchell, Moody, Morrill, Paddock, Pettigrew, Platt, Quay, Sawyer, Sherman, Spooner, Squire, Stewart, Stockbridge, Teller, Washburn, Wilson of Iowa.

Those who voted in the negative are:

Messrs. Barbour, Berry, Blackburn, Call, Coke, Colquitt, Daniel, Eustis, Faulkner, George, Gibson, Gorman, Gray, Hampton, Harris, Jones of Arkansas, Kenna, Morgan, Payne, Reagan, Turpie, Vance, Vest, Voorhees, Walthall, Wilson of Maryland.

So the resolutions were agreed to.

Mr. Wilbur F. Sanders and Mr. Thomas C. Power appeared, and the oath prescribed by law having been administered to them by the Vice-President, they took their seats in the Senate.

[This day's proceedings may be found on pp. 3419 to 3435, and 3433 to 3435, Cong. Record, 1st sess., 51st Cong.]

COMPENSATION OF CONTESTANTS.

FRIDAY, *July* 18, 1890.

Mr. Gray, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee on Appropriations:

Resolved, That there be allowed out of the contingent fund of the Senate to William A. Clark and Martin Maginnis the sum of $5,000 each, in full compensation for their time and expenses in prosecuting their respective claims to seats in the Senate as Senators from the State of Montana.

[These sums were appropriated by "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1890, and for prior years and for other purposes," approved September 30, 1890. (26 St. L,. 529.) The same act appropriated "to enable the Secretary of the Senate to pay Wilbur F. Sanders and Thomas C. Power their counsel fees and expenses in defending the title to their seats, $2,453. (*Ib.* 529.)]

[Second session—Fifty-first Congress.]

GEORGE L. SHOUP AND WILLIAM J. McCONNELL,

of Idaho.

December 29, 1890, a statement of the governor of Idaho transmitting a certified copy of the proceedings of the joint convention of the legislature of that State in which three Senators were elected, one for the term beginning March 4, 1890, was presented to the Senate, and on the same day the credentials of Messrs. Shoup and McConnell, as Senators, were presented. Mr. Shoup, who was present, was sworn and took his seat. The credentials were on the same day referred to the Committee on Privileges and Elections, which reported that the credentials presented a sufficient certificate of the executive of the State under its seal and countersigned by the secretary of state, and recommended that Mr. McConnell be also sworn and admitted to a seat. The report was adopted and Mr. McConnell was sworn.

The history of the case here given consists of a transcript of the Journal of the Senate relating to it. The report of the committee, No. 1904, Sen. Rep., 2d Sess. 51st Cong., being spread at length on the Journal, is not repeated below. The proceedings of the legislature of Idaho appear more fully in the case of Claggett *v.* Dubois, below.

MONDAY, *December* 29, 1890.

The Vice-President laid before the Senate a communication from the governor of Idaho, transmitting a certified copy of the proceedings of the joint session of the legislature of Idaho for the election of United States Senators, at Boise City, Idaho, December 18, 1890.

Ordered, That it lie on the table.

[This paper as printed on p. 847, Cong. Record, 2d Sess., 51st Cong.]

The Vice-President laid before the Senate the credentials of George L. Shoup and the credentials of William J. McConnell, elected Senators by the legislature of the State of Idaho; which were read.

On motion by Mr. Vance, that the credentials be referred to the Committee on Privileges and Elections,

On motion by Mr. Hoar,

Ordered, That George L. Shoup, whose credentials have been read, be now sworn and admitted as such Senator,

Whereupon

Mr. Shoup appeared and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[Mr. McConnell was not present.]

The question recurring upon the motion of Mr. Vance to refer the credentials to the Committee on Privileges and Elections,

After debate,

On motion by Mr. Hoar that the motion to refer lie on the table,

The yeas were 22 and the nays were 15.

On motion by Mr. Harris,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Aldrich, Allen, Casey, Dolph, Evarts, Frye, Hawley, Higgins, Hoar, McMillan, Mitchell, Morrill, Plumb, Power, Sanders, Sherman, Spooner, Stewart, Stockbridge, Teller, Washburn, Wolcott.

Those who voted in the negative are:

Messrs. Bate, Cockrell, Coke, Edmunds, Gibson, Gorman, Harris, Kenna, McPherson, Morgan, Pasco, Pugh, Reagan, Vance, Vest.

The number of Senators voting not constituting a quorum,

The Vice-President directed the roll to be called;

When

Fifty-four Senators answered to their names.

A quorum being present,

By unanimous consent the order for the yeas and nays was rescinded; and the motion to lay on the table was withdrawn by Mr. Hoar;

When,

The motion to refer the credentials to the Committee on Privileges and Elections was agreed to.

[For the debate see pp. 843–848 Cong. Record, 2d Sess. 51st Cong.]

JANUARY 5, 1891.

Mr. Hoar, from the Committee on Privileges and Elections, to whom were referred the credentials of George L. Shoup and William J. McConnell, as Senators from the State of Idaho, submitted the following report (No. 1904):

The Committee on Privileges and Elections, to whom were referred the credentials of George L. Shoup and William J. McConnell, as Senators from the State of Idaho, have considered the same and report:

That the said credentials constitute a sufficient certificate of the executive of the State under the seal thereof, properly countersigned by the secretary of said State, and certifying the election of Mr. Shoup and Mr. McConnell, respectively, as Senators from that State. Mr. Shoup has already been admitted to take the oath and has taken his seat.

The committee therefore are of the opinion that Mr. McConnell should likewise be admitted to take the oath as Senator, and that said credentials should be placed on file.

The credentials were accordingly placed on file,

When

Mr. McConnell appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

[Second session Fifty-first Congress.]

FRED T. DUBOIS,

of Idaho.

December 30, 1890, the credentials of Mr. Fred T. Dubois, as Senator from Idaho for six years beginning March 4, 1891, were laid before the Senate and referred to the Committee on Privileges and Elections. January 5 that committee reported that it was not customary to consider any questions arising on the credentials of a Senator until the term for which he claimed to be elected, and recommended that the credentials be placed on file. The credentials were filed accordingly.

The history of the part of the case here given is a transcript from the Journal of the Senate, 2d sess. 51st Cong. The report of the committee, Senate Rep. 1905, 2d sess. 51st Cong., is printed in full in the Journal, and therefore is not repeated.

For further proceedings in relation to Mr. Dubois's seat *v. infra* Claggett *vs.* Dubois.

TUESDAY, *December* 30, 1890.

The Vice-President laid before the Senate the credentials of Fred T. Dubois, elected a Senator by the legislature of the State of Idaho for the term of six years commencing March 4, 1891; which were read.

Ordered that they be referred to the Committee on Privileges and Elections.

[The credentials are printed at p. 863, Cong. Record, 2d sess. 51st Cong.]

MONDAY, *January* 5, 1891.

Mr. Hoar, from the Committee on Privileges and Elections to whom were referred the credentials of Fred T. Dubois, as a Senator from the State of Idaho, submitted the following report (No. 1905):

"The Committee on Privileges and Elections, to whom were referred the credentials of Fred T. Dubois, as a Senator from the State of Idaho, for the term of six years beginning March 4, 1891, have considered the same and report:

"That it is the usage of the Senate to consider any questions that may arise upon the credentials of a Senator, at a session held during the term for which the Senator claims to be elected, and not before; and no reason appears to the committee for a departure from such usage in the present case. They therefore recommend that the credentials be placed on file."

The credentials were accordingly placed on file.

SATURDAY, *January* 10, 1891.

The Vice-President laid before the Senate a memorial of certain members of the legislature of Idaho, remonstrating against the admission of Fred T. Dubois to a seat in the Senate, as a Senator from that State; which was referred to the Committee on Privileges and Elections and ordered to be printed.

[The memorial is Sen. Mis Doc. 44, 2d sess., 51st Cong.]

[First session Fifty-second Congress.]

WILLIAM H. CLAGETT v. FRED. T. DUBOIS,

of Idaho.

The first legislature of the State of Idaho met pursuant to proclamation by the governor, Monday, December 8, 1890. The house of representatives effected a permanent organization on that day. The senate, the lieutenant-governor being ex-officio presiding officer, after prayer, elected a clerk *pro tempore*, after which the senators were sworn, a committee on rules selected, choice of seats provided for, a set of temporary rules adopted, and, finally, a committee on organization appointed. Tuesday, December 9, the permanent organization was perfected by the choice of a secretary and other officers. Tuesday, December 16, being the second Tuesday after Monday, December 8, each branch of the legislature took one ballot, acting under joint resolution "to elect, as provided by law, United States Senators." The following day the two houses met in joint convention, and the result of the previous day's balloting showing no choice of a Senator, proceeded to ballot. No person was elected on this day. On the following day, Thursday, December 18, the joint convention elected Messrs. Shoup and McConnell Senators, to fill the existing vacancies, and Mr. Dubois for the term beginning March 4, 1891. Mr. Dubois's credentials were issued under date of December 18, 1890. February 6, 1891, the legislature of Idaho voted that there was "at least grave doubt" as to the validity of the election of Fred T. Dubois, and to proceed to a new election. In pursuance of this resolution a new election was held, and Mr. Clagett was declared elected February 11, 1891. The governor issued credentials, certifying that fact, under date of February 14, 1891. On the assembling of the Fifty-second Congress Mr. Dubois presented himself to take the oath as Senator. Objection was made and the matter went over until the following day, when Mr. Dubois was sworn, and his credentials, together with a memorial of William H. Clagett, claiming the seat, were referred to the Committee on Privileges and Elections. The majority of the committee reported that "both on construction and precedent the legislature of Idaho was organized on Monday, December 8, A. D. 1890, within the meaning of the term 'organization' as used in the constitution of the State of Idaho, in the act of admission, and in the Revised Statutes" (R. S. § 14), that "Tuesday, the 16th day of December, was, in the judgment of [the] committee, the second Tuesday after the meeting and organization of the legislature of the State of Idaho," and that therefore Mr. Dubois was duly elected and entitled to retain his seat. Two of the committee dissented, contending that according to precedent the word "organization" meant *permanent organization*, that the permanent organization was not effected until Tuesday, December 9, that the proceedings which culminated in the election of Mr. Dubois did not take place on the second Tuesday thereafter, but were premature, and that therefore he was not entitled to the seat as Senator from Idaho. February 25, pending the discussion of the report of the committee, Mr. Clagett was given the right to speak in his own behalf for two hours, and on the following day the limit of time was removed. March 3 Mr. Dubois was declared entitled to retain his seat by vote of 55 yeas to 5 nays. April 1 the committee recommended the payment of $2,000 to Mr. Dubois and $4,000 to Mr. Clagett, in compensation of all expenses incurred by them in the contest, and the resolutions were referred to the Committee on Appropriations.

The history of the case here given consists of a transcript of the journal of the Senate and the report of the committee, Senate Reports, 1st sess., 52d Cong., No. 148.

MONDAY, *December* 7, 1891.

Mr. Hale having objected to the oath of office being this day administered to Mr. Frederick T. Dubois, whose credentials as Senator from the State of Idaho were heretofore presented,

Mr. Cullom submitted a motion that the oath prescribed by law be administered to Mr. Dubois; and

Ordered, That the consideration of the motion be postponed to to-morrow.

TUESDAY, *December* 8, 1891.

The Senate proceeded to consider the motion yesterday submitted by Mr. Cullom, that the oath of office be administered to Frederick T. Dubois, as a Senator from the State of Idaho; and

The motion was agreed to,

Whereupon,

Mr. Dubois appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

On motion by Mr. Hale,

Ordered, That the credentials of Frederick T. Dubois and the memorial and papers of William H. Clagett, claiming a seat in the Senate from the State of Idaho, be taken from the files of the Senate and referred to the Committee on Privileges and Elections.

TUESDAY, *February* 2, 1892.

Mr. Mitchell, from the Committee on Privileges and Elections, to whom was committed the investigation of the contest inaugurated by William H. Clagett, involving the right of Mr. Fred T. Dubois to a seat in the Senate as Senator from the State

of Idaho, for the full term commencing March 4, 1891, submitted a report (No. 148) accompanied by the following resolutions:

Resolved, That Fred T. Dubois is entitled to hold the seat he now holds as Senator from the State of Idaho for the full term commencing March 4, 1891.

Resolved, That William H. Clagett is not entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, 1891.

THURSDAY, *February* 4, 1892.

On motion by Mr. Mitchell,

Ordered, That leave be granted to the minority of the Committee on Privileges and Elections to file with the Secretary their views in the matter of the contest for a seat in the Senate from the State of Idaho, and that they be printed in connection with the report of the committee (No. 148).

TUESDAY, *February* 16, 1892.

Mr. Vance presented a digest of State precedents to accompany the views of a minority of the Committee on Privileges and Elections in the contested election case from the State of Idaho, which was ordered to be printed as part 2 of the Report No. 148.

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Teller (chairman), Hoar, Mitchell, Chandler, Higgins, Vance, Pugh, Gray, Turpie.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1892.—Ordered to be printed.

Mr. Mitchell, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was committed the investigation of the contest inaugurated by Mr. William H. Clagett, involving the right of Mr. Fred T. Dubois to a seat in the Senate as Senator from the State of Idaho for the full term commencing March 4, 1891, and to which seat he was admitted on his prima facie case on the 8th day of December, 1891, having had the same under consideration, beg leave to submit the following report:

STATEMENT OF FACTS.

There is in this case really no material controversy in regard to the facts. The questions involved are of law, arising out of the construction of various constitutional and statutory provisions and their applicability to these facts. The sitting member, Mr. Dubois, and the contestant, Mr. Clagett, each claims to have been duly elected a United States Senator by the legislature of the State of Idaho for the full term above mentioned. Mr. Dubois claims to have been thus elected on Thursday, the 18th day of December, 1890; while Mr. Clagett claims to have been thus elected on Wednesday, the 11th day of February, 1891.

Inasmuch as each claimant claims to have been elected for precisely the same term, and as it is conceded that the election under which Mr. Dubois claims to have been elected was prior in time, it follows that, if it shall be held he was duly elected, that is the end of the contest and he is entitled to retain his seat. Upon the other hand, should it be determined that Mr. Dubois was not duly elected, then, and only then, will it become necessary to inquire into the legality of the election of Mr. Clagett.

For the purpose of determining as to the validity of the election of Mr. Dubois, in so far as the facts are involved, it is only necessary to consider the record of the proceedings of the first twelve days of the first session of the legislature of the State of Idaho, commencing Monday, December 8, A. D. 1890. This record, together with accompanying affidavits, supplying an alleged omission in such record on one particular point, and the truthfulness of the allegation as to such omission, and of its proper correction by the affidavits referred to, are not denied by the contestant, disclose the following facts in reference to the organization of the legislature and the election of Mr. Dubois:

Before proceeding, however, to a statement of the facts thus disclosed and admitted, it may be said that the State of Idaho was admitted into the Union by act of Congress dated July 3, 1890. This act refers to and adopts the constitution which the people of the late Territory of Idaho had adopted prior to that time. The fourteenth section of article 21 of such constitution contains the following provision:

"Within ten days after the organization of the legislature both houses of the leg-

islature shall then and there proceed to elect, as provided by law, two Senators of the United States for the State of Idaho. At said election the two persons who shall receive the majority of all the votes cast by said senators and representatives shall be elected as such United States Senators, and shall be so declared by the presiding officer of the said joint session. The presiding officers of the senate and house shall issue a certificate to each of said Senators, certifying his election, which certificate shall also be signed by the governor and attested by the secretary of state."

The act of Congress admitting the State into the Union, including the recitals, reads in part as follows:

"Whereas the people of the Territory of Idaho did, on the 4th day of July, 1889, by a convention of delegates called and assembled for that purpose, form for themselves a constitution, which constitution was ratified and adopted by the people of said Territory at an election held therefor on the first Tuesday of November, 1889, which constitution is republican in form and is in conformity with the Constitution of the United States; and

"Whereas said convention and the people of said Territory have asked the admission of said Territory into the Union of States on an equal footing with the original States in all respects whatever: Therefore,

"*Be it enacted, etc.*, That the State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared to be admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed."

Section 20 of said act admitting the State reads as follows:

"SEC. 20. That the legislature of the said State may elect two Senators of the United States, as provided by the constitution of the said State; and the Senators and Representatives of said State shall be entitled to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States."

THE REVISED STATUTES PROVIDING THE TIME AND MANNER OF ELECTING UNITED STATES SENATORS.

Sections 14, 15, 16, 17, 18, and 19 of the Revised Statutes of the United States, relating to the time and manner of the election of United States Senators, the same being a reënactment of the act of July 25, A. D. 1866, are for the convenience of the Senate here inserted. They read as follows:

"SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for who receives a majority of the whole number of votes cast in each house shall be entered on the journal of that house by the clerk or secretary thereof; or, if either house fails to give such majority to either person on that day, the fact shall be entered on the journal. At 12 o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for Senator, and the person who receives the majority of all the votes of the joint assembly—a majority of all the members elected by both houses being present and voting—shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote until a Senator is elected.

"SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed on the second Tuesday after meeting and organization to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for the full term.

"SEC. 17. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

"SEC. 18. It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

"SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State."

ORGANIZATION OF THE LEGISLATURE.

On Monday, December 8, A. D. 1890, the first legislature of the State of Idaho met, pursuant to the proclamation of the governor as required by section 14, article 21, of the constitution of the State.

ORGANIZATION OF THE HOUSE.

The house met at 12 o'clock meridian on Monday, December 8, A. D. 1890, in the hall of the house of representatives, in the capital of the State at Boise City. Neither the State constitution nor any statute made any provision for officers of the house. The house, therefore, was possessed of the inherent and exclusive power, not only of electing its own officers, but also of determining the number and kind of officers to be elected.

On the first day of the session, namely, Monday, December 8, 1890, the house of representatives, a quorum of members being present, elected a speaker and principal officers. The house was called to order on that day by Hon. H. J. Burkhart, speaker of the house of representatives of the fifteenth legislative assembly of the late Territory of Idaho, at the hour of 12 o'clock m., whereupon Charles H. Reed, chief clerk of the house of representatives of the fifteenth session of the legislative assembly of the late Territory of Idaho, acting as the chief clerk of the house, with the consent of all, there being no protest, then read the proclamation of the governor of Idaho convening the State legislature on that date.

The certificate of the secretary of state was then read, certifying the names of the different persons elected members of the house of representatives of the first session of the legislature of the State of Idaho. The roll of members, as they appeared upon such certificate of the secretary of state, was then called. All being present, the oath of office was administered to the members of the house, respectively, by Hon. John T. Morgan, associate justice of the supreme court of Idaho. After prayer by Rev. L. W. Gowan, the election of a speaker having been declared in order, Mr. Emery, of Custer County, placed in nomination Mr. Frank A. Fenn, of Idaho County; Mr. Jones, of Boise County, placed in nomination Mr. Ballentine, of Ada County. A ballot was taken, which resulted as follows:

Mr. Fenn received 29 votes; Mr. Ballentine, 5; Mr. Emery, 1; Mr. Steunenberg, 1. Mr. Frank A Fenn, having received a majority of all the votes cast, was declared duly elected speaker of the house, and was conducted to the chair by a committee consisting of Messrs. Price, Armstrong, and Cameron, appointed for that purpose by the temporary chairman. The committee presented Mr. Fenn, who was introduced to the house by Mr. Burkhart, the temporary presiding officer, as speaker of the house.

The oath of office was then administered to the speaker by Judge Morgan, associate justice of the supreme court of the State of Idaho; whereupon the house proceeded to the election of a chief clerk. Mr. Charles H. Reed, who had been acting as temporary chief clerk, was, on a ballot being taken, elected, and declared duly elected by the speaker, chief clerk of the house for the ensuing session. A recess was then, on motion of Representative Armstrong, taken for one hour.

The recess having expired, the house was called to order at 2 o'clock p. m., December 8, Mr. Speaker in the chair and a quorum present, whereupon Mr. John Hunter was elected sergeant-at-arms; Miss Carry Sweet, assistant chief clerk; Mr. J. W. Jackson, doorkeeper. An enrolling clerk, an assistant enrolling clerk, an engrossing clerk, and an assistant engrossing clerk were also each duly elected, and all the above-named officers were declared, respectively, to have been duly elected on that date, December 8, A. D. 1890. A page and a messenger were also elected, after all which, on motion of Mr. Hawkins, the house adjourned until 10 o'clock a. m., December 9, 1890, the record of proceedings in the house journal being signed as follows:

"F. A. Fenn, speaker; attest, Charles H. Reed, chief clerk."

No action was taken on that day, December 8, in the house looking to the possible election of any other officers on any future day; whether the house would elect any other officers during the session was uncertain. At 10 o'clock on the morning of Tuesday, December 9, 1890, the house of representatives reassembled, Mr. Speaker in the chair. Immediately after the journal was read, and which was then approved, a chaplain was elected. No other officer was chosen on December 9, 1890.

ORGANIZATION OF THE SENATE.

The senate of the State of Idaho also met at 12 o'clock meridian, Monday, December 8, A. D. 1890, in the senate chamber of the capitol of the State at Boise City. The State constitution of Idaho provides that the lieutenant-governor of the State shall be the presiding officer of the senate. The lieutenant-governor was Norman B. Willey, and at the hour and on the day just named, the members-elect of the senate being assembled in the senate chamber of the capitol at Boise City, a quorum being present, were called to order by Lieutenant-Governor Norman B. Willey, acting in virtue of a provision in the State constitution in the capacity of presiding officer of the senate.

After prayer by the Rev. Mr. Scidmore, Senator Gunn moved that M. C. Athey be elected secretary of the senate *pro tempore*, which motion, as will appear hereafter, prevailed. Mr. Athey was duly elected and so declared to be by the presiding officer, and he immediately entered upon the duties of his office. The president of the senate then read the proclamation of the governor, convening the legislature of the State of Idaho, at Boise City, on the 8th day of December, A. D. 1890. The president of the senate then called the roll of members as certified by the secretary of state, and a quorum, 16 in all—the whole number constituting the senate of the State of Idaho being 18—answered to their names. The oath of office was then administered to the senators-elect by Mr. Justice Sullivan, chief justice of the supreme court of the State of Idaho.

Senator Gray then moved that the senate adjourn until 2:30 o'clock p. m. of the same day. This motion was carried, and the president of the senate declared the senate adjourned until 2:30 o'clock Monday, December 8, 1890. At 2:30 o'clock p. m. of the same day the senate met pursuant to adjournment, Norman B. Willey, the lieutenant-governor, presiding. The roll was called, which disclosed the fact that all the senators were present.

Senator Gray moved that the rules of the legislative council of the fifteenth session of the late Territory be adopted, as far as consistent, for the regulation of the senate until the report of the committee on rules be adopted; which motion was put by the presiding officer, and by him declared carried.

Motions were then made for the purpose of determining the selection of seats of the several senators.

Senator Finch moved that in drawing for seats names be placed in a hat and the first name drawn would take seat No. 1, and so on.

Senator Gunn moved to amend this motion by adding that the senators retain the seats then occupied by them, which latter motion prevailed.

The senate then adjourned.

These acts on the part of the senate constitute, in the judgment of your committee, an organization on the part of that body sufficient to enable it to exercise every function of a State senate, legislative and otherwise, including that of electing a Senator of the United States. These acts constituted an organization, in the judgment of your committee, within the meaning of that term as employed is section 14 of the Revised Statutes. Whatever else may have been done by the senate, thus organized on Monday, December 8, 1890, either on that date or at any subsequent time, could not, in the opinion of your committee, invalidate such organization.

What further did occur, we will inquire, on Monday, December 8, or subsequently, on which contestant rests his contention that there was no such organization on Monday as is contemplated by the statute? Simply this: Senator Brigham, on Monday, December 8, after the members had been sworn, a chief clerk elected and entered upon his duties, and rules adopted, moved that the president appoint a committee of three on organization, to designate and determine the number and order of officers to be filled by the senate. This motion was carried, and the president of the senate appointed Senators Brigham, Gunn, and Jewell such committee.

Senator Shoup also moved, on Monday, that a committee of five be appointed by the chair to report rules for the government of the senate, which motion was carried. This was *prior* to the adoption of the motion of Senator Gray that the rules of the legislative council of the fifteenth session be adopted as hereinbefore recited. Subsequent to this the president, in accordance with Senator Shoup's motion, appointed as a committee on rules of government of the senate, Senators Shoup, Weiler, Langrische, and Branstetter.

But surely these acts, so far from proving or tending to prove that there was not already, prior to and at the time they occurred, a perfect and complete temporary organization of the senate, such as would have enabled it to censure or expel a member, pass a bill, or do any other act required of it by the laws of its being, that it could rightfully do after the permanent organization had been effected, conclusively, as it seems to your committee, prove the very reverse. Why the necessity of adopting the rules of a late Territorial council if it were not understood that the senate was *organized* and in a condition to transact business? Why adopt rules "for the

regulation of the senate" if there were no *organized senate* in existence—no senate to regulate. And, again, can an unorganized senate adopt rules, appoint important committees, etc.?

The appointment of the committee on organization clearly had reference to a *permanent* organization. This is made plain by what occurred on Tuesday, December 9. On that date the journal shows the *senate* met pursuant to adjournment at 10 o'clock a. m. It was the *senate*—an *organized body* that met, not the *members* of the senate in their unorganized capacity.

The senate, says the *journal*, was opened by prayer by Rev. Mr. Gowan. Roll called; all present. The committee appointed on Monday reported a list of offices to be filled by the senate, which report was adopted. This list included president *pro tempore* of the senate and secretary of the senate *pro tempore*, each of whom had been duly installed on Monday. These several offices were then filled by election. M. C. Athey, who had been elected and installed on Monday as secretary *pro tempore* of the senate, was elected as secretary of the senate.

All this conclusively shows, in the judgment of your committee, that the senate itself understood there had been a *temporary organization* of the senate on Monday, and it was the *permanent* organization that was being effected on Tuesday, December 9. This view is fully confirmed by the character of the notices which passed between the two houses on Tuesday, December 9, as each of these recites that the house "*has permanently organized.*"

The question as to the effect in determining the date of organization which these notices should have, from the fact that they were not transmitted until Tuesday, will be further considered later on in this report.

The only constitutional office of the senate is that of president. Upon the senate in like manner, as in the case of the house, devolves the power not only of choosing all of its other officers, but of determining what officers were to be chosen. Each house, therefore, it will be observed, had, by constitutional provision as to the president of the senate, and by election as to the other officers named, a duly elected and acting (and without any protest from any source) presiding officer and chief clerk of each house on Monday, December 8, 1890; the house having duly elected on that date eleven of its officers—all but chaplain, who was elected on Tuesday, December 9—while the senate had on that date (Monday, December 8) its duly elected and qualified presiding officer, and also a duly elected and acting secretary *pro tempore.*

The senate reassembled at 10 o'clock a. m. on Tuesday, December 9, 1890, and as appears from the record, elected certain other officers, all of whom were elected before the adjournment at 12 o'clock meridian of December 9.

OMISSION IN JOURNAL.

In this connection attention is attracted to an evident omission in the journal of the proceedings of the senate of December 8, 1890.

The record of the proceedings of the senate of the State of Idaho of December 8, A. D. 1890, recites as follows:

"After prayer by the Rev. Scidmore, Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tempore.*"

This record, it is true, does not recite the fact that the motion was carried or that Mr. Athey was either elected or declared elected secretary of the senate *pro tempore.* It does appear, however, from such record that M. C. Athey *acted* as secretary *pro tempore* of the senate on that day without objection from any source, and the proceedings of the senate for that day, Monday, December 8, A. D. 1890, are in the journal certified as follows:

"N. B. Willey, president of the senate. Attest: M. C. Athey, secretary *pro tem.*"

The journal therefore clearly shows upon its face that M. C. Athey *acted* as secretary *pro tempore* of the senate on the 8th day of December, 1890. He was on that day, as appears from the record of the proceedings, *de facto* if not *de jure* secretary of the senate *pro tempore*, and therefore comes within the rule laid down in the case of Bank *vs.* Dandridge (12 Wheaton, 64), by the Supreme Court of the United States, and which is recognized in both England and America as settled law, namely:

"It (the law) will presume that a man acting in a public office has been rightly appointed."

But as a matter of fact Mr. M. C. Athey was formally elected secretary *pro tempore* on Monday, December 8, A. D. 1890, in pursuance of the motion made by Mr. Gunn, as recited in the record, and he then immediately entered upon his duties as such secretary *pro tempore*, and the record of the proceedings of the session of the senate of that day is shown to be clearly defective in omitting to recite that the motion of Mr. Gunn that Mr. M. C. Athey be elected secretary *pro tempore* of the senate was adopted by the senate. This is made clearly apparent by the affidavits of James Gunn, the author of the motion; M. C. Athey, the secretary *pro tempore;* by H. C. Branstetter, a

senator, representing Ada County in said senate; and by J. M. Wells, a member of the senate of the State of Idaho, representing the counties of Kootenai and Latah. These affidavits are as follow:

"STATE OF IDAHO, *County of Alturas, ss:*

"James Gunn, being first duly sworn, on his oath doth say: I am the duly elected and qualified senator for Alturas County in the senate of the State of Idaho. As such senator I was in my seat in the senate of the State of Idaho on the first day of the last session of the said senate, the same being the eighth day of December, A. D. 1890. As such senator I made a motion that M. C. Athey be elected secretary of said senate *pro tem.* The said motion was duly seconded, and by the president of the senate put to the senate, and the same was carried unanimously. Whereupon the said M. C. Athey did immediately enter upon and perform all the duties of secretary of the senate from that time henceforward, until he was, by vote of the senate, made the permanent secretary of the senate. That immediately upon the election of the said secretary, as aforesaid, the senate proceeded to the regular business of the session. Further deponent said not.

"JAMES GUNN.

"Subscribed and sworn to before me, this twenty-eighth day of September, in the year of our Lord 1891.

"[SEAL.] "W. H. WATT,
"*Notary Public.*

"STATE OF IDAHO, *County of Ada, ss:*

"M. C. Athey, of the city of Boise, county and State aforesaid, being duly sworn, on his oath says: That he is the identical M. C. Athey who was elected secretary *pro tem.* of the senate of the legislature of the State of Idaho, on the eighth day of December, A. D. 1890, and permanent secretary of said senate, on the ninth day of December, A. D. 1890. That the motion made by Mr. Gunn, in the first day's proceedings of said senate, which reads as follows: 'Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tem.*;' upon being seconded by Senator ———, was stated to the senate by Lieutenant-Governor Norman B. Willey, president of the senate, and a vote taken thereon. M. C. Athey, having received a majority of all the votes cast, was then and there declared elected secretary *pro tem.* of the senate by its president. That in writing up the senate roll of the first day's proceedings the fact of Senator Gunn's motion for the election of M. C. Athey as secretary *pro tem.* of the senate, having been *put* and *carried* in the senate and so announced by its president, was omitted from the record. Affiant further saith not.

"M. C. ATHEY.

"Subscribed and sworn to before me, this 29th day of August, A. D. 1891.

"[SEAL.] "A. J. PINKHAM.
"*Secretary of State.*

"STATE OF IDAHO, *County of Ada, ss:*

"H. Clay Branstetter, residing at Boise City, in the county and State aforesaid, being duly sworn, on his oath saith that on the 8th day of December, A. D. 1890, he was a senator, representing Ada County, State of Idaho, in the senate of the legislature; that he has carefully read the affidavit of M. C. Athey, hereto attached, and that the statements therein made, relating to his election as secretary *pro tem.* of the senate on said 8th day of December, A. D. 1890, and the omission in the senate journal of the same date, as stated by him are true. Affiant further saith not.

"H. C. BRANSTETTER.

"Subscribed and sworn to before me this 28th day of October, A. D. 1891.

"[SEAL.] "A. J. PINKHAM
"*Secretary of State.*

"STATE OF IDAHO, *County of Kootenai, ss:*

"James M. Wells, of the county and State aforesaid, being duly sworn, on his oath saith: That he was a member of the senate of the State of Idaho at its first session, representing the counties of Kootenai and Latah, which convened at Boise City, the capital of said State, on December the 8th, A. D. 1890; that after the senate was called to order by Lieutenant-Governor Norman B. Willey, president of the senate, on the day and date above named, prayer was offered by Rev. Skidmore, when Senator James Gunn, of Alturas County, entered the following motion: 'Mr. Gunn moved that M. C. Athey be elected secretary of the senate *pro tem.*;' that said motion, having received a second, was stated to the senate by its president, and a vote taken thereon, and the result duly announced by the president of the senate that M.

C. Athey had been duly elected secretary *pro tem.* of the senate; whereupon M. C. Athey took his seat and assumed the discharge of his duties as secretary *pro tem.* Affiant further saith not.

"J. M. WELLS.

"Subscribed and sworn to before me this 19th day of October, A. D. 1891.
"[SEAL.] "W. H. PLUMMER,
Farmington, Wash."

It is therefore conclusively shown to your committee that Mr. M. C. Athey was formally and regularly elected to the office of secretary *pro tempore* of the senate of the State of Idaho on Monday, December 8, A. D. 1890. These affidavits, it will be observed, do not contradict the journal. While the journal as it stands does not expressly prove the formal election of Mr. Athey, it does not disprove it; nor is there anything in it from which a presumption can be indulged in that no such formal election took place, or which in any manner tends to overcome the counter presumption in its favor raised by the fact that Mr. Athey *acted* as secretary *pro tempore*, which fact clearly appears by the printed journal.

These affidavits do not contradict the journal, but simply supply an apparent omission in the same. Certainly the presumption is violent that *some* disposition was made of the motion of Mr. Gunn to the effect that M. C. Athey be elected secretary of the senate *pro tempore*. The record of the proceedings of the senate of that date fails to disclose that *any* disposition was made of it; but as the journal shows he *acted* as such this fact raises a conclusive presumption not only that Mr. Gunn's motion was adopted, but also that Mr. Athey was then and there duly elected. It is, therefore, in the opinion of your committee, although unnecessary to constitute a sufficient record in this case, clearly regular to permit this evident omission to be supplied by evidence *aliunde* the record.

To hold that the failure of the secretary *pro tempore* to record the fact of his own election could vitiate the election of a Senator of the United States would border very closely on an absurdity. If there is any rule which would compel a judicial tribunal to refuse to permit such a correction in a record—and your committee believe there is not—there most certainly is none which would compel the Senate of the United States, in the exercise of its rightful jurisdiction of judging of the election of its members, to close its eyes to the very truth of a case when clearly demonstrated by indisputable evidence other than that of the record itself and in harmonious connection with it. That no such rule is recognized in judicial tribunals is apparent from the rule in the following cases:

In Green *v.* Weller (3 Miss., 650), the supreme court of Mississippi said:

"In England the journals of the Lords and Commons, which are kept as memorials of their proceedings, may be proved by an examined copy. But the courts do not judicially notice them, and they do not import absolute verity, and are not conclusive of the facts stated in them, except in the case of a judgment rendered by the House of Lords, as a judicial tribunal, upon appeal (1 Phill. Ev., 406). In this country the same rule prevails, and such documents are not noticed judicially by the courts, but must be proved."

In Taymouth *v.* Kochler (35 Mich., 22), the supreme court of Michigan said:

"The township clerk is, by statute, made the clerk of the board of highway commissioners, and required, under their direction, to record their proceedings. It has, however, frequently been held that, while parol evidence can not be admitted to *contradict* the record, yet it might be introduced to show the facts omitted to be stated; that the rights of creditors, or third persons, can not be prejudiced by the neglect of the clerk to perform his duty in this respect."

In Ohio the clerk of the county commissioners was required by law to record certain official proceedings. In King *v.* Kenney (4 Ohio, 79), the supreme court of Ohio said:

"The omission was in the clerk of the commissioners. It would seem unreasonable that such ministerial nonfeasance should render the whole proceeding nugatory. To authorize this construction, for such omission, would require precedents and authorities. But in fact they are the other way."

In the case of Bigelow *v.* Amboy (1 Dutcher, 297), the court said:

"Nor can the right of the creditor to recover depend upon the regularity with which the minutes of the city council are kept, nor whether they are kept at all. It is expressly proved by the city clerk that a resolution, substantially the same as that shown to the clerk of the plaintiffs, was passed by the council. Whether the resolution furnished to the mayor was copied from the minutes, or furnished to him before the minutes were recorded, or whether they were recorded at all, is a matter which can not prejudice the claim of the creditor."

In the case of Marbury *v.* Madison (1 Cranch, 137), the court said:

"When all the requirements have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been

given, the instrument is, in law, considered as recorded, although the mere labor of inserting it in a book kept for that purpose may not have been performed."

THE CONTESTANT CONCEDES THIS POINT.

But the contestant, Mr. Clagett, has abandoned this contention and now makes no point on this omission in the record in his supplemental brief filed in this case. Mr. Clagett also in this paper abandons the point which was really the only one originally urged against the election of Mr. Dubois at the time of his election, namely, that he, Mr. Dubois, was not elected because his alleged election was had before the two Senators elected to existing vacancies had drawn for terms. We quote from Mr. Clagett's brief the following on these two points:

"(1) I make no point on the omission of the senate journal to say that Mr. Athey was *elected* secretary *pro tempore* on Monday, December 8. I had personal knowledge that he was so elected, and, although the journal does not show the fact, in my brief (p. 22) I so state. Affidavits to prove an expressly admitted fact are, to say the least, unnecessary.

"(2) Neither do I urge that Mr. Dubois was not elected because his alleged election was had before the two Senators elected to fill existing vacancies had drawn for terms. I was for a short period inclined to this opinion, but on full consideration abandoned it, and it is not mentioned in my brief. Had the legislature waited until after the two Senators had drawn for terms, it would have avoided the undignified and indecent haste which characterized the election in December. It would also have been spared the political perfidy involved in the open repudiation of the instructions given to the members in the platforms of both political parties to so act as to assure as near as possible equal representation in the Senate to the two great sections of the State. Although undignified and indecent, the course taken was not for *this* reason illegal."

While your committee would be unwilling to hold that a formal election is indispensable to an organization where it is clearly shown that a certain person had acted in the capacity of secretary *pro tempore* with the consent of the senate and without objection from any source, and who as such had certified to the record of the proceedings, still in the case under consideration your committee are fully satisfied from the evidence presented not only that Mr. Gunn moved that Mr. Athey be elected secretary *pro tempore* of the senate, but that such motion was put by the presiding officer and carried, and, further, that Mr. Athey was on that date duly elected as such and so declared to be, and in pursuance of such election then and there, Monday, December 8, 1890, entered upon the duties of his office.

WAS THE LEGISLATURE OF THE STATE OF IDAHO IN VIEW OF THE FOREGOING FACTS, ORGANIZED ON MONDAY, DECEMBER 8, A. D. 1890, WITHIN THE MEANING OF THE TERM "ORGANIZATION," AS EMPLOYED IN SECTION 14 OF THE REVISED STATUTES?

It is virtually conceded by the contestant and admitted by all that if the legislature of the State of Idaho were organized on Monday, December 8, A. D. 1890, within the meaning of the term "organization" as used in the fourteenth section of the Revised Statutes of the United States relating to the time and manner of electing United States Senators, then Mr. Dubois was duly elected Senator for the State of Idaho for the term for which he claims to have been elected.

The contention on the part of Mr. Clagett, however, is, in so far as this question is concerned, that there was no such organization of the legislature as is contemplated by the statute until Tuesday, December 9, A. D. 1890. It is conceded by the contestant, or, if not, the fact is clearly shown by the record, that there was at least a *complete* temporary organization of the legislature of the State of Idaho on Monday, December 8, 1890. The question therefore arises, What is necessary to be done to constitute an organization of a legislature within the meaning of the term organization as used in the statutes? Inasmuch as Congress has provided that the election shall be held, or at least the first steps preliminary to an election shall be taken, on the second Tuesday after the meeting and organization of the legislature, without indicating in the remotest manner what shall be the character of such organization—whether it is to be a permanent organization with all the officers of every grade elected and installed which the legislature may determine necessary for its convenience in the transaction of business, as contradistinguished from a temporary organization, such as will enable the respective bodies to exercise fully all legislative functions, enact laws, censure or expel a member, and the like—is it not competent for the legislature to elect on the second Tuesday after such temporary organization?

In other words, does not such an organization as last described meet the requirements of the Revised Statutes as to organization? Your committee are of the opinion that it does. If the term "organization" as used in the Revised Statutes must be construed to mean only such an organization as exists after every officer is elected that either house may see proper to elect, or may be necessary to elect, for the mere

convenience of the body, then it would seem to be quite unsafe to regard the legislature as organized within the meaning of the statute, so long as there existed the remotest possibility of electing any additional officers of any grade or character during the progress of the session. In other words, if that is the character of organization intended by Congress, then it would seem to be most difficult indeed to draw the line or define the exact date when the organization of the two houses is complete within the meaning of the law.

Your committee are of the opinion that whenever each house has progressed *so far* in the election of such officers, respectively, as will enable it and the two houses together to transact business, exercise legislative functions, enact laws, and make and keep a record of such business, that then there has been such an organization of the two houses as is contemplated by the statute. When *that* has been done, in so far as the election of officers of the two houses is concerned which will enable them respectively to exercise the functions for which they have been brought into existence, and which will enable them to make, keep, and certify a record of the same, then, it seems to your committee, although much less than this may, and by some members of your committee is, deemed to be sufficient, the requirement of the statute as to the organization necessary from which *time* shall date in the election of a United States Senator, is clearly and fully met.

In other words, a legislature is, in the judgment of your committee, organized within the meaning of section 14 of the Revised Statutes relating to the time and manner of electing United States Senators when each house has a presiding officer, authorized to ascertain and declare its will, and a method of recording its action satisfactory to and recognized by itself, subject, of course, to any constitutional provision, State or Federal, or existing statute on the subject.

In defining the term "organization," as used in section 14 of the Revised Statutes, which with subsequent sections is a reënactment of the act of July 25, A. D. 1866, the purpose of Congress in enacting the same should not be lost sight of; and such construction should be given as will best effectuate such purpose.

The intention of Congress, as is plainly evident from a consideration of the whole act, was to place it out of the power of a majority of either house to prevent a majority of the two houses acting together in joint assembly from electing a United States Senator, in a case where there had been such an organization of the legislature as will enable it to exercise the ordinary functions of a legislative body, such as enacting laws and making record thereof. This being so, is not the conclusion irresistible that whatever is a sufficient organization to enable a legislature to do the latter should be sufficient to enable it to elect a United States Senator?

Any other construction would place it in the power of each house to organize so as to enable the legislature to sit its entire session of forty, sixty, or one hundred days, as the case may be, enact laws, and perform every function of its being, save and except only that of electing a United States Senator, and then adjourn, and yet would place it in the power of a *factious* majority in *either* house, the dilatory and obstructive action of which as a *minority* of a whole legislature in respect of proceeding with the necessary preliminary steps toward the election of a United States Senator is the *very* thing above all others the legislation was aimed at, to absolutely prevent the election of a Senator by refusing to make that *permanent* organization which the contestant insists is necessary before the legislature can elect a Senator.

Such a construction would, in the judgment of your committee, while there is nothing in the phraseology of the statute to warrant, much less compel it, and much to the contrary, would be absolutely and fatally destructive of the statute defining the time and manner of electing United States Senators.

It must be conceded not only that it is one of the important duties of the legislature of a State, but one among the most exalted, if indeed not the very highest duty incumbent on it, to choose Senators at the time and in the manner provided by law. It is a duty impressed by the National Constitution, and in its exercise or nonexercise is involved the very existence of that machinery absolutely essential to the full and perfect exercise of the functions of the National Government.

Therefore the great purposes in the Congress in enacting the law of 1866 was to remove every obstruction that might by factious opposition be thrown in the way of an election of Senator and to facilitate the exercise on the part of the legislatures of the several States of this high constitutional duty, and to the end that States might not go unrepresented in the Senate of the United States. That such was the purpose is manifest from the character of speeches made in the Senate by such eminent Senators as Lyman Trumbull, Reverdy Johnson, and others when the bill which finally became the act of July 25, 1866, regulating the election of United States Senators, was under consideration in the Senate. On July 11, 1866, when this bill was the pending measure in the Senate of the United States, Senator Trumbull, the member of the committee who reported the bill, said:

"We think the public interest is not subserved by leaving a State unrepresented; the intention of the Constitution is that it should be represented, and it is for the

public good that we should have a law that will produce uniformity in these elections and secure representation."

While Senator Reverdy Johnson, also a member of the committee, said:

"The Government of the United States can not go on without a representation in the Senate of the United States. The Constitution assumes that every State in the Union will elect Senators; and the Constitution, in its spirit, is obligatory upon every State to make such an election. The only way, as I think, to compel the State to perform that constitutional obligation is to stop the wheels of the government of the State until that higher duty is performed. It is infinitely a higher duty upon the part of the States and the members of the legislatures of the several States to elect Senators of the United States, the Government of the United States being important to all the States, than it is to go on with their ordinary legislation."

IT IS CONCEDED BY CONTESTANT'S COUNSEL THAT THE LEGISLATURE WAS SUFFICIENTLY ORGANIZED MONDAY, DECEMBER 8, 1890, TO ENABLE IT TO ENACT LAWS THAT WOULD BE VALID.

Counsel for contestant, Mr. Shellabarger, conceded on the hearing that the temporary organization effected on Monday, December 8, was sufficient to enable the legislature to enact laws, and that such laws would have been valid; while the contestant, Mr. Clagett, virtually, if we do not misinterpret his language, concedes the same thing when, in the printed brief last filed with the committee (p. 5), he says:

"Nor have I ever held that a State legislature is not organized within the meaning of section 14 until both houses have supplied themselves with *all* the officers and assistants which they may choose to provide for themselves during the session, nor even with *all* [the italics are Mr. Clagett's] official force which the laws of the State may provide where such provision is made by State law."

If the concession of Mr. Shellabarger be well founded, as your committee have no doubt, it is clear that, in the absence of the statute of 1866 or the provisions of the Revised Statutes, the legislature could at that moment—December 8, 1890—in its discretion, have proceeded to the election of a United States Senator, and such election would have been valid.

It therefore follows, if the argument of the contestant be sound, that a legislature sufficiently organized for all purposes of legislation and also sufficiently organized for the election of a United States Senator, in the absence of this statute of 1866, is without power to make such election solely by the operation of the statute, which was intended not only to facilitate it, but to compel it.

It appears clearly to your committee that one of two things must be true—either it must be held that whenever a sufficient number of officers of each house of a legislative assembly under the law as it stood as applicable to the State of Idaho when the first legislature of that State convened, are elected to enable each of such houses to exercise fully all legislative functions, or otherwise that no such organization as is contemplated by the statute relating to the time and manner of the election of United States Senators is consummated until *all* of the officers of every grade are elected by each of such houses which each house may in its judgment determine to elect.

Your committee are of the opinion that the true line should be drawn at the date when each house has elected such officers and they have entered upon their duty as will enable the houses, respectively, to exercise their full functions as legislative bodies, and make, preserve, and certify a record thereof. In the case under consideration it is true the two houses did not notify each other, respectively, that the permanent organization was complete until Tuesday, December 9, but this fact raises no implication whatever that a perfect *temporary* organization did not take place as a matter of fact the day before, and the fact that the notice of organization was not given until Tuesday can not alter the fact that the organization was had on Monday.

The statute requires that the vote for Senator be taken on the second Tuesday after the meeting and organization of the legislature and not on the second Tuesday after the exchange of *notices* of the organization of the two houses; besides, in the case we are considering, the notices exchanged on Tuesday, December 9, related to the *permanent* organization of the two houses, and this fact is recited in the notices themselves, the notice from the senate reading:

"I am instructed to inform your honorable body that the senate has *permanently* organized by the election of the following officers." * * *

While the notice from the house reads:

"I am instructed to inform your honorable body that the house of representatives has *permanently* organized," etc.

And it is submitted that the very fact that the notices exchanged on Tuesday recited that the organization referred to was a *permanent* organization clearly implied, or if there was no such implication there was certainly nothing to negative the fact that a temporary organization had existed before such permanent organization had taken place.

PRECEDENTS.

In the case of the election of Wright and Howell to the Senate of the United States from the State of Iowa in 1870, the senate of Iowa met on Monday, January 10, 1870. On that day a few temporary officers were chosen, but the senators were not sworn. On Tuesday, January 11, 1870, the senators were sworn and the permanent officers were all elected; thereupon, as the journal of the senate of that day recites:

"Senator Tuttle moved that a committee of three be appointed to inform the house that the senate is now organized and ready to proceed to business, which was agreed to; and the president appointed as such committee, Senators Tuttle, Beardsley, and Fellows."

Messrs. Wright and Howell were chosen United States Senators Tuesday, January 18, 1870, one week and one day after the temporary organization. This was a case, therefore, in which the senate met on Monday, and notified the house of its organization on Tuesday and a senator was elected on the next Tuesday thereafter, which is a precisely parallel case to that of the election of Mr. Dubois.

Again, in 1872, the senate of Iowa met Monday, January 8. A few temporary officers were chosen on that day, but the senators were not sworn. On Tuesday, January 9, the senators were sworn and all the permanent officers were chosen. The following proceedings, as shown by the journal, was then had:

"Senator McNutt moved that a committee of two be appointed to inform the house that the senate was organized and ready for business, which motion prevailed, and Senators McNutt and Boomer were appointed such committee."

The house of representatives met January 8, 1872; some temporary officers were chosen, but the representatives were not sworn. On Tuesday, January 9, the journal shows the following proceeding was had:

"On motion of Mr. Irish, Messrs. Campbell and Hewitt were appointed a committee to wait upon the senate and notify them that the house was organized and ready to proceed to business."

William B. Allison was elected United States Senator Tuesday, January 16, 1872, and in joint convention was duly declared elected Wednesday, January 17, 1872, another case parallel with that of the election of Mr. Dubois.

The same thing occurred in the Iowa legislature January 14, 1878.

OATH NOT NECESSARY.

But objection is made by the contestant that no oath of office was administered either to the secretary *pro tempore* of the senate or to the chief clerk of the house of representatives on Monday, December 8, 1890. But in the judgment of your committee, no oath of office was then required, either by the Constitution of the United States, by the constitution of Idaho, or by any statute, Federal or State. It is provided in the Federal Constitution that *certain* State officers shall be bound by oath or affirmation to support the Constitution. Article 6 of the Federal Constitution contains the following provision:

"The senators and representatives before mentioned, and the *members* of the several State legislatures, and all *executive* and *judicial* officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

While this clause of the Constitution of the United States requires members of the State legislatures to be sworn to support the Constitution of the United States, it does not require them to be sworn to support the State constitution, nor is there in it any requirement whatever that any *officers* of either house of the State legislature shall be sworn at all. It is only "*executive* and *judicial* officers" who are required to take the oath, and the officers of a State senate and house of representatives are neither executive nor judicial officers, they are ministerial officers. There is therefore no power vested in Congress, express or implied, which authorizes that body to prescribe an oath of office for the *officers* of either house of a State legislature. The act of Congress of June 1, 1789, third section, provides as follows:

"And the members of the several State legislatures and all *executive* and *judicial* officers of the several States, who shall be chosen or appointed after the said first day of August, shall, before they proceed to execute the duties of their respective offices, take the foregoing oath or affirmation."

This was simply making operative as to the *members* of the State legislatures and *executive* and *judicial* officers of the States, the provision of the Federal Constitution on that subject, and therefore was clearly valid; but Congress having no power under the Constitution to embrace within its scope *officers* of the respective houses of the State legislature as such, who are not *executive* or *judicial* officers, did not include in the legislation such officers of the respective houses in the class who should be bound by oath or affirmation to support the Constitution of the United States. Each house, therefore, of the legislature of Idaho having the power to make its own rules, pos-

sessed the exclusive power and right to determine whether its officers shall or shall not be sworn.

Your committee are therefore of the opinion that neither by the Constitution of the United States nor the constitution of the State of Idaho, nor by any statute, was the secretary *pro tempore* of the senate or the chief clerk of the house of representatives required to be sworn in order to make good the organization of these respective bodies or of the legislature, within the meaning of the term "organization" as used in the Revised Statutes. The lieutenant-governor presided in the senate; he had already been sworn into office. The speaker of the house of representatives was sworn in on Monday, December 8, 1890.

The only tribunal to determine whether the secretary *pro tempore* of the senate should or should not be sworn was the senate itself, and until the senate was organized it could not possibly pass upon the question, and the same is true of the house of representatives of the State of Idaho. If, after organization had been completed, either or both of the houses had determined, by rule or otherwise, that the respective officers of their houses should be sworn, this fact could not possibly vitiate an organization. It is a fact, therefore, as your committee find, that all the offices of each house created in accordance with the State constitution were duly filled on Monday, December 8, 1890, and these, moreover, were all the offices that were necessary or in any manner required to enable the legislature and each house thereof to exercise its and their appropriate functions.

Some other and additional officers, doubtless were necessary to enable this to be done with greater celerity, ease, and dignity; but these were not essential to the full exercise of every legislative function, nor were they necessary to an organization such as is contemplated by the statute.

THE TERRITORIAL STATUTE NOT APPLICABLE, BESIDES IT IS MERELY DIRECTORY.

It is suggested by the contestant, Mr. Clagett, that an old Territorial statute of the late Territory of Idaho requiring officers of the respective houses of the legislature of the late Territory to be sworn is still in force and applicable to the officers of the respective houses of the legislature of the State of Idaho. It is a matter of very grave doubt, in the first place, whether the statute referred to can be held to be in force and applicable to the officers of the legislature of a State. Your committee believe it can not be, for the reason that the offices of clerks of a Territorial legislative council and house are different offices from those of secretary *pro tempore* of a State senate and of chief clerk of a State house of representatives, and therefore the Territorial statute does not apply.

Inasmuch as each house of the State legislature has the right to determine as to its own organization, as to the number and kind of organs it shall have to represent its action, record its decrees, and aid in the transaction of its business, and as it is conceded there is no constitutional requirement, either Federal or State, such a statute, if applicable at all, must be regarded as merely directory; and your committee are clearly of the opinion that a failure of compliance with its provisions would in no manner affect the validity of an otherwise valid organization.

THE LIEUTENANT-GOVERNOR, PRESIDENT OF THE SENATE, SPEAKER OF THE HOUSE, SECRETARY OF THE SENATE AND CHIEF CLERK OF THE HOUSE ALL CERTIFIED THAT TUESDAY, DECEMBER 16, WAS THE SECOND TUESDAY AFTER THE ORGANIZATION.

That the leading officers, respectively, of the two houses of the Idaho legislature were of the opinion that the legislature of that State was duly organized on Monday, December 8th, A. D. 1890, is made clearly apparent by the certificate of such officers accompanying and constituting a part of the credentials, respectively, of Messrs. Shoup, McConnell, and Dubois. This certificate is dated Boise City, Idaho, December 19, 1890, and recites in terms that Tuesday, the 16th day of December, 1890, was "the second Tuesday after the meeting and organization of the legislature," and on the day following, Wednesday, at noon, December 17, 1890, both houses in joint assembly met and proceeded to vote for a United States Senator for the State of Idaho, and the same person not receiving a majority of the votes cast, said joint assembly adjourned and reconvened on Thursday, the 18th day of December, A. D. 1890, at noon and proceeded to ballot for a United States Senator, * * * and then and there Fred T. Dubois received a majority of all the votes of the joint assembly and was thereupon, by the presiding officer of the joint assembly, declared duly elected a Senator of the United States for the State of Idaho for the term to begin March 4, 1891. This certificate is signed as follows:

"Norman B. Willey, president of the Senate; F. A. Fenn, speaker of the house of representatives; Charles H. Reed, chief clerk of the house of representatives; M. C. Athey, secretary of the senate."

THE CONTESTANT, CLAGETT, CONCEDES THE CASE TO MR. DUBOIS BY HIS DEFINITION OF THE TERM "ORGANIZATION."

But the contestant, Mr. Clagett, it seems to us, concedes the case to the sitting member when, in his supplementary brief, page 5, he says:

"(5) Nor have I ever held that a State legislature is not organized within the meaning of section 14 until both houses have supplied themselves with *all* the officers and assistants which they may choose to provide for themselves during the session, nor even with *all* the official force which the laws of the State may provide where such provision is made by State law."

And then states his position to be as follows:

"I affirm that the word '*organized*,' as used in this section 14, and as applied to a legislative body, is used to signify that the entire body had come into the condition where it was authorized and enabled to proceed according to *settled parliamentary usage* in enacting laws; and when it was endowed with the *necessary* official force provided by the laws of the State for the transaction of the legislative business."

While your committee do not deem it necessary to concede and do not concede that the foregoing definition is in all its essentials a proper one of the term "organization," as used in the statutes they submit that what *was* done by the two houses of the legislature of the State of Idaho, on Monday, December 8, A. D. 1890, brings the case within this definition. Each house had a presiding officer; each house had a recording officer; each house, in other words, was so organized as to authorize and enable the legislature to proceed according to parliamentary usage, and as such to perform the functions for which it was brought into existence.

Either house as then organized, and the two houses as then organized, had full power to legislate—to enact laws. Either house could have expelled a member, or performed any other function rightfully attaching to a legislative body.

"What is organization [says Coleridge] but the connection of parts in and for a whole, so that each part is at once end and means * * * to furnish with organs; to endow with the capacity for the functions of life."

If it be true, as claimed by the contestant, that a legislature is not organized within the meaning of the term organization as used in the Revised Statutes, where each house has a presiding officer and a recording officer *de facto*, if not *de jure*, and if it is further true as conceded by him, and as your committee agree that it is not necessary to an organization of a legislature within the meaning of that term as used in the Revised Statutes, that *all* the officers which the senate and house may deem proper to elect for convenience and the expedition of business, shall have been elected, then we repeat *where* is it, and *when* is it the line must be drawn between the two extremes, when the full requirement of the statute is met, and the organization is consummated within the meaning of the statute?

PRECEDENTS IN ORGANIZATION OF THE NATIONAL HOUSE OF REPRESENTATIVES.

The power of the house of representatives of the State of Idaho under the constitution of that State, and also the power of the senate of the State of Idaho under such constitution, save and except as to its presiding officer, is identical with the power of the House of Representatives of the United States under the Federal Constitution. The provisions of the Federal Constitution, and the only provisions bearing upon the question as to when the Senate or House of Representatives of the United States is organized, are as follows:

"The House of Representative shall be composed of members chosen every second year by the people of the several States. The House of Representatives shall choose their Speaker and other officers. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years. The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States. Each House shall keep a journal of its proceedings. The Senators and Representatives before mentioned, and the members of the State legislatures, and all the executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

As the constitution of the state of Idaho does not expressly create any office for either house, except the office of presiding officer of the senate, so the Federal Constitution does not expressly create any office for either House of Congress, except the office of President of the Senate. It does not indicate what officers the respective Houses shall choose, save and excepting that the House of Representatives shall choose "their Speaker and other officers."

It is nowhere prescribed in the Constitution of the United States, except in the

case of the presiding officer of the Senate, what officers shall be chosen by each House, except that the House shall have a Speaker; neither is there any limitation of the power of each House, respectively, to elect just such officers, and as many of them as each House may see fit, save and except in the case of the presiding officer of the Senate, which is created by the Constitution, and the Speaker of the House, whom the Constitution requires shall be elected by the House.

The only provisions of the constitution of Idaho bearing upon the question when the senate or house of representatives of that State is organized are the following:

"The legislative power of the State shall be vested in a senate and house of representatives (Art. 3, Sec. 1). Each house when assembled shall choose its own officers (Art. 3, Sec. 9). The lieutenant-governor shall be president of the senate (Art. 4, Sec. 13). Each house shall keep a journal of its proceedings (Art. 3, Sec. 13). All bills and joint resolutions passed shall be signed by the presiding officers of the respective houses (Art. 3, Sec. 21). The members of the legislature shall, before they enter upon the duties of their respective offices, take or subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the constitution of the State of Idaho, and that I will faithfully discharge the duties of senator (or representative, as the case may be) according to the best of my ability (Art. 3. Sec. 25). In case of the absence or disqualification of the lieutenant-governor, from any cause which applies to the governor, or when he shall hold the office of governor, then the president *pro tempore* of the senate shall perform the duties of the lieutenant-governor until the vacancy is filled or the disability removed (Art. 4, Sec. 13)."

Thus it will be seen that the provisions of the constitution of Idaho, in so far as they relate to the officers of the two houses of the legislature, are identical with those of the Federal Constitution relating to the officers of the Senate and House of Representatives of the United States. In each case the presiding officer of the senate is designated by the constitution. In the case of the constitution of Idaho the lieutenant-governor shall be the president of the senate, while under the Federal Constitution the Vice-President of the United States shall be President of the Senate.

Under the State constitution, "each house, when assembled, shall choose its own officers;" while under the Federal Constitution it is prescribed that "the House of Representatives shall choose their Speaker and other officers." In the case of the two Houses of Congress, therefore, the only officers prescribed or designated are (1) the President of the Senate, and (2) in the case of the House, a Speaker; while under the constitution of the State of Idaho, the presiding officer of the senate is the only officer named in the constitution. As to all other officers in both cases, namely, in the House of Congress and in the two houses of the legislature of the State of Idaho, the question as to the number and character of officers to be selected by the respective houses is left entirely to the discretion of the houses themselves, except it may be very properly said, there is an implied power that each house shall elect a chief clerk or other similar officer, whose duty it shall be to keep a record of the proceedings of the house.

In this view of the case it becomes interesting to inquire what officers the Senate and House of Representatives of the United States have decided to be essential to the organization of those bodies. It appears from the record of the fifty-one Houses of Representatives which have assembled since the organization of the Government eleven declared themselves organized and ready for the transaction of legislative business before the election of any officer other than Speaker, while twenty others were ready for the transaction of business and so declared themselves before the election of any officers except Speaker and Clerk. One House declared itself organized before any officers had been elected except Speaker, Clerk, and Sergeant-at-Arms.

Only nineteen Houses of Representatives out of fifty-one have elected all their officers before announcing themselves organized and ready to proceed to business. The Senate has at different times for a period aggregating thirty-two days transacted its ordinary business with the office of Secretary vacant. On not less, therefore, than eleven different occasions has the House of Representatives of the United States decided, and in this decision the Senate and the President have acquiesced, that it is an organized House when a quorum of the Representatives have assembled, taken the oath of office, and chosen a presiding officer.

The case under consideration, it will be conceded, is infinitely stronger. Inasmuch as in the senate of the State there was a presiding officer *de jure*, duly installed and exercising his functions, and also a secretary, *pro tempore*, while in the house there were not only duly elected a speaker and a chief clerk, each of whom entered on the duties of his respective office on that date, but all the other officers of the house that ever were elected during the whole session, save and except a chaplain, were elected on December 8. The House of Representatives has decided in at least thirty-three cases that it is an organized House when a quorum of the Representatives have assembled, taken the oath of office, and chosen presiding and reporting

officers. Each and every one of these decisions must be held to be an authority in opposition to the contention that the election of *all* the officers of each branch of a legislature is essential to the organization of such legislature within the meaning of section 14 of the Revised Statutes.

Your committee, however, do not by any means base their decision in this case solely or at all on the House precedents, but rather upon the construction your committee place upon the provisions of the statute as an original proposition now before the Senate for the first time for its decision.

THE IDEA THAT THE LEGISLATURE WAS NOT ORGANIZED ON MONDAY, DECEMBER 8, A. D., 1890, AN AFTERTHOUGHT.

So far as appears from the journals of either senate, house, or joint assembly no protest based on the ground that the legislature was not organized on Monday, December, 8, 1890, or that the organization did not occur till Tuesday, December 9, was ever made by anyone, nor was that question ever suggested by anyone opposed to the election of Mr. Dubois, or anyone else, until long after December 18, 1890, the date when he claims to have been elected. Not until February 6, A. D. 1891, was the question ever mooted, so far as appears from any *record in the journal* of either house of the legislature of the State of Idaho, that the organization of the legislature had not taken place until Tuesday, December 9, 1890.

Prior to that date, however, on January 10, 1891, a protest against the election of Mr. Fred. T. Dubois was presented to the Senate of the United States and on that date referred to the Committee on Privileges and Elections. This protest was signed by 23 members of the legislature of the State of Idaho. It contains no date, nor is there any evidence in the record tending to show the date when this protest was signed. It is fair to presume, therefore, that the same was signed at or about the time or shortly before the time when the same was presented to the Senate.

This protest contains the first intimation, so far as appears from any evidence submitted to your committee, except as hereinafter stated, that the date of the organization of the legislature was questioned, or in which it was claimed that the organization did not take place on Monday, December 8, A. D. 1890, as had up to that date been assumed by the *whole legislature*, and which fact had been certified to twice, on two different dates, by the governor and secretary of state, and also once by the speaker and chief clerk of the house and the secretary *pro tempore* of the senate. And even this protest virtually concedes the organization of the house of representatives on Monday, December 8, but insists that the senate did not organize on that date and claims it was not organized until Tuesday, the 9th day of December, 1890.

Nor was this protest, it will be observed, the action of the legislature or of either house thereof, nor was it ever made a part of the record proceedings of the legislature or either house thereof; and not until February 6, A. D. 1891, just fifty days after the date on which Mr. Dubois claims to have been elected, was the question ever raised by either house to the effect that the legislature of the State had not been organized on Monday, December 8, and then the question was only incidentally raised in a preamble and resolution adopted by the senate on that date—the recital in the preamble being to the effect that the legislature was organized on Tuesday, December 9, 1890.

Various other matters were recited in the preamble to the resolution, such as that the State constitution and the admission act required that *two* United States Senators should be elected within ten days after the organization of the legislature; that such legislature had, on the 16th day of December, 1890, voted for a United States Senator in the two houses, acting separately, and thereafter, as provided by law, met in joint assembly on December 18, and within ten days after its organization elected, in the manner provided by law, the honorables George L. Shoup and William J. McConnell United States Senators, and thereupon immediately proceeded to vote for Hon. Fred T. Dubois for the term beginning March 4, 1891, *in advance of the drawing for terms by the two Senators elected in advance of the time fixed by law*, and without first voting in the two houses, acting separately, and against the protest of the members of the joint assembly, the preamble finally concluding as follows: "After full consideration of the facts, it is the opinion of the legislature that if the alleged election of said Hon. Fred T. Dubois is not void, there is at least grave doubt as to its validity," after which followed the resolution, which is as follows:

"*Resolved by the senate* (*the house of representatives concurring*): That at the hour of 12 o'clock meridian of the first legislative day after the passage of this resolution the legislature will proceed to elect a United States Senator to succeed Hon. William J. McConnell, for the term beginning March 4, 1891, and that such election shall be conducted in all respects in the manner provided in section 15 of the Revised Statutes of the United States."

Then followed five days subsequently, February 11, 1891, the voting for and alleged election of the contestant, Mr. Clagett.

It is very plain to your committee that even at this time no reliance whatever was placed upon the question *now* urged as the one on which main reliance is placed, namely: That the legislature was not organized on Monday, December 8, as claimed by Mr. Dubois.

The real ground of this protest evidently was that the legislature had no right to elect a *third* Senator until after the drawing had taken place between Senators Shoup and McConnell.

It is true John S. Gray, a member of the senate of the State legislature of Idaho, in an *ex parte* affidavit made on the 19th day of February, A. D. 1891, and attached to the memorial of Mr. William H. Clagett, the contestant, states that he, on December 18, 1890, when the joint assembly met, opposed the resolution offered by Senator Gunn to go into the election of the third Senator at that time, and urged several objections, among others, as he states, that the legislature was not organized until December 9, 1890; but the record of the proceedings of the joint assembly of that date, filed with your committee by Mr. Clagett, the contestant, fails to disclose any opposition, either on the part of Senator Gray or any other member *upon such grounds*. The following is the full record of the proceedings of this joint assembly, as appears from the journal filed with your committee:

"JOINT SESSION.

"The joint session of the two houses was called to order by the lieutenant-governor, the president of the senate.

"The roll of the senate then called by the secretary of the senate.

"All present.

"The chief clerk then called the roll of the house.

"All present.

"The chief clerk of the house read from the journal of the house of yesterday that portion relating to the joint assembly; which was approved.

"Senator Gunn offered the following resolution:

"'*Resolved, by the joint assembly of the senate and house of representatives of the legislature of the State of Idaho*, That we proceed to elect two United States Senators to fill vacancies, and that after such elections we immediately proceed to elect one United States Senator to fill vacancy occurring March the 4th, 1891.'"

"Senator Gray then offered the following amendment:

"I move to amend the resolution to read as follows: "That we do now proceed to elect one Senator from North Idaho, and then proceed to elect one Senator from South Idaho, to fill vacancies now existing.'"

"Senator Gunn raised the point of order that the amendment was not in order; which was sustained by the chair.

"Senator Gray then withdrew his amendment, and offered the following as a substitute for the original resolution:

"I move that the resolution read as follows: 'That we proceed to elect two Senators to fill the vacancies now existing.'"

"The question being on the adoption of the substitute, the ayes and nays were called for and taken, with the following result:

"SENATE ROLL CALL.

"Ayes—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrishe, White; total, 8.

"Nays—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

"HOUSE ROLL CALL.

"Ayes—Armstrong, Ballentine, Cameron, Casey, Dryden, Emory, Hanley, Hawkins, Irwin, Jones, Martin, Porter, Scofield, Smith, W. H., Smith, B. H., Sperry, Steunenberg; total, 17.

"Nays—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger; total, 19.

"Total ayes in all, 25.

"Total nays in all, 29.

"And so the substitute was rejected.

"The question recurring on the original resolution, the ayes and nays were taken, with the following result:

"ROLL CALL OF SENATE.

"Ayes—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

"Nays—Branstetter, De Lamar, Dempsey, Finch, Gray, Jewell, Langrische, White; total, 8.

"ROLL CALL OF HOUSE.

"Ayes—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, Swanger; total, 19.

"Nays—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Irwin, Jones, Martin, Porter, Scofield, Smith, W. H., Smith, B. H., Sperry, Steunenberg; total, 17.

"Total ayes in all, 29.

"Total nays in all, 25.

"And so the resolution was adopted.

"The president directed that the joint assembly proceed to the election of a United States Senator to fill an existing vacancy by a *viva voce* vote of each member present.

"The rolls of the respective houses were then called, with the following result:

"Total number of votes, 54; of which George L. Shoup received 31, William H. Clagett received 12, Alexander E. Mayhew received 10, W. J. McConnell received 1.

"Those voting for George L. Shoup were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, and Wells, of the senators; and Messrs. Briggs, Caldwell, Emery, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyon, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Smith, W. A., Suydam, and Swanger, of the house—31.

"Those voting for William H. Clagett were: Messrs. De Lamar, Finch, Gray, and Langrische, of the senate; and Messrs. Armstrong, Cameron, Casey, Hanley, Hawkins, Porter, Scofield, and Sperry, of the house—12.

"Those voting for Alexander E. Mayhew were: Messrs. Branstetter, Dempsay, Jewell, and White, of the senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg, of the house—10.

"Mr. Wing of the senate voting for William H. McConnell.

"George L. Shoup having received a majority of all the votes cast, was declared duly elected United States Senator.

"Mr. Emery moved to adjourn, upon which the yeas and nays were called and taken, with the following result:

"ROLL CALL OF SENATE.

"Ayes—Branstetter, De Lamar, Dempsay, Finch, Gray, Jewell, Langrische, White; total, 8.

"Nays—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, Wing; total, 10.

"ROLL CALL OF HOUSE.

"Ayes—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Jones, King, Porter, Scofield, Smith, W. H., Smith, B. H., and Steunenberg; total, 15.

"Nays—Briggs, Caldwell, Ethel, Frederickson, Goodnight, Green, Hixon, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Sperry, Suydam, Swanger, Mr. Speaker; total, 20.

"Ayes in all, 23.

"Nays in all, 30.

"And so the motion to adjourn was lost.

"The joint assembly then proceeded to the election of a United States Senator to fill the other existing vacancy.

"SECOND BALLOT.

"The rolls of the respective houses were then called with the following results:

"Total number of votes cast, 54; of which W. J. McConnell received 29, Wm. H. Clagett received 15, and Geo. Ainslie received 10.

"Those voting for W. J. McConnell were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, and Wing, of the senate; and Messrs. Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, Lyon, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger, of the house—29.

"Those voting for W. H. Clagett were: Messrs. De Lamar, Finch, Gray, Langrische, of the senate; and Messrs. Armstrong, Cameron, Casey, Emery, Hanley, Hawkins, King, Porter, Scofield, Smith, W. H., and Sperry, of the house—15.

"Those voting for Mr. Ainslie were: Messrs. Branstetter, Dempsay, Jewell, and White, of the senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg, of the house—10.

"Mr. McConnell having received a majority of all the votes cast was declared duly elected United States Senator.

"Senator Gray moved to adjourn, upon which the ayes and nays were called for and taken, with the following result:

"ROLL CALL OF SENATE.

"Ayes—Branstetter, De Lamar, Dempsay, Finch, Gray, Jewell, Langrische, White, and Wing; total, 9.

"Nays—Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells; total, 9.

"HOUSE ROLL CALL.

"Ayes—Armstrong, Ballentine, Cameron, Casey, Dryden, Emery, Hanley, Hawkins, Irvine, Jones, Porter, Scofield, Smith, W. H., Smith, B. H., Sperry, Steunenberg; total, 16.

"Nays—Briggs, Caldwell, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Suydam, and Swanger; total, 20.

"Total of all ayes, 25.

"Total of all nays, 29.

"And so the motion to adjourn was lost.

"The joint assembly then proceeded to the election of a United States Senator, whose term should begin March 1, 1891.

"By request of Senator Gray his objection to the election of a third United States Senator is entered on the journal.

"THIRD BALLOT.

"The rolls of the respective houses were called with the following result:

"Total number of votes cast, 54; of which Fred T. Dubois received 32, Wm. H. Clagett received 12, and John Haley received 10.

"Those voting for Mr. Dubois were: Messrs. Brigham, Gunn, McPherson, Rogers, Shoup, Smith, Underwood, Weiler, Wells, and Wing, of the senate; and Messrs. Briggs, Caldwell, Casey, Ethel, Fenn, Frederickson, Goodnight, Green, Hixon, King, Lyons, Martin, Merrell, Mills, Monroe, Price, Pyeatt, Ramsey, Scattaboe, Sperry, Suydam, and Swanger, of the house—32.

"Those voting for Wm. H. Clagett were: Messrs. De Lamar, Finch, Gray, and Langrische, of the senate; and Messrs. Armstrong, Cameron, Emery, Hanley, Hawkins, Porter, Scofield, Smith, W. H., of the house—12.

"Those voting for Mr. Haley were: Messrs. Branstetter, Dempsay, Jewell, and White, of the senate; and Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg, of the house—10.

"Mr. Dubois, having received a majority of all the votes cast, was declared duly elected United States Senator for the term commencing March 1, 1891.

"On motion of Mr. Wells the joint assembly dissolved.

"HOUSE IN SESSION.

"Mr. Speaker in chair.

"On motion of Mr. Green the house adjourned.

"F. A. FENN,
"*Speaker.*

"Attest:
"CHAS. H. REED, *Chief Clerk.*"

It will be seen from this record that the only protest against the resolution of Senator Gunn, made by Senator Gray, was first, he moved to amend the resolution by providing that the joint convention should then proceed to elect one Senator from north Idaho, and then proceed to elect one Senator from south Idaho to fill vacancies then existing. This amendment was ruled out of order by the chair and

was thereupon withdrawn by Senator Gray, who then offered as a substitute the following:

"That we proceed to elect two senators to fill vacancies now existing."

This subtitute was rejected—25 ayes, 29 noes. Senator Gunn's resolution was then adopted. This seems to be the only protest offered to the resolution of Senator Gunn by Senator Gray, and no other protest or objection seems to have been made by any other member of the joint assembly.

THE GOVERNOR OF THE STATE OF IDAHO CERTIFIED TWICE UNDER HIS HAND AND THE GREAT SEAL OF STATE THAT MR. DUBOIS WAS DULY ELECTED SENATOR THURSDAY, DECEMBER 18, A. D. 1890, AND THAT THE PRECEDING TUESDAY WAS THE SECOND TUESDAY AFTER THE ORGANIZATION OF THE LEGISLATURE.

But the governor of the State of Idaho, Hon. Norman B. Willey, although he on the 14th day of February, 1891, signed the credentials of the contestant certifying to his election as Senator from the State of Idaho for the full term commencing March 4, 1891, had previously to that, first on the 19th day of December, 1890, in connection with the speaker of the house, and the chief clerks, respectively, of each house certified that the election of Mr. Dubois for the same term had taken place on Thursday, the 18th day of December, A. D. 1890, and that the preceding Tuesday was the *second Tuesday after the meeting and organization of the legislature*, and also had on the 23d day of December, 1890, certified over his own signature as follows:

"That at a joint session of the senate and house of representatives of said State, duly convened and held at Boise City, Idaho, the capital of said State, on the 18th day of December, 1890, a majority of the members of the senate and house of representatives being present and voting, Fred. T. Dubois received a majority of all the votes cast at said joint session for Senator for the State of Idaho for the full term, commencing March 4, A. D. 1891, *and was duly elected and so declared elected* as said Senator for said term by the presiding officers of said joint session as provided by law.

"Given under my hand and the seal of the State of Idaho the day and year first above written.

NORMAN B. WILLEY,
"Governor.

"By the governor:
"A. J. PINKHAM,
"Secretary of State."

THERE WAS A VOTE IN THE SEPARATE HOUSES ON THE SECOND TUESDAY AFTER THE ORGANIZATION OF THE LEGISLATURE.

Some objection is made that a vote was not taken in the houses separately prior to the convening of the joint assembly. This is incorrect. The record filed with your committee shows that senate concurrent resolution No. 3 was adopted by both houses. This resolution was as follows, having been offered by Mr. Gunn in the Senate:

"*Resolved by the senate (the house concurring)*, That the senate and house of representatives proceed to elect, as provided by law, United States Senators at the hour of 12 o'clock m., on Tuesday, the 16th day of December, 1890;"

Which was on that date, December 12, on motion of Mr. Gunn, referred to the committee on judiciary, of which Senator Gray was chairman. On the following day, December 13, 1890, Senator Gray, from the committee on judiciary, submitted the following report:

"SENATE CHAMBER, *December* 13, 1890.

"Mr. PRESIDENT: The judiciary committee, to whom was referred senate concurrent resolution No. 3, that the senate and house of representatives proceed to elect, as provided by law, United States Senators at the hour of 12 o'clock m., on Tuesday, December 16, 1890, have had the same under consideration, and respectfully report the same back with the recommendation that it do pass.

"GRAY, *Chairman.*

The resolution was then, December 13, 1890, taken up, considered, and on motion of Senator Gunn adopted, and, so far as the record shows, without any opposition. It was sent to the house on December 16, and at 11:30 o'clock a. m. the same came up for consideration. Mr. Stenuenberg moved that the rules be suspended and the resolution read a third time and placed on its final passage. On this motion 35 votes were cast in the affirmative, the votes of all the members constituting the

house of representatives, save and except one, Representative Mills, who was noted absent.

So the rules were suspended, the resolution was read a third time, and the question being, "Shall the resolution pass?" the ayes and noes were taken, with the following result: Ayes 35, being the votes of all the members present, and all the members constituting the house of representatives except 1; noes 0.

The hour of 12 o'clock meridian then having arrived on December 16, 1890, the speaker announced as the next business in order the balloting for United States Senators, and directed the clerk to call the roll. The following is the journal proceedings of the house of that date:

"The roll being called, 35 votes were cast, of which

"Wm. H. Clagett received 6.

"Fred T. Dubois received 13.

"Edward A. Stevenson received 6.

"Wm. J. McConnell received 5.

"Geo. L. Shoup received 5.

"The members voting for Mr. Clagett were: Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry—6.

"Those voting for Mr. Dubois were: Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixon, King, Lyon, Merrell, Monroe, Price, Ramsey, and Mr. Speaker—13.

"Those voting for Mr. Stevenson were: Messrs. Ballentine, Dryden, Irwin, Jones, Smith, B. H., and Steunenberg—6.

"Those voting for Mr. McConnell were: Messrs. Casey, Green, Hawkins, Martin, and Scattaboe—5; and

"Those voting for Mr. Shoup were: Messrs. Emery, Porter, Pyeatt, Smith, W. H., and Swanger.

"Mr. Mills being absent.

"And so the speaker announced that the house of representatives has failed to give a majority of the whole number of votes cast to any person.

"On motion of Mr. Emery, the house took a recess until 2:30 o'clock p. m.

"On motion of Mr. Caldwell, the house adjourned.

"F. A. FENN, *Speaker.*

"Attest:

"CHAS. H. REED, *Chief Clerk.*

The record discloses the following proceedings of the separate vote in the Senate on December 16 at 12 o'clock meridian, the time fixed by the foregoing resolution:

NINTH DAY.

"SENATE CHAMBER,
"*Boise, December* 16, 1890.

"The senate met at 11:30 o'clock a. m., pursuant to adjournment.

"Mr. President in the chair.

"Prayer by the chaplain.

"Roll called.

"All present except Mr. De Lamar, who was excused.

"Journal of yesterday was read, corrected and approved.

* * * * * *

"At 12 o'clock meridian the president announced the business before the senate to be the consideration of the subject contained in senate concurrent resolution No. 3, to wit, the election of United States Senators.

"After the reading of that portion of the United States Revised Statutes relating thereto, the senate proceeded to vote for United States Senator. Upon calling the roll, the vote stood as follows:

"Those who voted for Fred T. Dubois were Messrs. Rogers, Smith, Underwood, and Weiler—4.

"Those who voted for George L. Shoup were Messrs. Gray, McPherson, and James M. Shoup—3.

"Those who voted for W. J. McConnell were Messrs. Brigham, Gunn, Wells, and Wing—4.

"Those who voted for Wm. H. Clagett were Messrs. Finch and Langrische—2.

"Those who voted for Mr. Ed. A. Stevenson were Messrs. Branstetter, Dempsay, Jewell, and White—4.

"Whole number of votes cast, 17. Necessary to a choice, 9.

"The president announced that not a majority of all the senators elected having voted for United States Senator, therefore there has been no election.

"Mr. Gunn moved that the senate do now proceed to elect a second United States Senator to fill the existing vacancy.

"Mr. Weiler moved that the senate take a recess until 2 o'clock p. m.;
"Which motion prevailed.
"Senate resumed its session at 2 o'clock p. m.,
"Mr. President in the chair.
"Roll called.
"All present except Messrs. De Lamar and Weiler.

* * * * * * *

"MESSAGE FROM THE HOUSE.

"OFFICE OF CHIEF CLERK OF HOUSE OF REPRESENTATIVES,
"*Boise City, December* 16, 1890.

"Mr. PRESIDENT: I am instructed to inform your honorable body that the house of representatives has had under consideration and has passed senate concurrent resolution No. 3, requiring the senate and house of representatives to proceed to elect United States Senators as provided by law, which are herewith transmitted.

"CHARLES H. REED,
"*Chief Clerk.*

"At 4:30 o'clock p. m., on motion of Mr. Gunn, the senate adjourned until 10 o'clock a. m. to-morrow.

"N. B. WILLEY,
"*President of the Senate.*

"Attest:
"M. C. ATHEY, *Secretary.*"

It will be observed, therefore, that a separate vote for the United States Senators was taken in each house of the legislature of Idaho separately on Tuesday, December 16, 1890, at 12 o'clock meridian; Mr. Clagett, Mr. Dubois, Mr. Shoup, and Mr. McConnell each receiving votes in each house, the voting being in pursuance of senate resolution No. 3, aforesaid, which provided not for the election of a Senator or Senators for any given or specified term, but which provided simply for the election of United States Senators *as provided by law.*

No person having received a majority of all the votes cast in both houses, or in fact in either house, the two houses, as provided in the Revised Statutes, met in joint assembly in the hall of the house of representatives on December 17, 1890, at 12 o'clock meridian, and were called to order by the lieutenant-governor, acting in his official capacity as the president of the senate. The roll of the senate was then called by the secretary of the senate, all the senators being present. The chief clerk then called the roll of the house, all the members being present except Mr. Mills, who had been excused. The president then read from the Revised Statutes of the United States that portion relating to the election of United States Senators. The further proceedings of the joint assembly, as appears from the journal, were as follows:

"The secretary of the senate read from the journal that portion of the proceedings of yesterday relating to the ballot taken for United States Senators, and the chief clerk of the house read from the journal of the house yesterday that portion relating to the ballot for United States Senators.

"It appearing therefrom that the same person has not received a majority of all the votes in each house, the president directed that the joint assembly proceed to choose, by a *viva voice* vote of each member present, a Senator.

"The rolls of the respective houses were then called, with the following result:

"Total number of votes cast were 53, of which William J. McConnell received 9, William H. Clagett received 8, Geo. L. Shoup received 9, Fred T. Dubois received 17, Alexander E. Mayhew received 3, Edward A. Stevenson received 7.

"Those voting for Mr. McConnell were Messrs. Brigham, De Lamar, Gunn, Wells, and Wing, of the senate; and Messrs. Casey, Green, Martin, and Scattaboe, of the house—9.

"Those voting for Mr. Clagett were: Messrs. Finch and Langrische, of the senate; and Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry, of the house—8.

"Those voting for Mr. Shoup were: Messrs. Gray, McPherson, and Shoup, of the senate; and Messrs. Emery, Hawkins, Pyeatt, W. H. Smith, Suydam, Swanger, of the house—9.

"Those voting for Mr. Dubois were: Messrs. Rogers, Smith, Underwood, and Weiler, of the senate; and Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixson, King, Lyon, Merrell, Monroe, Price, Ramsey, and Mr. Speaker—17.

"Those voting for Mr. Stevenson were: Messrs. Branstetter, Dempsey, Jewell, and White, of the senate; and Messrs. Irwin, Jones, and B. H. Smith, of the house—7.

"And those voting for Mr. Mayhew were: Messrs. Ballentine, Dryden, and Steunenberg, of the house—3.

"Absent: Mr. Mills, of the house.

"No person having received a majority of all the votes cast, Mr. Wells moved that a second vote be taken; which motion prevailed.

"SECOND BALLOT.

"The rolls of the respective houses were then called, with the following result:

"Total number of votes cast, 53; of which William J. McConnell received 5, Fred T. Dubois received 17, William H. Clagett received 8, Geo. L. Shoup received 13, Alexander E. Mayhew received 5, and Edward A. Stevenson received 5.

"Those who voted for Mr. McConnell were: Mr. Brigham, of the senate, and Messrs. Casey, Green, Martin, and Scattaboe, of the house—5.

"Those who voted for Mr. Dubois were: Messrs. Rogers, Smith, Underwood, and Weiler, of the senate; and Messrs. Briggs, Caldwell, Ethel, Frederickson, Goodnight, Hixson, King, Lyon, Merrell, Monroe, Price, Ramsey, and Mr. Speaker, of the house—17.

"Those voting for Mr. Clagett were: Messrs. Finch and Langrische, of the senate; and Messrs. Armstrong, Cameron, Hanley, Porter, Scofield, and Sperry, of the house—8.

"Those voting for Mr. Shoup were: Messrs. De Lamar, Gray, Gunn, McPherson, Shoup, Wells, and Wing, of the senate; and Messrs. Emery, Hawkins, Pyeatt, W. H. Smith, Suydam, Swanger, of the house—13.

"Those voting for Mr. Mayhew were: Messrs. Ballentine, Dryden, Irwin, Jones, and Steunenberg, of the house—5.

"Those voting for Mr. Stevenson were: Messrs. Branstetter, Dempsay, Jewell, and White of the senate; and Mr. B. H. Smith, of the house—5.

"No person having received a majority of all the votes cast, the president declared there was no election.

"On motion of Mr. Gray, of the senate, the joint assembly adjourned."

* * * * * * *

Two ballots having been taken without an election, the joint assembly of the two houses adjourned, and met again in joint assembly in the hall of the house of representatives the next day, Thursday, December 18, 1890, at 12 o'clock meridian, and proceeded to elect, and did elect, three United States Senators—Messrs. Shoup, McConnell, and Dubois. The proceedings of such joint convention are set out *supra*.

But conceding, for the argument, that no action was taken on the second Tuesday after the organization of the Idaho legislature by a vote separately in the two houses in regard to the third Senator who was to be elected, then such omission could in nowise affect the validity of the election of Mr. Dubois in the joint assembly if in all other respects there was a compliance with the provisions of the statute. This is made clear by the express words of the statute of July 25, 1866, now section 15 of the Revised Statutes, relating to the duty of the joint assembly, which reads as follows:

"But if the same person has not received a majority of the votes in each house or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, * * * etc."

This precise question was presented and decided in the case of Hart *v.* Gilbert in the Forty-first Congress. Senator Trumbull submitted the report of the committee, which was agreed to. The following is an abstract from this report:

"The only ground for the other objection arises from the fact that the legislature failed to take action on the 'second Tuesday after its organization,' in regard to the third Senator who was to be elected; but it took action on the subject of electing Senators, and actually voted, though unsuccessfully, on that day for persons to fill the two existing vacancies.

"The object of the act of Congress was to insure the election of Senators by the proper legislature, and to fix a time when proceedings for that purpose should be commenced and continued till the elections were effected.

"The legislature, by which the sitting members were elected, was the one chosen next preceding the term which would commence on the 4th of March, 1869, and was, therefore, the proper legislature to elect. 'The second Tuesday after the meeting and organization of the legislature,' was the time prescribed by the act of Congress for initiating the election of Senators, and that was the time when the legislature proceeded to that business. There being three Senators to elect, it took action on that day only in reference to two of them. Did its failure to take action on that day, and the two subsequent days (which were occupied in electing the first two Senators),

in reference to the third Senator, render his election, in all other respects regular, invalid? The committee think not.

"The language of the law is: 'In case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock meridian, of each succeeding day during the session of the legislature, and take at least one vote till a Senator shall be elected.' No formal adjournment from day to day, by vote of the joint assembly was necessary, but it was the duty of the members of each house to meet, in joint assembly, at noon of each day and vote at least once till all the Senators whom the legislature had the right to elect were chosen This is exactly what the legislature did.

"In no view which the committee can take would the petitioner be entitled to a seat in the Senate; for if the election of the sitting Senator was irregular, that of the petitioner, by the same legislature at a subsequent session, was equally so."

Again, the same question is substantially decided by the Senate in the case of the election of J. W. Flanagan and M. C. Hamilton as United States Senators from the State of Texas. That State was admitted to representation in Congress March 30, 1870. On the 22d day of February, 1870, without any previous authority from Congress, the legislature of the State elected Mr. Flanagan United States Senator for the term ending March 3, 1875, and also at the same time elected M. C. Hamilton United States Senator for *two* terms, namely, the term ending March 3, 1871, and the term ending March 3, 1877. Senator Stewart of Nevada, submitted the report of the committee, declaring Mr. Hamilton legally elected for the term ending March 3, 1877, and he was admitted without debate or division.

THE ELECTION OF MR. DUBOIS WAS WITHIN THE TIME FIXED BY THE ACT OF ADMISSION AND THE STATE CONSTITUTION, PROVIDED THESE PROVISIONS SHOULD BE HELD APPLICABLE TO HIS CASE.

While your committee are clearly of the opinion that the election of Mr. Dubois was valid under the provisions of the Revised Statutes, it is proper that the fact should be stated that in the event it should be held (and upon this point your committee being divided express no opinion) that an election of a Senator for the full term commencing March 4, A. D. 1891, could have been legally had under the provisions of the constitution of the State of Idaho, and of the act of Congress admitting that State into the Union, then your committee agree that Mr. Dubois's election is also valid under those provisions. These constitutional and statutory provisions changed the law as to the *time* within which at least the first two Senators from the State of Idaho could be elected from the second Tuesday *after* the meeting and organization of the legislsture, as provided in the Revised Statutes, to within ten days after its organization.

The legislature met and organized, as found by your committee, on Monday, December 8, while contestant claims the organization was not effected until Tuesday, December 9; so, in any event, inasmuch as the election of Mr. Dubois took place on Tuesday, December 18, it was *within ten days after the organization of the legislature*, and therefore valid, under the provisions of the State constitution and those of the act of Congress admitting the State in the Union provided they should be made applicable, as some members of your committee believe they should be, to this election.

WHEN THE ORGANIZATION TAKES PLACE ON A TUESDAY, WHEN SHOULD THE VOTING IN SEPARATE HOUSES TAKE PLACE?

In this case the claim has been made upon the part of the sitting member, Mr. Dubois, that in the event it should be held that the organization contemplated by section 14 of the Revised Statutes means necessarily a *permanent* organization, which in this case it is conceded did not take place until Tuesday, December 9, although consummated prior to 12 o'clock meridian of that day, that still the next Tuesday following would be, within the meaning of the fourteenth section of the Revised Statutes, the second Tuesday after the meeting and organization of the legislature.

While under the view taken of this case by the committee it is not necessary to decide this question, your committee are clearly of the opinion that this contention upon the part of Mr. Dubois is not well founded. It is the opinion of your committee that in the computation of time in respect of the provisions of this statute the first day, that is, the day of organization, must in the count be excluded; consequently, where the organization takes place on a Tuesday, the second Tuesday after the meeting and organization provided in the statute would be two weeks from that date.

IMMATERIAL ISSUES.

An immaterial issue was raised in the hearing before your committee, and both parties were permitted to argue it, involving the good faith of Mr. Dubois and others in connection with certain resolutions in each of the State platforms of the two

political parties in the State of Idaho in the campaign preceding the election of the first legislature in the State of Idaho, and under and in pursuance of which it is claimed that one Senator should have been chosen from northern Idaho and another from southern Idaho, the State being thus geographically divided. This, however, being a wholly immaterial matter, one which can have no possible bearing upon the legal and constitutional questions involved, and which can properly have no influence whatever in determining the legality of the election of either the sitting member or the contestant, your committee do not feel called upon to express any opinion whatever on the issue thus presented.

Counsel for Mr. Dubois has also argued in his printed brief at some length that even conceding Mr. Dubois was not legally elected, and that therefore there existed a vacancy on February 11, 1891, the date when the contestant, Mr. Clagett, claims to have been elected, that the alleged election of the latter, for sundry reasons suggested, was not legal. But as your committee find that Mr. Dubois *was* legally elected December 18, 1890, for the same term for which Mr. Clagett claims to have been elected February 11, 1891, it follows there was no vacancy on the latter date and it is unnecessary, therefore, to consider the questions involved in the alleged election of Mr. Clagett.

THE CONCLUSION.

In conclusion it is now conceded on all sides, and of this there can be no question, that it was not only the *right* but the *duty* of the legislature of the State of Idaho which convened Monday, December 8, A. D. 1890, to elect, not only two Senators for the two then existing vacancies, but also a third Senator for the full term commencing March 4, A. D. 1891, as it was then certainly known to the legislature that there would be a vacancy for such term, and it was also known that such term would commence before another legislature of the State would be convened. Senators Shoup and McConnell were, as all concede, duly elected to fill the two then existing vacancies, while in the judgment of your committee Mr. Fred T. Dubois was at the same time, on December 18, A. D, 1890, duly and legally elected Senator for the full term commencing March 4, A. D. 1891.

It was a legal certainty from the moment of the election of Messrs. Shoup and McConnell that the term of one or the other of these Senators would expire March 4, 1891. It was at that time a legal certainty that the three classes of Senators whose terms were to expire March 4, 1891, 1893, and 1895, respectively, were required by the Federal Constitution to be equal in number as nearly as possible, and it was a legal certainty that when Senators Shoup and McConnell were sworn as Senators the classes of Senators whose terms were to expire March 4, 1893, and March 4, 1895, respectively, contained each 29 Senators, while the class of Senators whose terms were to expire March 4, 1891, contained only 28. It was therefore a legal certainty that one of the two Idaho Senators was a member of the latter class, and that, too, not by virtue of any act of the Senate, but by the operation of the Constitution itself. The function of the Senate of the United States was not to determine whether *one* of the two terms expired March 4, 1891, but to determine *which* one of the two terms expired on that day.

Your committee hold, both on construction and precedent, that the first legislature of the State of Idaho was organized on Monday, December 8, A. D. 1890, within the meaning of the term "organization," as used in the constitution of the State of Idaho, in the act of admission, and in the Revised Statutes. The election of Mr. Dubois took place on Thursday, the 18th day of December, A. D. 1890.

Tuesday, the 16th day of December, A. D. 1890, was, in the judgment of your committee, the second Tuesday after the meeting and organization of the legislature of the State of Idaho. On that date a separate vote for Senator was taken *viva voce* in each house of the legislature as provided by the Revised Statutes. There being no election, the two houses met in joint assembly Wednesday, on the 17th day of December, A. D. 1890, at 12 o'clock meridian in pursuance of the Revised Statutes, and took two ballots for United States Senator.

There being no election, the joint assembly again reconvened at 12 o'clock meridian Thursday, December 18, A. D. 1890, all the members of the two houses save one being present and voting, at which time Mr. Fred T. Dubois received the *viva voce* votes of 10 senators, the whole number of senators constituting the senate of the State of Idaho being 18. He received 22 votes from as many members of the house of representatives, the whole number of members constituting the house being 36, making in all 32 votes that were cast for the sitting member, Mr. Dubois, the whole number of members of the legislature of the State of Idaho being 54.

Your committee therefore report back the following resolutions and recommend their adoption:

RESOLUTIONS.

Resolved, That Fred T. Dubois is entitled to retain the seat he now holds as Senator from the State of Idaho for the full term commencing March 4, 1891.

Resolved, That William H. Clagett is not entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, A. D. 1891.

H. M. TELLER,
Chairman.
GEO. F. HOAR.
JOHN H. MITCHELL.
WM. E. CHANDLER.
ANTHONY HIGGINS.
JAMES L. PUGH.
DAVID TURPIE.

VIEWS OF THE MINORITY.

It is admitted that the election held by the Idaho legislature on the 16th of December, 1890, for two Senators to fill existing vacancies from that State in the United States Senate was properly and lawfully held on that day, the application of the general regulation of such elections contained in the act of Congress of 1866 being superseded by the language of the constitution of Idaho, ratified and approved by the act of Congress admitting said State into the Union, and permitting the election of those Senators "within ten days" after the organization of the legislature.

It seems to be further admitted that the election of a third Senator by the same legislature to fill a vacancy to occur in the future, to wit, on the 3d of March, 1891, necessarily arising from the expiration of the term of the one of the two Senators elected on the said 16th day of December, 1890, which should draw the short term, was required to be held, not within ten days as prescribed above, but under the provisions of the act of Congress of 1866. The real question at issue then is whether the alleged election of F. T. Dubois was held in compliance with that act as to time and manner. If it was, Mr. Dubois is entitled to retain his seat. If not, then either W. W. Clagett is entitled to occupy the seat or else it is vacant.

The following is a copy of the statute of 1866 referred to:

"SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

"SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for who receives a majority of the whole number of votes cast in each house shall be entered on the journal of that house by the clerk or secretary thereof; or, if either house fails to give such majority to either person on that day, the fact shall be entered on the journal. At 12 o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for Senator, and the person who receives the majority of all the votes of the joint assembly—a majority of all the members elected to both houses being present and voting—shall be declared duly elected. If no person receives such majority on the first day the joint assembly shall meet at 12 o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote until a Senator is elected.

"SEC. 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed on the second Tuesday after meeting and organization to elect a person to fill such vacancy in the manner prescribed in the preceding section for the election of a Senator for the full term."

It will be seen that, in pursuance of the Constitution, Congress by this act has provided regulations both for the time and the manner of electing United States Senators. The time at which the elections are to begin is "on the second Tuesday after the meeting and organization" of the legislatures; the manner is prescribed to be by a *viva voce* vote of each member of each house of the legislature taken separately, and on failure of any candidate to receive a majority of the votes in each house, or if either house has failed to take the required proceedings of voting separately, then the two houses are convened in joint assembly and proceed with the election, etc.

The members of the legislature of Idaho assembled in compliance with law at Boise

City, on Monday, the 8th of December, 1890. There can be no doubt, therefore, but that Tuesday, the 16th of the same month, was the second Tuesday after the *meeting* of the legislature. But the legislature is required to elect Senators on the second Tuesday, not after the meeting alone, but after "the meeting and organization." Now, let us inquire if the Idaho legislature was organized, as well as had met, on Monday, the 8th of December, 1890; for, if it was not organized until Tuesday, the 9th, both reason and authority unite to say, and in part the report admits, that Tuesday, the 16th, was not the second Tuesday *after* organization, but the first.

In adopting the language of the statute we have no reason to suppose that Congress attached any abstruse or unusual meaning to the word organization. On the contrary, we are to presume that they used it in its ordinary and common-sense application, such as is understood to be its universal meaning by all American communities in the formation of every class and character of representative assemblies, whether official and legal or merely popular or social. It is the comprehensive and familiar term used to describe that process by which collective bodies of the people emerge from the chaos of mere numbers into that combined unity which is necessary to efficient and concerted action.

A number of men entertaining certain opinions or desiring to do certain things meet at a certain time and place, and by common consent choose a mouthpiece who shall represent them and give utterance to their collective will, and a scribe or recording officer to record that will. We then speak of such a body as "organized," and not until then. There is, perhaps, no exception whatever to this.

No one probably ever heard of an assembly of any kind in our country being spoken of as organized until it had some one to preside over its deliberations, collect its will by an appeal to the members present, and a proper officer to record and perpetuate that will when collected and announced. To suppose an instance to the contrary would be to imagine an absurdity. We must conclude, therefore, that when Congress fixed the time from which should be computed the "second Tuesday after organization" it meant so much and such complete organization as is usually understood to be necessary for the efficient action and practical working of legislative bodies in all the American States.

It is not necessary to aver that Congress meant that the legislature should have elected and installed in office every possible officer that in its discretion it might deem necessary to its efficiency or convenience, but we hold that Congress must have meant that the organization should include, together with a presiding officer to collect and announce its will, a recording officer to preserve and perpetuate that will. And as the presiding officer was required to be sworn, so was the recording officer, and until both of these things had been done there was no organization within the meaning of the act.

The records of the two houses of the Idaho legislature show that on the first day of the session, to wit, the 8th of December, the senate took no steps toward electing any of its officers, being called together by the lieutenant-governor, who, under the constitution of the State, was *ex officio* its president, and a secretary *pro tempore* being appointed, or assuming to act by a common consent. The members were sworn in, committees were appointed to provide rules for the government of the senate, arrangements were made for the distribution of seats among the members, a resolution was adopted providing for the application of the rules of the fifteenth session of the legislative council to the government of the senate until the report of the committee on rules was adopted, and finally a committee on "organization to designate and determine the number and order of offices to be filled" was appointed, whereupon the senate adjourned until the next day.

This comprised substantially the whole of the first day's proceedings, not one act of which constituted organization, but every one of which was a step in the process of organization; which condition of disorganization is fully and explicitly acknowledged by the adoption of a resolution for the appointment of a committee for the express purpose of providing for and determining that organization.

On the next day, to wit, on Tuesday, the 9th of December, that committee on organization made the following report:

"SECOND DAY.

"SENATE CHAMBER,
"*Boise City, December 9, 1890.*

"Senate met, pursuant to adjournment, at 10 o'clock a. m.
"Senate was opened by prayer by Rev. Mr. Gowan.
"Roll called; all present.
"The committee on organization made the following report:
"'MR. PRESIDENT: We, your committee on organization appointed to designate

and determine the number and order of the offices to be filled by the senate, ask *lief* to report as follows:

"'1st. President *pro tempore* of the senate.
"'2d. Secretary of the senate.
"'3d. Assistant secretary of the senate.
"'4th. Engrossing clerk.
"'5th. Assistant engrossing clerk.
"'6th. Enrolling clerk.
"'7th. Assistant enrolling clerk.
"'8th. Two pages.
"'10th. Doorkeeper.
"'11th. Janitor.
"'12th. Chaplain.
"'Respectfully submitted.

"'J. W. BRIGHAM, *Chairman.*'

"Mr. Weller moved that the report be adopted.
"Which motion prevailed.
"Mr. Wells moved that the senate now proceed to the election of the officers as designated in the report of the committee on organization.
"The motion prevailed."

The officers here provided for were all elected on the same day; they were notified of their election; were required to be present in the chamber at 2 o'clock to take the oath of office; they appeared and were sworn in. Whereupon, and not before, it was moved and carried that a message be sent to the "house of representatives, informing them that the senate is *now* organized and ready for the transaction of business." Thus it appears that the senate of the Idaho legislature did not consider itself "organized," and, in fact, was not organized, until the afternoon session of Tuesday, December 9, 1890, when, and for the first time, it had in office the proper and necessary officers, duly sworn; whereupon it not only announced its organization to the lower branch, but announced it as well to the coördinate or executive branch of the lawmaking power of the State.

In the house of representatives almost exactly similar proceedings were had; a speaker and principal officers were elected on Monday, the 8th, but none except the speaker were sworn or inducted into office that day. On Tuesday, the 9th, the officers of the house were completed by the election of a chaplain; a committee was appointed to draft rules for the government of the house; the officers and attachés elected on the previous day were caused to appear, and the oath of office was administered to them; and then immediately, as appears by the record, and not until then, on motion of Mr. Jones, it was ordered—

"That the chief clerk notify the council (senate) that the house was permanently organized and ready to proceed to the transaction of legislative business."

Nothing can be plainer than the fact that neither house of the legislature considered itself organized until the moment when it so announced, and the attempt to evade the force of this fact by saying that the official and customary announcement of organization on a certain day does not forbid the conclusion that that organization had taken place the day previous, is the merest begging of the question, and is nothing short of trying to make an unsupported inference contradict the positive assertions of the record.

This method of announcing the formal organization of legislative bodies immediately succeeding the selection of its permanent officers has for its precedent the example of the United States House of Representatives. In the manual and digest of its rules, after providing for the method of electing a speaker, and after his election, it is stated on page 423:

"The organization of the House is then completed by the election of the officers named in Rule 2, after which the Delegates from the Territories are then called and sworn."

Rule 2 is as follows:

"There shall be elected by a *viva voce* vote at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain, each of whom shall take an oath to support the Constitution of the United States."

The manual continues—

"At this stage (immediately after such election and swearing in of officers) it is usual for the House to adopt the order that a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled, and that ———, one of the Representatives from the State of ———, has been chosen Speaker, and that ———, a citizen of the State of ———, has been chosen Clerk, and that the House is *now* ready to proceed to business."

That is to say:

"Having a presiding officer to collect and announce the will of the body and a clerk to record that will, we are *now* ready to proceed to business—we are *now* organized."

Is it possible to mistake the meaning of Congress in the language of the act of 1866, in fixing the time for the election of Senators on the second Tuesday "after the *meeting* and *organization*" of the legislature? Could they have meant anything else than that that organization should consist at least of the election of speaker and clerk, both duly sworn and inducted into office, when Congress itself required not only this much, but that all the other officers mentioned in Rule 2 to have been elected, sworn, and inducted into office before formally announcing to all concerned that their organization was complete and that they were ready to proceed to business?

It must be borne in mind, too, that the evidence of the organization of the two houses of the Idaho legislature furnished by their records here referred to is not only possessed of all the ordinary weight attached to the solemn records of legislative or judicial bodies, but is peculiarly convincing by reason of the fact that its statements were written down before any of these contentions, disreputable combinations and bitter feuds growing out of the Senatorial elections had arisen, and before their significance could have in any way been anticipated; and in this unbiased way, in this natural way, the truth incontestably appears that neither house of that legislature was organized on Monday, the 8th of December; that neither house treated itself as organized or claimed that it was organized, or attempted to do any act except those which would lead up to "organization" until Tuesday, the 9th of December, 1890.

Then, having elected and sworn in the officers which they thought necessary, in obedience to the recommendations of a special committee appointed for that very purpose, then, and not till then, did they declare themselves organized and ready to proceed with the public business.

An attempt is made to show that the language of the statute is complied with by maintaining that a temporary organization is sufficient and equivalent to permanent organization. This we do not think is tenable. The law only speaks of organization; one state or condition of readiness for the legal transaction of business. It must mean the real, the complete.

It is not possible for any body to put itself into shape for effective action without going through some preliminary steps which must be permitted by sufferance and common consent. For example, a multitude desires to resolve itself into a deliberative body. The only possible way by which this can be done is for some one of the number to propose that A. B. be requested to take the chair, or to preside. Now, the mover of this proposition does so by virtue of no legal right or authority, all in the assemblage being upon an absolute equality. But some one must take the initial step or organization will never be effected. So by common consent he puts the machine in motion and calls for an expression of opinion or the will of the multitude on his own authority, and announces the result. A. B. is chosen chairman and organization is begun.

Now, as well might it be said that the meeting was organized when this volunteer assumed to control its proceedings and take the sense of its members, as to say that an officer called upon temporarily to perform certain duties in the legislature, for the purpose of testing the sense of the body as to who its officers should be, constituted an organization within the meaning of the act of Congress. This was not organization, but only one further step toward it. A *temporary* organization, as its name imports, is merely a makeshift, a tide-over, a stepping-stone to the real organization which the act of 1866 contemplated; a mere mold to hold the soft material in shape until it hardens into self-sustaining consistency.

Viewed in another sense, a temporary organization is in terms an incomplete organization, and an incomplete organization is no more an "organization" contemplated or required by the act than is a part of anything the thing itself. A body can not be said to be organized when it is admittedly only partly organized; and if there be no distinction between the organization of a body and the necessary unavoidable initial steps which lead up to it, then the whole force and purpose of the act of Congress is rendered indefinite and worthless, since there are a score of such preliminary steps, each one of which might be counted as "organization," and from which the time required by the statute might be computed.

Nor do we think that the capacity of a legislature to enact a law a fair test of its condition of "organization" within the meaning of the act of Congress. If such had been its meaning there would have been no necessity for the insertion of that word. In fact, it would have been quite as effective and much more definite if the words had been "on the second Tuesday after the *meeting* of the legislature," for the body of men elected for that purpose would not in fact become the "legislature" until they had put themselves in shape to discharge their constitutional functions.

This was the original language of the bill, but on the suggestion of Mr. Fessenden, Mr. Clark, who had the bill in charge, agreed to add the words "and organization," in order to meet the cases where organization did not immediately ensue after the *meeting* of the legislature. (See Globe, first session, Thirty-ninth Congress, pages 3727, 3728.)

Congress, therefore, saw fit to use the words, "meeting and organization," and they must have meant by it to fix the time of electing Senators to depend upon some other stage of legislative existence than that of its first capacity to enact a law.

Organization as applied to all deliberate assemblies in our country had a well-known meaning of universal use, and designated a stage in the existence of the assembly where it was supplied with all the necessary adjuncts of legislation, and nothing more was required to enable it to discharge its functions. Again, if the capacity to enact a law was a sufficient organization to comply with the statute, then the obvious intention of the lawmakers could be easily defeated. For it is not to be denied that a legislature has the power to enact a law without either a speaker or a clerk, unless required to have such officers by the State constitution.

Yet, in requiring that there should be an organization as well as a meeting of the legislature at least two Tuesdays prior to its election of Senators, Congress plainly precluded such an idea, and described the event from which the time was to be computed as the organization of the legislature in the plain, simple, and usual manner of such bodies.

WHO HAS THE RIGHT TO DECIDE WHEN A LEGISLATURE IS ORGANIZED?

The Constitution of the United States provides that Senators shall be chosen by the *legislatures* of the States, respectively, and grants to Congress the power of regulating the "time" and "manner" of so choosing them. The act of Congress of July, 1866, has fixed the time for initiating the proceedings for such choosing as the second Tuesday after the meeting and *organization* of the legislature next preceding, etc. Clearly the duty imposed by the Constitution is upon a lawmaking body; upon that department of the government having the legislative function, and when the act speaks of the *organization* of that body, it must, by every reasonable intendment, mean that systematized arrangement of constituent and independent parts, or organization of each house, which by the determination of each house shall be appropriate and necessary for the discharge of its legislative function.

What stage, or degree, or kind of organization may be appropriate and necessary for this purpose is not for the Senate of the United States to decide. That must belong to the two houses, respectively, of the legislature, and is necessarily exclusive. It is competent for either house to decide that an organization less complete than that sanctioned by the universal usage of American Commonwealths shall be the organization through and by which it will discharge its legislative duties. It might be determined that a presiding officer and clerk elected *de novo* each day should be the final method of organization. Or, if the constitution did not otherwise provide, that it would impose on the presiding officer the duty of keeping the journal.

Such organization, it is true, would be anomalous, violation of established usage, and demoralizing, and not to be presumed as the will of a legislative body, except upon the clearest proof that such was its determination.

But the point we are making is that it is exclusively within the competence of each branch of a State legislature, except so far as it is restrained by the constitution or laws of the State, to decide for itself what its final or legislative organization shall be. When that determination clearly appears, either by express declaration or by conduct of business, or by both, then it is not competent for any other body or person or department of Government to determine otherwise.

It is a clearly established fact in the present case that both houses of the legislature of Idaho were merely proceeding on the 8th of December in orderly fashion *towards* a final legislative organization, such an organization as they considered necessary and appropriate for the performance of their *legislative functions*. The evidence is overwhelming that neither branch considered the so-called temporary organization made on the 8th as anything more than a proper and necessary step in the process of reaching that final legislative organization which was accomplished on Tuesday the 9th. What either branch *might* have considered this first stage in the proceeding is not the question, but what did it consider it?

Not only do we have the conduct and action of each branch, as set forth in their respective journals, as evidencing its determination in this regard, but we have their declarations, as set forth in resolutions adopted by each house, expressing and confirming that determination.

In addition to the resolutions adopted by each house separately on Tuesday, December 9, to inform the other that it was permanently organized, we have the resolutions of the two houses passed on Tuesday, December 9, after the reception of

the messages from the houses, respectively, pursuant to the resolutions referred to, as follows:

"Mr. Mills offered the following resolution; which was adopted:

"'*Resolved*, That a committee of three (3) members be appointed by the speaker to join a like committee which may be appointed by the senate to wait upon his excellency, the governor, and inform him that the legislature is organized and now in session and ready to receive any communications he may be pleased to transmit.'

"The speaker appointed as such committee Messrs. Monroe, Porter, and Ballentine.

"Mr. Wells moved that a committee of two be appointed to act with a like committee of the house to wait upon his excellency, the governor, to inform him that the legislature is now organized and ready to receive any communication he desires to make.

"The motion prevailed."

It is idle, therefore, to contend that the partial and incomplete organization o either house on Monday was sufficient to enable it to perform legislative business if it chose to do so, in the face of the fact that both houses determined that a further and more complete stage of the process, not attained until Tuesday, was necessary for that purpose.

INCIDENTAL REFERENCES NOT CONCLUSIVE OF THE FACT OF ORGANIZATION.

It can not surely be maintained with seriousness that the incidental recital of a conclusion by a presiding or other officer of the body is entitled to greater weight than the direct and solemn resolution of the body itself. Yet the committee insist that the recitals of President Willey and Speaker Fenn, contained in their certificate, made on the 19th of December, 1890, that the houses were organized on Monday, the 8th, are conclusive, although the two houses themselves announced their organization on the 9th at the moment of its accomplishment, and subsequently, on the 9th of February, 1891, by a joint resolution, solemnly declared that their organization was made on Tuesday, the 9th of December, 1890.

THE AFTERTHOUGHT CONCERNING THE WRONG DAY NOT MATERIAL.

In answer to the allegations of the report that the charge that the election of Dubois as Senator was held on the wrong day was merely an afterthought and was not suggested by anyone at the time, it seems to the undersigned to be sufficient to simply remind the Senate that when a time and place are fixed by law for holding an election the election must be held then and there, and nowhere else, or it is void. Consent of all the voters can not change it, and the fact that no one objected makes not the slightest difference if in fact the time was not the day prescribed by the law.

CONGRESSIONAL AND STATE PRECEDENTS.

The conclusion reached by the committee that Mr. Dubois was elected is based entirely upon the contention that the Idaho legislature was organized within the meaning of section 14, on Monday, December 8, because on that day each house had a permanent presiding officer, duly chosen and qualified, and a permanent clerk in the house, duly chosen but not qualified, and a secretary *pro tempore* in the senate, who was never, as secretary *pro tempore*, qualified by being sworn into office. In other words, that each house was organized within the meaning of section 14, because it had a permanent presiding officer and acting clerk in the house, and a permanent presiding officer and temporary secretary in the senate. To support this contention the committee in its report cites certain alleged precedents in the House of Representatives and the legislature of Iowa in the years 1870 and 1872.

We regret that the committee did not make a more careful examination from the original records of these alleged precedents. Had it done so it would have discovered that instead of being precedents in favor of the sitting member when tested by conceded legal principles and examined as to facts in detail, they are without exception precedents in favor of contestants. These alleged precedents are all dwelt upon at length in the printed brief of Mr. Paine, counsel for Mr. Dubois, submitted to the committee, and which the majority of the committee seems to have accepted without examination as being correctly stated as to fact and conclusion.

We will examine the alleged precedents in Iowa first. In the years 1870 and 1872, when Senators were elected in that State, the legislature elected such Senators on the second Tuesday after the meeting of the legislature on Monday, the day appointed by law for holding its regular sessions. In both of those years, as also in every year thereafter, down to 1890, the uniform practice adopted on Monday, the day of meeting, was to elect a speaker and clerk *pro tempore* in the house, and then adjourn

until the next day, after appointing a committee on credentials in some cases, and in others without appointing such committee.

On Tuesday (the next day) where the committee on credentials had been appointed the day before, the report of this committee was first received, and where not appointed the day before, a committee was appointed on Tuesday to ascertain from their credentials who were the members elect, and therefore entitled to take part in the organization of the body. This being ascertained, in every instance, the members elect were sworn into office on Tuesday, and immediately thereafter proceeded to elect their regular officers, which being done, notice was given to the senate that the house was organized.

In those two years the legislature elected Senators on the second Tuesday from this Monday, and the credentials of those Senators presented to the Senate certified that they were elected on the second Tuesday after the *temporary* organization of the legislature. It will not be disputed that the qualification of the members by being sworn into office (as required by the Constitution of the United States) is absolutely essential to transform a body of members elect into members, and change such body of members elect into a legislative house. In the two cases above mentioned this was not done until the Tuesday after the day of meeting. Until such Tuesday, therefore, there was not even a house of representatives in existence, to say nothing about there being a house duly organized. Nevertheless, the Iowa legislature, in electing Senators in those years, assumed that each house was organized within the meaning of section 14 on Monday, the day of meeting, when there was not a legislative house in existence, but only a body of men claiming that they had a right to sit as members when it should be ascertained they were so entitled and they should be duly sworn in as members.

The simple statement of these facts disposes of those two alleged precedents, unless it can be shown that a violation of all law becomes law from the mere fact of such violation.

At the next five ensuing Senatorial elections in that State, made in the years 1876, 1878, 1882, 1884, and 1888, respectively, the legislature of Iowa followed the course taken by its predecessors in 1870 and 1872 and elected Senators on the second Tuesday after Monday, its day of meeting, and before a single member had been sworn in in either house. This action seems to have been taken in deference to the example set prior to 1876. Those five legislatures, however, beginning with 1876, evidently concluded that the idea of treating the two houses as being organized when there was not any house *in existence* was radically wrong, because while following the practice in 1870 and 1872 and electing the second Tuesday after the temporary organization, they also held a double election in each case one week after the permanent organization and elected the same person over again.

This deliberate action by the Iowa legislature at five successive elections is proof that those legislatures considered that the action taken in 1870 and 1872 was without warrant of law. And at the last election held in that State in 1890 the legislature deliberately overturned those two alleged precedents and distinctly declared, not only by its action, but by formal resolution also, that it was the *permanent* and not the *temporary* organization that is referred to in section 14. We now refer to the facts relating to the last election in 1890, as shown by the journals of the two houses.

The legislature met Monday, January 13, 1890. In the house nothing was done on that day, except that a person was authorized to "act as temporary reading clerk." (H. J., p. 1.)

Beginning with Tuesday, January 14, the house balloted daily and without success down to January 27, when a temporary speaker and speaker *pro tempore* and a temporary clerk and a clerk *pro tempore* were elected. Immediately upon their election a committee on credentials was appointed, and the members being ascertained were duly sworn into office. Balloting then began for *permanent* officers and continued without success from January 27 to February 19, when a permanent speaker, chief clerk, and other officers were elected and sworn. (J., pp. 83–87.)

After the election of such permanent officers, and not before, the house in the usual form notified the senate "That the house has completed its organization and is ready to receive any communication from the senate." (J., pp. 87, 88.) From the meeting of the legislature, on January 13, to February 19, when the *permanent* officers were elected, the house transacted no legislative business whatever.

The senate on the day of meeting elected a temporary secretary, sergeant-at-arms, and other officers (S. J., p. 1), and adjourned until the next day. January 14 the members were sworn, and on the same day thereafter, the permanent officers elected and qualified, and the governor thereupon notified that the senate was organized. January 15 the senate notified the house of its organization.

Thus on January 27 the senate had a *permanent* and the house a *temporary* organization. If the legislature had followed the practice in 1870 and 1872, it would have initiated the election of Senator on the second Tuesday after January 27. Instead

of doing so, however, it waited until the 4th of March, being the second Tuesday after February 19, on which day both houses had secured a *permanent* organization.

On March 3, 1890, the legislature of Iowa passed a concurrent resolution which in terms settled the construction in that State of section 14, and removed for the future the doubts which had theretofore prevailed as to whether the temporary organization could legally answer the requirements of that section, in the election of a Senator. The concurrent resolution, found in House Journal, page 153, is as follows:

"That at 12 o'clock meridian on Wednesday, March 5, 1890, that being the day following the second Tuesday after the *organization* of the general assembly, the members of the general assembly will meet in joint convention in the hall of the house to compare the journals of the two houses and to declare the result thereof with reference to the election of a United States Senator for the State of Iowa for six years from the 4th day of March, 1891."

On the day following the passage of this resolution, viz, on March 4, the two houses voted separately for Senator, said day being the second Tuesday after the *permanent* organization, and on the next day, viz, on March 5, met in joint assembly, as provided in the concurrent resolution, and Mr. Allison was duly declared elected Senator.

Thus, after twenty years of confusion and doubt, the State of Iowa has at last distinctly settled for itself the construction of section 14 by adopting the construction which has uniformly prevailed in every other State of the Union on that subject. So that now we have a uniform legislative exposition of *all* the States to the effect that it is the *permanent* and not the temporary organization which is the event from which to compute the second Tuesday.

We have heretofore shown that the adoption of the construction claimed by the majority of the committee would make universal in all the States the same doubt and confusion which prevailed in Iowa for twenty years, and absolutely destroy the value of the act of 1866 by substituting for a certain day, and hour of the day, when an election is held, a shifting, indefinite, and uncertain time, under which every evil would be greatly increased to prevent which that act was passed; not only increased in States where the evils existed prior to the passage of that act, but extended to every State of the Union which prior to that time had held regular and orderly elections under the safeguards of State laws, which State laws were abrogated and all others prohibited when Congress legislated on this subject.

To the above statement, that the construction in *all* the States is *now* to the effect that it is the permanent organization created by the election of permanent presiding and recording officers that is mentioned in section 14, there would appear to be an exception in the South Carolina case cited in Mr. Paine's brief (p. 19). This citation is made in such terms as to cause it to appear that in 1868 the legislature of that State voted that it was permanently organized, by the election and qualifications of a permanent *speaker only*, the clerk and other officers being such *pro tempore*. *As stated*, this case would seem to support the claim of the committee; and, although not referred to by it in the report, we deem it proper to consider it, as it has been called to the attention of the Senate by the distribution of Mr. Paine's brief.

The legislature of 1868 was the first one convened under the State constitution adopted in that year, at the close of the period of reconstruction, and the manner in which the first legislature should be organized is prescribed in an ordinance attached to the constitution, as follows:

"SEC. 2. That each house shall be temporarily organized by the election of a presiding officer, to whom the oath of office shall be administered by the president of this convention, and which presiding officer shall then administer the said oath to the other members.

"SEC. 3. That as soon as the house of representatives has *permanently organized by the election of a speaker*, and shall have appointed a date for the purpose, the governor shall be installed into office in the presence of both houses, and the oath of office shall be administered to him by the president of this convention, and who shall thereafter administer the said oath to the lieutenant-governor in the senate chamber. (Constitution S. C., 1868, p. 43.)"

It is thus seen that at that session, specially provided for in the constitution, the house was declared permanently organized by the election of a speaker *only*, and the proceedings in the organization of that legislature were strictly in accordance with the constitution. At subsequent elections held in that State in the years 1870, 1872, and 1878, and when it was *not* proceeding under this special constitutional provision, the legislature of that State, by its action and vote, held that the house was not organized until the permanent *speaker* and *clerk* were both elected and qualified.

THE CONGRESSIONAL PRECEDENTS REFERRED TO IN REPORT OF COMMITTEE.

The eleven Congressional precedents in the House of Representatives cited in the committee's report [page 681, *ante*] are cited to show that in these eleven cases the House of Representatives has voted that it was organized and ready to proceed

to business when it had a permanent presiding officer only, and when it had no regularly chosen and qualified recording officer.

This appears from the language of the report [p. 682, *ante*], as follows:

"On not less, therefore, than eleven definite occasions has the House of Representatives of the United States decided, and in its decision the Senate and the President have acquiesced, that it is an organized House when a quorum of the Representatives have assembled, taken the oath of office, and chosen a presiding officer."

The conclusion reached by the committee, that in these eleven Houses the House had no regularly chosen and qualified recording officer, is based upon the fact that after the election of Speaker, and before the election of the Clerk, the House has notified the Senate that it was organized and ready to proceed to business, and in many instances has transacted legislative business during the time intervening between the election of the Speaker and the election of a Clerk.

The alleged precedents are no precedents at all in favor of Mr. Dubois, but are precedents of the most conclusive character in favor of contestant, for the reason that since the beginning of the Twenty-fifth Congress (1839) the House has had a standing rule by which its Clerk and Sergeant-at-Arms, and at a later date its Doorkeeper and Chaplain, when once elected, hold their offices *until their successors are elected and qualified*. Prior to 1839 the practice of the House is thus summarized by Mr. Barclay:

"On the 1st of April, 1789, being the first day of a quorum of the House assembled under the new Constitution, the House immediately elected a Clerk by ballot, without a previous order being passed for that purpose, although in the case of a Speaker, who was chosen on the same day, an order was previously adopted. A Clerk has been regularly chosen at the commencement of every Congress since. The provision for the election of all officers of the House by *viva voce* vote was adopted December 10, 1839. (See Barclay's Digest, p. 163.)"

In 1839 the following rules were adopted by the Twenty-fifth Congress:

"The Clerk of the House shall take an oath for the true and faithful discharge of the duties of his office to the best of his knowledge and ability, and shall be deemed *to continue in office until another be appointed*. (Constitution, Rules, and Manual, Twenty-fifth Congress, p. 67.)

"A Sergeant-at-Arms shall be appointed to *hold his office during the pleasure of the House*, whose duty it shall be to attend the House during its sittings; to execute the commands of the House from time to time, together with all such powers issued by authority thereof as shall be directed to him by the Speaker. (See Constitution, Rules, and Manual, Twenty-fifth Congress, p. 59.)"

These rules were adopted, by special order, by the Twenty-sixth Congress (Congressional Globe, Vol. 6, p. 56), by the Twenty-seventh Congress (Congressional Globe, Vol. 8, p. 4), by the Twenty-eighth Congress (Vols. 12 and 13, p. 335), by the Twenty-ninth Congress (Vol. 15, pp. 4 and 428), by the Thirtieth Congress (Vol. 18, pp. 3 and 49), by the Thirty-first Congress (Vol. 21, p. 78), by the Thirty-second Congress (Vol. 26, p. 10), by the Thirty-third Congress (Vol. 32, p. 4), by the Thirty-fourth Congress (Vol. 38, p. 35), and by the Thirty-fifth Congress (Vol. 4, p. 3).

At the first session of the Thirty-sixth Congress, on March 16, 1860, these old rules were changed to read as follows:

"There shall be elected at the commencement of each Congress, *to continue in office until their successors are appointed*, a Clerk, Sergeant-at-Arms, Doorkeeper, and Postmaster, each of whom shall take an oath for the true and faithful discharge of the duties of his office to the best of his knowledge and ability, and to keep the secrets of the House; and the appointees of the Doorkeeper and Postmaster shall be subject to the approval of the Speaker; and in all cases of election by the House of its officers the vote shall be taken *viva voce*. (Rule 10, Constitution, Rules, and Manual, 1876, p. 163.)"

This rule 10 remained the standing rule of the House until the present rule 2 was adopted, which rule is as follows:

"There shall be elected by a *viva voce* vote at the commencement of each Congress *to continue in office until their successors are chosen and qualified*, a Clerk, a Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain, each of whom shall take an oath to support the Constitution of the United States, for the true and faithful discharge of their duties to the best of their knowledge and ability, and to keep the secrets of the House, and each shall appoint all of the employés of his department provided for by law. (Rule 2, Constitution, Manual, and Digest Fifty-second Congress.)"

It thus appears that the entire period covered by the eleven Congressional precedents referred to by the committee the Clerk and Sergeant-at-Arms of the House of Representatives after being once chosen and qualified, *continued in office* as the regular officers of the House until their successors were chosen and qualified.

It results, therefore, that in every instance referred to by the committee to show that the House *had no clerk* when it notified the Senate that it was organized after

the election of the Speaker, is incorrect, because in every case the Clerk elected at the last preceding Congress was in office, holding over under the Rules of the House.

To make it absolutely clear that at every period of its existence the House has considered the election and qualification of a Clerk *equally as essential* to the organization of that body as the election and qualification of its Speaker, attention is called to the fact that in the Thirty-first Congress the Clerk's office became vacant during the session by the death of the incumbent. The proceedings taken thereon by the House (Mr. Howell Cobb, Speaker) are inserted herein in full, as follows:

"HOUSE OF REPRESENTATIVES, *Tuesday, April 16, 1850.*

"The Speaker called the House to order at 12 o'clock.

"One of the assistants of the late Clerk of the House, Mr. J. C. Walker, proceeded to read the Journal of yesterday.

"Mr. Hall interposed and said that he had risen to inquire by what authority any person prepared the Journal here, under what authority the individual now at the desk was reading the Journal. The House had had a Doorkeeper and a Postmaster foisted upon it and he, for one, was not willing that a Clerk should be put upon the House in the same way. He objected to the Journal being read until the House had authorized some individual to read it.

"The SPEAKER. The Chair will state to the House that the Journal has been prepared as usual under the direction of the Speaker. The individual at the desk, who was reading the Journal, was one of the subordinate officers of the late Clerk of the House of Representatives. The positions occupied by these officers previous to the death of the Clerk are still, in the judgment of the Chair, occupied by them. They are not authorized, however, to discharge the duties of Clerk. *In the opinion of the Chair until a Clerk shall have been elected the House is not organized and no business can be transacted until an election shall have taken place.* But this state of things does not prevent the preparation or the reading of the Journal. The Journal has been regularly read even before the election of the Speaker *in the original organization of the House,* and the Chair is not able to perceive any objection against the reading.

"Mr. HALL said he wished to remark that he considered the present state of things very different from that which existed when the House was organized. *Under the rule of the House the Clerk of each Congress held over until his successor was elected.* If the gentleman who read the Journal did so merely at the discretion of the House *and not as clerk,* he (Mr. Hall) had no objection to it. But he understood that the gentleman was *acting as clerk.*

"The SPEAKER. The Chair has stated that no person was authorized to discharge the duties of clerk.

"The Journal was then read and approved.

"Mr. HARRIS, of Illinois, rose and moved that the House proceed to the election of a Clerk.

"Mr. BROWN, of Mississippi, moved to amend the motion by adding after the word 'Clerk' the words 'and Doorkeeper.'

"The SPEAKER. In the opinion of the Chair, the amendment is not in order.

"Mr. BROWN. Then I offer the following resolution:

"The resolution was read as follows:

"'*Resolved,* That the order heretofore passed by the House, postponing the election of Doorkeeper, be, and the same is hereby, rescinded; and that the House of Representatives proceed to the election of Clerk and Doorkeeper.'

"The resolution having been read:

"The SPEAKER. In the opinion of the Chair, *no resolution, no business is in order until a Clerk shall have been elected,* and the House can take action upon *no subject whatever until the election of a Clerk—that being necessary to the organization of the House.*

"Mr. BROWN. I suppose some motion is necessarily in order?

"The SPEAKER. *No motion is in order except the motion made by the gentleman from Illinois* (Mr. Harris) *that the House proceed to the election of a Clerk.*

"Mr. KAUFMAN rose to inquire whether the motion of the gentlemen from Illinois (Mr. Harris) was debatable; because, if it was so, he had risen for the purpose of moving the previous question.

"The SPEAKER. The Chair does not think that the motion to go into the election of a Clerk is debatable. If it is so, the debate must be confined within very narrow limits. But the Chair thinks that the question is not debatable at all.

"Mr. KAUFMAN. Then it is unnecessary for me to move the previous question.

"Mr. BROWN. That I may have the sense of the House on that question, I appeal from the decision of the Chair, and I would like to submit a remark.

"The SPEAKER. The Chair has ruled that the resolution of the gentleman from Mississippi (Mr. Brown) is out of order, upon the ground *that the House is not organized until a Clerk shall have been elected, and that no business is in order until the House*

shall have been organized by the election of a Clerk. From this decision the gentleman from Mississippi appeals. And the question is:

"'Shall the decision of the Chair stand as the judgment of the House?'

"And the question thereon was taken and decided in the affirmative without a division.

"So the judgment was affirmed.

"The question then recurred and was taken on the motion of the gentleman from Illinois (Mr. Harris), that the House do now proceed to the election of a Clerk; and it was decided in the affirmative without a division.

"So the motion was agreed to. And thereupon the House proceeded to the election *viva voce* of a clerk.

"(Congressional Globe, vol. 21, part 1, 1849–'50, pp. 740, 741.)"

It results, therefore, that the House of Representatives, from the foundation of the Government, *has by its action* uniformly held that the election and qualification of its permanent *presiding* and *recording* officers were *absolutely essential* to its organization and to authorize it to proceed with legislative business. And in the only instance in which there was a vacancy in the office of Clerk, it (upon the question being directly raised) formally decided that all legislative and other business must stop until this vacancy was filled.

When we consider that the rules of the House of Representatives, in connection with Jefferson's Manual, constitute the generally, if not universally, accepted parliamentary law governing the State legislatures, the above facts are conclusive to the effect, first, that a regularly chosen and qualified *permanent clerk is essential* to the organization of a legislative body; and, secondly, that a temporary designation of a speaker and clerk is not an *organization* of the body, but only the *preliminary stages* in such organization, especially when the body immediately and universally follows the so-called temporary organization by the election of its permanent officers, and postpones until then all legislative business and the notification to the other house that *it is organized and ready to proceed with the public business.*

SENATORIAL PRECEDENTS REFERRED TO IN COMMITTEE'S REPORT.

The committee is equally unfortunate in the statement [p. 682, *ante*] that:

"The Senate has at different times for periods aggregating thirty-two days transacted its ordinary business *with the office of Secretary vacant.*"

As this statement is made in the same terms in the brief of Mr. Payne (pp. 17, 18), the committee doubtless refers to the two cases mentioned in that brief (p. 15), where it is alleged that the Senate, in 1814 and again in 1861, decided that the formal election of a Secretary was not indispensable to its organization.

If it were true that in case of a vacancy in the office of Secretary his duties were performed by an *acting* clerk it still would not follow that the election and qualification of a Secretary was not essential to the organization of the Senate. The Senate is a *continuous* body. It has never been organized but once—namely, in 1789. If the Senate had *then* voted that a Secretary was not essential such vote would be a precedent here. It would be as absurd to say that when a *continuous* body has become organized by the election of the necessary officers it becomes disorganized and resolved into its original elements by the death of one of those officers as it would be to hold that where a newly created county had been organized by the appointment of the county officers it ceased to be an organized county upon the death of one of them.

We, however, deny the facts upon which this portion of the committee's report is based. The facts in the case cited in 1814, as shown by the records, are as follows, to wit:

The Secretary having died during the recess prior to the convening of the special session held that year, on the assembling of the Senate it was—

"*Resolved*, As the former Secretary of the Senate has departed this life, that the Chief Clerk do act as *the Secretary thereof* until one shall be appointed,

"And thereupon such clerk *was regularly sworn in as the* Secretary of the Senate. (Senate Journal, 1814, vol. 5, p. 523.)"

On being so appointed and sworn in the person who therefore had been the Chief Clerk became the *Secretary* of the Senate and acted as such until it pleased the Senate to elect another, on October 11. The Journal shows that no legislative business was transacted by the Senate after convening until the Secretary was sworn in on September 19.

In the case in 1861 there never was a vacancy in the office of Secretary. When the Republicans obtained the control of the Senate in the Thirty-seventh Congress they removed the Secretary, Sergeant-at-Arms, and Doorkeeper by electing their successors under special resolutions passed at different dates.

The Senate Journal, Thirty-seventh Congress, 1861, p. 1, shows that the Senate *had a Secretary in office* when it convened in special session July 4, 1861. The officers

first removed were the Sergeant-at-Arms and Doorkeeper (pp. 6, 7). Their successors were elected and sworn in July 5. July 6 an assistant doorkeeper was elected (p. 20). July 10 a Chaplain was elected (p. 25). July 15 a new Secretary was elected (p. 41).

None of the several resolutions to elect the above officers mentioned the fact that such elections were for the purpose of *removing* the then incumbents. But that such was the purpose is shown by the remarks of Mr. Hale (who made all of the several motions to elect) immediately after the removal of Mr. McNair, Sergeant-at-Arms, as follows:

"As an act of justice and courtesy to Mr. McNair, who is *removed without any cause affecting his moral character*, etc. (Congressional Globe and Appendix, first session Thirty-seventh Congress, p. 11.)"

It thus appears that from the foundation of the Government the Senate has never assumed to transact any legislative business, except where it had a regularly chosen and qualified Secretary.

We have had examined the Journals since 1866 of one-half of the States, and in no instance has a case been found, first, where any legislative house has ever considered itself organized so as to authorize it to transact legislative business until the *permanent* organization was completed by the election in *all* cases of at least a *permanent presiding* and *recording* officer; in *most* cases of a permanent presiding, recording, and executive officer, and in *very many* cases of *all* the permanent officers which it deemed necessary or convenient for the transaction of its business; and, secondly, no case where a legislative house has ever notified the other branch of the legislature that it was organized when it had a *temporary organization only;* or when it had a permanent *presiding* officer and a temporary *secretary*, or while it was engaged (as in the case in Idaho), in the election of its officers. In every case the notices have been formally exchanged after the *permanent* officers have been chosen and qualified and not before, and upon such exchange being made the house has, for the first time, proceeded to legislative business.

We are now having prepared a tabulated statement showing the above facts, which we hope to have completed before the determination of this case by the Senate so that the Senate may have the same before it as an aid to a correct decision.

When it is considered that in every state of the Union it is *now* the accepted practice to compute the second Tuesday from the *permanent* organization of both houses of the legislature, and that it is the universal practice in the States to treat the election and qualification of a *permanent* presiding and recording officer *as essential* to the organization of a legislative house, and that the same rule has from the foundation of the Government prevailed in the Senate and House of Representatives, it becomes clear that to seat Mr. Dubois the Senate will have to overturn the State and Congressional precedents of more than a hundred years.

The undersigned are further of the opinion that the present occupant of the seat was not duly elected Senator from Idaho, for the reason that, supposing the legislature had been duly organized on Monday, December 8, yet on the second Tuesday thereafter, to wit, on December 16, the two houses did not, as required by law, proceed to vote separately for a Senator to fill the term beginning March 4, 1891. This fact appears by the record of their proceedings on that day.

We think in this respect the language of the act of Congress is mandatory to the extent that at least one house must comply. Had the intention of Congress been to include both houses by the use of the words "either house" it is inconceivable to suppose a reason why they did not say so. If they had said so it would be scarcely possible to avoid the conclusion that they were attempting an absurdity. Unmistakably they were striving to remedy the evil, then too common, of a failure of one branch of the legislature to coöperate with the other branch, when, on joint ballot, the party having the control of the one house was in the minority, and, not being able to elect their candidate, were determined to defeat any election.

In this view of the action of Congress the legislation of July, 1866, was wise and timely. Surely they were not attempting to force the election of Senators where both houses should determine to hold no election. Surely they did not contemplate a remedy for a case where both houses having a majority of the same political faith and able to elect their candidate should yet refuse to do so. Such an idea we submit is not for a moment to be entertained. And where both houses, as in this case, failed to take the initial step of a separate vote on the day required, and failed to produce their journals as demanded by the act, it is impossible to see what gave jurisdiction to the joint assembly.

The condition precedent not having been performed, all powers and proceedings dependent thereon failed, as it seems to us.

It is true that the two houses did vote separately on Tuesday, the 16th, for Senators, and it is true that the record shows that Mr. Dubois was voted for, but it is respectfully submitted that the record, imperfect as it is, plainly discloses the fact

that these votes were cast for the election of two Senators to fill the two then existing vacancies.

In addition to what is disclosed by the record it is a matter of notoriety that the elections gone into on Tuesday (16th) were to fill these existing vacancies simply, and it was not until after the failure of two ballots in joint assembly to fill those two vacancies that a resolution was suddenly sprung upon the assembly to fill the other at the same time. The following is a copy of the said resolution:

"Resolved by the joint assembly of the senate and house of representatives of the legislature of the State of Idaho, That we proceed to elect two United States Senators to fill existing vacancies; and that after such election we immediately proceed to elect one United States Senator to fill the vacancy occurring March 4, 1891."

So far as we have been able to ascertain this resolution adopted on the 18th *was* the first attempt or even mention of the election of a Senator for the term beginning March 4, 1891. In the case of Hart *vs.* Gilbert, Forty-first Congress, cited by the committee, it is true that no vote was taken in the separate houses for the election of a third Senator for the term beginning March 4, 1869, but the two houses did take separate action in regard to the election of that third Senator by the passage of a joint resolution that they would meet in joint assembly on a day named for the purpose of electing such Senator.

They did not ignore the act of Congress altogether. But whatever may have been the conditions which influenced the admission of Gilbert to his seat, we can not believe that in the passage of the act Congress intended to say that the two houses of the legislature in proceeding to the election of a Senator should ballot separately on a given day, but that both as well as either one were at liberty to disobey the law if they saw fit.

Unable therefore for the foregoing reasons to concur in the committee's report, and believing that the alleged election of Fred T. Dubois was not held in compliance with law, either as to the time or manner thereof, submit the following:

Resolved, That Fred T. Dubois is not entitled to retain the seat he now occupies as Senator from the State of Idaho for the full term commencing March 4, 1891.

Resolved, That William H. Clagett is entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, 1891.

Z. B. VANCE.
GEORGE GRAY.

[The Digest of Precedents referred to in the views of the minority is omitted. It may be found in Sen. Repts., 1st sess. 52d Cong., No. 148, pt. 2, and also Cong. Record, 1st sess. 52d Cong., pp. 1187–1202.]

PROCEEDINGS IN THE SENATE OF THE UNITED STATES.

TUESDAY, *February* 10, 1892.

On motion by Mr. Mitchell,
The Senate proceeded, etc. [For the debate see Cong. Record, 1st sess. 52d Cong., pp. 1202–1209.]

WEDNESDAY, *February* 17, 1892.

On motion by Mr. Mitchell,
The Senate resumed, etc. [See Record, ib., 1229–1244.]

WEDNESDAY, *February* 24, 1892.

Mr. Stewart submitted the following resolution for consideration; which was ordered to be printed:

Resolved, That William H. Clagett, the contestant for the seat in the United States Senate now occupied by Hon. Fred. T. Dubois, have leave to occupy a seat on the floor of the Senate pending the discussion of the report of the Committee on Privileges and Elections, and that he have leave to speak to the merits of his right to the seat, and on the report of the committee.

* * * * * * *

On motion by Mr. Mitchell,
The Senate resumed, etc. [See Record, ib., 1384–1401.]

THURSDAY, *February* 25, 1892.

The President *pro tempore* laid before the Senate the resolution yesterday submitted by Mr. Stewart, granting William H. Clagett, contestant for a seat in the Senate from the State of Idaho, leave to speak on his right to the seat; and having been amended on motion of Mr. Mitchell, by inserting after the word "speak" the words *not exceeding two hours,*

On the question to agree to the resolution as amended as follows:

Resolved, That William H. Clagett, the contestant for the seat in the Senate now occupied by Hon. Fred T. Dubois, have leave to occupy a seat on the floor of the

Senate pending the discussion of the report of the Committee on Privileges and Elections, and that he have leave to speak not exceeding two hours, to the merits of his rights to the seat, and on the report of the committee,

It was determined in the affirmative. Yeas 48, nays 1.

On motion by Mr. Platt,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are:

Messrs. Allen, Allison, Barbour, Bate, Berry, Brice, Call, Carey, Casey, Chandler, Chilton, Cockrell, Coke, Cullom, Daniel, Davis, Dawes, Dubois, Felton, Frye, Gallinger, Gorman, Hale, Harris, Hawley, Hiscock, Kyle, Mitchell, Morgan, Morrill, Paddock, Pasco, Peffer, Perkins, Pettigrew, Proctor, Pyle, Ransom, Sanders, Sherman, Squire, Stanford, Stewart, Teller, Vance, Vest, Washburn, Wolcott.

Mr. Platt voted in the negative.

So the resolution was agreed to.

[For the debate on this resolution see Record, ib., 1430–1432.]

* * * * * * *

The Senate resumed, etc. [See Record, ib., 1445–1448.]

FRIDAY, *February* 26, 1892.

The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested seat in the Senate from the State of Idaho; and

Pending debate,

On motion by Mr. Morgan,

Ordered, That the limitation as to time allowed the contestant, William H. Clagett, to speak be withdrawn.

After further debate. [See Record, ib., 1473–1486.]

On motion by Mr. Sherman,

The Senate proceeded to the consideration of executive business.

MONDAY, *February* 29, 1892.

The Senate resumed, etc. [See Record, ib., 1538–1551.]

TUESDAY, *March* 1, 1892.

On motion by Mr. Mitchell,

The Senate resumed, etc. [See Record, ib., 1584–1598.]

WEDNESDAY, *March* 2, 1892.

On motion by Mr. Mitchell,

The Senate resumed, etc. [See Record, ib., 1622–1636.]

THURSDAY, *March* 3, 1892.

On motion by Mr. Mitchell,

The Senate resumed the consideration of the report of the Committee on Privileges and Elections on the contested seat in the Senate from the State of Idaho; and

The question being on the first resolution reported by the committee, viz:

Resolved, That Fred T. Dubois is entitled to retain the seat he now holds as Senator from the State of Idaho for the full term commencing March 4, 1891, after debate,

On motion by Mr. Morgan to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting:

Resolved, That the vote or other proceeding that constitutes a choice of a Senator of the United States must be had by the legislature of the State in which such Senator is chosen, and until the houses of such legislature have met and organized as legislative bodies, they can not choose a Senator of the United States.

2. The Constitution of the United States requires that the choice of a Senator shall be, when made, the act of the legislature of the State, and not the act of the Senate or of Congress.

3. That in regulating the time and manner of choosing a Senator, a new electoral body, which is not the legislature, and is not acting by its authority, can not be substituted so as to act in the place and stead of the legislature, and so to deprive the legislature of its power to elect a Senator.

4. That if it is lawful in regulating the time and manner of electing Senators, to transfer the power to choose a Senator from the two houses, in their organized capacity, to a number of the members of the two houses, such electoral power is secondary to the right of the legislature to choose a Senator, and can only be exercised when the houses of the legislature, or either of them, has made default in considering the subject of choosing such Senator, or having made an effort, has failed to make, or to proceed to make such choice.

5. When, as in the case of the claim of Hon. Fred T. Dubois, the members of the legislature of Idaho who, on the 18th day of December, 1890, voted for Hon. Fred T. Dubois sat in

their respective houses on Tuesday, the 16th day of December, 1890, a quorum being present in each house, and voted for two Senators from Idaho, who were, on subsequent days, chosen as such, and failed to take any action upon the question of electing a third Senator to the seat now occupied by Hon. Fred T. Dubois, they can not claim or exert the power to choose such Senator in default of action on that subject, which was the result of their own delinquency in public duty.

Mr. Mitchell raised a question of order, viz: That the amendment is simply a declaration of principles and decides nothing; that it is offered as a substitute for a resolution which relates to a question of the highest privilege, namely, whether the sitting member was or was not duly elected a Senator from the State of Idaho for the full term commencing March 4, 1891; and that it neither declares the contestant elected nor does it declare there was no election.

The Vice-President submitted the question of order for the decision of the Senate, and

On the question, Is the amendment in order?

It was determined in the negative, { Yeas ..... 9 / Nays 51

On motion of Mr. Mitchell,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are—

Messrs. Berry, Cockrell, Coke, George, Gorman, Harris, Hill, Jones of Arkansas, Morgan.

Those who voted in the negative are—

Messrs. Allen, Allison, Bate, Blodgett, Call, Carey, Carlisle, Casey, Chandler, Chilton, Cullom, Daniel, Davis, Dawes, Dolph, Felton, Gallinger, Gibson of Maryland, Hansbrough, Hawley, Higgins, Jones of Nevada, Kenna, Kyle, Mitchell, Morrill, Paddock, Palmer, Pasco, Peffer, Perkins, Pettigrew, Platt, Proctor, Pugh, Sanders, Sawyer, Sherman, Shoup, Squire, Stanford, Stockbridge, Teller, Turpie, Vest, Vilas, Voorhees, Warren, Washburn, White, Wolcott.

So it was decided that the amendment was not in order.

On motion by Mr. Vance, to amend the resolution by striking out all after the word "Resolved," and in lieu thereof inserting:

That Fred T. Dubois is not entitled to retain the seat he now occupies as Senator from the State of Idaho for the full term commencing March 4, 1891.

Resolved, That William H. Clagett is entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, 1891.

It was determined in the negative, { Yeas ..... 7 / Nays 55

On motion by Mr. Vance,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are—

Messrs. George, Gorman, Harris, Kyle, Morgan, Pasco, Stewart.

Those who voted in the negative are:

Messrs. Allen, Allison, Bate, Berry, Call, Carey, Carlisle, Casey, Chandler, Chilton, Cockrell, Coke, Colquitt, Cullom, Daniel, Davis, Dawes, Dolph, Felton, Frye, Gallinger, Gibson of Maryland, Hansbrough, Hawley, Higgins, Hill, Jones of Nevada, Kenna, McPherson, Mitchell, Morrill, Paddock, Palmer, Peffer, Perkins, Pettigrew, Platt, Proctor, Pugh, Sawyer, Sherman, Shoup, Squire, Stanford, Stockbridge, Teller, Turpie, Vest, Vilas, Voorhees, Walthall, Warren, Washburn, White, Wolcott.

So the amendment was not agreed to.

The question recurring on agreeing to the resolution, as follows:

Resolved, That Fred T. Dubois is entitled to retain the seat he now holds as Senator from the State of Idaho for the full term commencing March 4, 1891.

It was determined in the affirmative, { Yeas ..... 55 / Nays 5

On motion by Mr. Mitchell,

The yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are—

Messrs. Allen, Allison, Bate, Berry, Call, Carey, Carlisle, Casey, Chandler, Chilton, Cockrell, Coke, Colquitt, Cullom, Davis, Dawes, Dolph, Felton, Frye, Gallinger, Gibson of Maryland, Hansbrough, Hawley, Higgins, Hill, Jones of Nevada, Kenna, McPherson, Mitchell, Morgan, Morrill, Paddock, Palmer, Peffer, Perkins, Pettigrew, Platt, Proctor, Pugh, Sawyer, Sherman, Shoup, Squire, Stanford, Stockbridge, Teller, Turpie, Vest, Vilas, Voorhees, Walthall, Warren, Washburn, White, Wolcott.

Those who voted in the negative are—

Messrs. George, Harris, Kyle, Pasco, Stewart.

So the resolution was agreed to.

On the question to agree to the second resolution reported by the Committee on Privileges and Elections, as follows:

Resolved, That William H. Clagett is not entitled to be admitted to a seat in the Senate from the State of Idaho for the term commencing March 4, A. D. 1891.

It was determined in the affirmative.

[See Record, ib., 1665–1677.]

COMPENSATION OF CONTESTANTS.

FRIDAY, *April* 1, 1892.

Mr. Mitchell, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee on Appropriations:

Resolved, That there be allowed and paid to Fred T. Dubois, Senator from the State of Idaho, out of any moneys in the Treasury not otherwise appropriated, the sum of $2,000, in full compensation for his expenses incurred in connection with the contest inaugurated by William H. Clagett, involving his right to a seat in the Senate as Senator from the State of Idaho.

Mr. Mitchell, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee on Appropriations:

Resolved, That there be allowed and paid to William H. Clagett, out of any moneys in the Treasury not otherwise appropriated, the sum of $1,000, in full compensation for his time and expenses in prosecuting his claim to a seat in the Senate as Senator from the State of Idaho.

[First session—Fifty-second Congress.]

WILKINSON CALL,

Of Florida.

December 7, 1891, R. H. M. Davidson presented the credentials from the governor of Florida described in the following case, at the same time a transcript of the proceedings of the two houses of the legislature of Florida in a joint convention, composed of a majority of the members of the two houses, but not of a majority of the members of each, recording what purported to be the election of Wilkinson Call. Mr. Call presented himself on the same day, claiming the right to take the oath by virtue of the proceedings of that joint convention. The facts set forth in the transcript were undisputed. The matter went over under objection to the next day, when Mr. Call was admitted to take the oath, on motion by Mr. Hoar, and the credentials were referred to the Committee on Privileges and Elections.

The history of the case here given consists of a transcript of the Journal of the Senate in relation to it.

MONDAY, *December* 7, 1891.

The Vice-President laid before the Senate the credentials of Wilkinson Call, being a transcript* of the proceedings of the legislature of the State of Florida, in joint assembly, certifying to the election of Mr. Call as Senator from that State for the term of six years commencing March 4, 1891; which were read.

Ordered, That they lie on the table.

Mr. Harris presented the credentials of Robert H. M. Davidson, appointed a Senator by the governor of the State of Florida to fill a vacancy alleged to exist in the term commencing March 4, 1891; which were read.

Ordered, That they lie on the table.

* * * * * * *

On motion by Mr. Hoar, that the oath prescribed by law be administered to Mr. Wilkinson Call as Senator from the State of Florida,

Ordered, That the consideration of the motion be postponed to to-morrow.

TUESDAY, *December* 8, 1891.

On motion by Mr. Hoar,

The Senate proceeded to consider the motion yesterday submitted by him, that the oath of office be administered to Wilkinson Call as a Senator from the State of Florida; and

The motion was agreed to.

Whereupon

Mr. Call appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

On motion by Mr. Hoar,

Ordered, That the credentials of Wilkinson Call and also the credentials of R. H. M. Davidson, claiming a seat in the Senate by appointment of the governor of Florida, be referred to the Committee on Privileges and Elections.

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* The transcript of the proceedings of the legislature of Florida in joint assembly, resulting in the election of Mr. Call, is printed in the Record, 1st sess. 52d Cong., p. 2. The credentials of Mr. Davidson may be found in the same place.

[First session—Fifty-second Congress.]

R. H M. DAVIDSON v. WILKINSON CALL,

Of Florida.

In April, 1891, the legislature of the State of Florida met and was duly organized at the time and place appointed by law. On the second Tuesday after such organization, being the 21st day of April 1891, the two chambers of which it was composed held a session and voted, each separately, for the election of a United States Senator. No one was chosen at this election, and it was so declared and entered upon the journals of the respective houses. On the following day, being Wednesday, the 22d of April aforesaid, the legislature met at noon in joint assembly, and one vote was taken for Senator which resulted in no election. And on every succeeding day, except Sundays, until the 26th day of May, 1891, they met and took one vote in the same manner, with the same result. On the 26th day of May, 1891, the joint assembly met as before, and upon a vote being taken for United States Senator it was found that Wilkinson Call had received a majority of the votes of those present and voting, the same being also a majority of all the members elected to both houses of the legislature. Thereupon Mr. Call was declared duly elected.

The validity of this election was questioned upon the ground that there was not a quorum of the State senate present and voting at the time it occurred. This objection was based upon the proposition that the joint convention or assembly in such cases is composed of the two houses as such, and that therefore a quorum of each must attend to properly form such convention.

The governor being of the opinion that this position was sound appointed Robert H. M. Davidson to be Senator from the State of Florida until the next meeting of the legislature, and issued credentials in the usual form under date of September 22, 1891, to which the secretary of State affixed the great seal of the State in obedience to a peremptory writ of mandamus issued by the supreme court of Florida, November 17, 1891. The credentials of both claimants were presented to the Senate December 7, 1891. On the following day Mr. Call was sworn and his credentials, as well as those of Mr. Davidson, were referred to the Committee on Privileges and Elections. The committee reported, February 1, 1892, finding the facts set forth in the preceding paragraph, and holding that "This act [of July 25, 1866] provides that 'the *members* of the two houses shall convene in joint assembly,' etc. The joint assembly is thus composed not of the two houses, but of the members thereof. The joint assembly is not a junction or union of the two houses as such; it is not a merger of the two houses into one of either, but it is a body distinct and separate from either as such, and has by the words of the enactment a quorum of its own prescribed and defined, to wit, 'a majority of all the members elected to both houses,' without any reference to a quorum either of the senate or the house. * * * The term legislature in this clause is not to be construed technically with reference to the separate chambers which may exist within it, but as designating the collective number of all the persons composing it," and that therefore Mr. Call was duly elected.

February 4, 1892, the Senate considered the report of the committee and declared Mr. Call "lawfully entitled to a seat in the Senate."

The history of the case here given consists of a transcript of the Journal of the Senate relating to it with the report of the committee, No. 106, Parts 1 and 2, 1st sess., 52d Cong.

The decision of the supreme court of Florida was rendered in the case of The State of Florida *ex rel.* Francis P. Fleming, governor, *v.* John L. Crawford, secretary of State, 28 Fla. 441.

[For the first proceedings in this case see the case of Wilkinson Call, *supra*, *p.* 805.]

MONDAY, *January* 25, 1892.

Mr. Turpie, from the Committee on Privileges and Elections, to whom were referred the papers, evidence, and certificates in the case of Wilkinson Call, and of the contestant R. H. M. Davidson, respecting the question of the title to a seat in the Senate, submitted a report (No. 106) with the following resolution:

Resolved, That the Hon. Wilkinson Call, of Florida, was duly elected by the legislature of the said State on the 26th day of May, 1891, a Senator of the United States from the said State for the term of six years commencing on the 4th day of March 1891, and that he is lawfully entitled to a seat in the Senate.

[The resolution may also be found in the Record, 1st sess. 52d Cong., p. 512. There was no discussion at this time.]

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Teller (chairman), Hoar, Mitchell, Chandler, Higgins, Vance, Pugh, Gray, Turpie.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 1, 1892.—Ordered to be printed.

Mr. Turpie, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom were referred the papers in the case of R. H. M. Davidson, contestor, against Wilkinson Call, contestee, concern

ing the right to a seat in this body for the State of Florida, have had the same under consideration, and have instructed me to make the following report:

In April, 1891, the legislature of the State of Florida met and was duly organized at the time and place appointed by law. On the second Tuesday after such organization, being the 21st day of April, 1891, the two chambers of which it was composed held a session and voted, each separately, for the election of a United States Senator. No one was chosen at this election, and it was so declared and entered upon the journals of the respective houses. On the following day, being Wednesday, the 22d of April aforesaid, the legislature met at noon in joint assembly, and one vote was taken for Senator, which resulted in no election. And on every succeeding day, except Sundays, until the 26th day of May, 1891, they met and took one vote in the same manner, with the same result. On the 26th day of May, 1891, the joint assembly met as before, and upon a vote being taken for United States Senator it was found that Wilkinson Call had received a majority of the votes of those present and voting, the same being also a majority of all the members elected to both houses of the legislature. Thereupon Mr. Call was declared duly elected.

The validity of this election is questioned upon the ground that there was not a quorum of the State senate present and voting at the time it occurred. This objection is based upon the position that the joint convention or assembly in such cases is composed of the two houses as such, and that therefore a quorum of each must attend to properly form such convention. The law of the case is found in the act of Congress of July 25, 1866, being chapter 1, title 2, of the Revised Statutes, concerning the election of United States Senators, an act adopted by the constitution of the State of Florida in respect to such elections, and so in a double sense to be regarded as the law of this case. But if the constitution of Florida had provided in express terms that a quorum of both houses was necessary to constitute a joint assembly this would not be the law unless the same is required by said act of 1866. The Federal law is paramount.

This act provides that "the *members* of the two houses shall convene in joint assembly," etc. The joint assembly is thus composed not of the two houses, but of the members thereof. The joint assembly is not a junction or union of the two houses as such; it is not a merger of the two houses into one of either; but it is a body distinct and separate from either as such, and has by the words of the enactment a quorum of its own prescribed and defined, to wit, "a majority of all the members elected to both houses," without any reference to a quorum either of the senate or the house. The joint assembly is authorized and created by the act of Congress, and when the circumstances have transpired which make it necessary to convene the same, all the members of both houses, without any reference to the further action of either house as such, are entitled to seats in it, and may join together and coöperate as members in the choice of a Senator until one is elected. It has always been conceded that the object of the statute of 1866 was to prevent the inaction or neglect of either house—that is, of a majority or quorum of either house—from delaying or defeating the will and voice of the majority of the whole legislative body.

The two houses, as such, are given their day in court—are given, under a previous provision of the act, an opportunity to make the choice of Senator. After they have failed to make a choice, to hold that a quorum of each is necessary to make a joint assembly is to give them a chance to repeat this failure—it is to vitiate the very purpose of the enactment and to reinstate the evil which it was designed to remedy. It was not the intention of the makers of the law of 1886 to place or leave it in the power of any minority of the whole number, or of a quorum in either house, as such, to prevent or postpone the representation of the State in this body. For this reason the law operates, so far as it relates to the joint meeting, upon members as individuals, not as component parts of the respective bodies to which they may belong; and for this reason also a majority of the whole number of members is constituted the quorum of the joint assembly; that is, the number requisite to transact its business in the senatorial election. If the minority of the members, absent at the time of Mr. Call's election, had all been present and voted, this would not have changed the result. It seems unreasonable, under the provisions of this statute or any other, to give a greater effect to the absence and nonaction of this minority than to their presence and action.

It seems yet more unreasonable to hold that a quorum of the senate, in Florida 17 members, should defeat the action of thrice their number under a statute designed expressly to provide for the permanent and, as far as practical, the continuous representation of the States in the Senate of the United States.

It is implied in the argument made against the right of the contestee that this construction of the act is in conflict with the section of the Constitution which provides that Senators shall be chosen by the legislature—that this is composed of two houses—and that a quorum of each is practically and legally the house; that without a quorm there is no house. We grant that the quorum is in legal effect the house. But the term legislature in this clause is not to be construed technically with reference to the separate chambers which may exist within it, but as designating the col-

lective number of all the persons composing it. This is clear from the fact that one of the States at least, Pennsylvania, had at the time of the adoption of the Constitution only one legislative chamber. Besides this the word legislature is commonly used in this way—as the word magistracy is used and indeed is defined to mean "the body of magistrates" in a State or country. Legislature in this section means the body of legislators of the State, without reference to the different chambers, as such, in which they may serve. The joint assembly created by the act of 1866 is thus in the fullest sense of the term the legislature of the State, its whole number being equal to that of all the persons elected to either branch of the legislature and its quorum being a majority of that number.

In these views the recent decisions of the Senate agree.

The legislature of Florida is composed of a house of 68 and a senate of 32 members, in all 100. Fifty-two members attended the joint assembly of the 26th of May aforesaid; were present and voted. Mr. Call received of this number the votes of 51. So that the joint assembly contained and the person chosen received the votes of a majority of all the members elected to both houses.

We are therefore of the opinion that Mr. Call was duly elected.

The appointment by the governor thereafter of Mr. Davidson, under the erroneous supposition that a vacancy existed in the office of United States Senator, was an act of mere irrelevancy which it is not necessary further to notice.

THURSDAY, *February* 4, 1892.

On motion by Mr. Turpie,

The Senate proceeded to consider the report of the Committee on Privileges and Elections on the question of the title to a seat in the Senate from the State of Florida; and,

After debate,

The resolution reported by the committee was agreed to, as follows:

Resolved, That the Hon. Wilkinson Call, of Florida, was duly elected by the legislature of said State on the 26th day of May, 1891, a Senator of the United States from said State for the term of six years, commencing on the 4th day of March, 1891, and that he is lawfully entitled to a seat in the Senate.

[The debate may be found, Cong. Record, 1st sess. 52d Cong., pp. 833–846.]

EXPENSES OF CONTESTANTS.

WEDNESDAY, *February* 10, 1892.

Mr. Vance submitted the following resolution; which was referred to the Committee on Privileges and Elections:

Resolved, That there be paid out of the contingent fund of the Senate the sum of $1,258 to the Hon. R. H. M. Davidson for expenses in prosecuting his claim to a seat in the Senate under the appointment of the governor of Florida.

THURSDAY, *March* 31, 1892.

Mr. Chandler, from the Committee on Privileges and Elections, to whom was referred the resolution submitted by Mr. Vance February 10, 1892, to pay R. H. M. Davidson for expenses in prosecuting his claim to a seat in the Senate under the appointment of the governor of Florida, reported the following amendment, intended to be proposed in the general deficiency bill; which was referred to the Committee on Appropriations:

To enable the Secretary of the Senate to pay R. H. M. Davidson the expenses incurred by him in prosecuting his claim to a seat in the Senate under the appointment of the governor of Florida, $1,250.

[See Cong. Record, 1st sess. 52d Cong., p. 2754.]

[Special session of the Senate, March 4, 1893.]

WILLIAM N. ROACH, *Senator from North Dakota.*

On the 28th day of March, 1893, Mr. Hoar submitted a resolution providing for an investigation of certain allegations charging William N. Roach, a Senator from the State of North Dakota, with the offense of criminal embezzlement. On the 10th day of April, 1893, a substitute for this resolution was introduced by Mr. Hoar, and on the 14th day of April, 1893, a substitute for the resolutions then pending in said matter was introduced by Mr. Gorman. The resolution and the substitutes were the subject of debate in the Senate, but no action was had or taken thereon.

It appears from the debates that the case presented the question as to the right of the Senate to take cognizance of an accusation against a Senator of an offense committed before his election to the Senate.

The history of the case here given consists of a statement of the proceedings in the Senate in relation thereto, as published in the Congressional Record, with a reference to the debate as contained in the Congressional Record, and extracts from remarks by Mr. Chandler in such debate, with the statement made by Mr. Roach in the Senate in reference to the matters referred to in such resolution and substitutes.

PROCEEDINGS IN THE SENATE.

TUESDAY, *March 28, 1893.*

Mr. Hoar submitted the following resolution, which was read:

"*Resolved*, That the Committee on Privileges and Elections be directed to investigate the allegations recently extensively made in the public press, charging William N. Roach, a Senator from the State of North Dakota, with the offense of criminal embezzlement, to report the facts of the transactions referred to, and further to report what is the duty of the Senate in regard thereto. For that purpose the committee shall have authority to send for persons and papers, to administer oaths, to employ a stenographer, and to act through a subcommittee."

The resolution was ordered to lie over and be printed.

(Cong. Rec., vol. 25, p. 37.)

MONDAY, *April 10, 1893.*

Mr. Hoar submitted the following resolution, which was read:

"*Resolved*, That the Committee on Privileges and Elections be directed to examine the allegations recently made in the public press, charging William N. Roach, a Senator from the State of North Dakota, with certain criminal offenses committed while cashier or officer of a bank in the city of Washington, and to ascertain the facts and circumstances so far as to enable the committee to determine and report what are the duty and power of the Senate in regard thereto; and for that purpose the committee shall have authority to send for persons and papers, to employ a stenographer, to sit during the recess of the Senate, and to act through a subcommittee; and its expenses shall be paid from the contingent fund of the Senate."

Mr. HOAR. This resolution is proposed as a substitute for one introduced by me the other day, and has been agreed upon after a conference between several Senators on both sides of the Chamber as the proper form. I will let it lie over, however, one day in order that it may be seen by Senators.

The resolution was ordered to lie over and be printed.

(Cong. Rec., vol. 25, pp. 111, 112.)

FRIDAY, *April 14, 1893.*

Mr. ROACH. Mr. President, I rise to a question of personal privilege.

My colleague, the senior Senator from North Dakota [Mr. Hansbrough], is reported to have said, referring to the charges alleged in the resolution of the Senator from Massachusetts, that I told him I desired to offer a resolution for investigation, or that I thought it was the best thing to do. I rise now to confirm that statement, and to say further that as far as that investigation is concerned I desire it and am perfectly willing that it shall be proceeded with.

After the conversation referred to by my colleague, I yielded to the advice of friends in the Senate and did not act upon my own impulses in the matter. Hence I did not offer the resolution that I desired and intended to offer. New to this body and entirely unfamiliar with the customs and usages of the Senate, I naturally attached weight to the advice and opinion of those older in the service and versed in the practices and precedents of the Senate. I was given to understand that, however much I might desire or demand an investigation, it was not the practice of the Senate to take jurisdiction of alleged acts or conduct prior to the election of a Senator and having no connection with the legality thereof. If this practice is to be now changed, I have no protest to make; on the contrary, I repeat I am willing and desirous that the investigation be made. I seek no shelter and shrink from no scrutiny into my public and private character.

I desire to say at this time that I am perfectly willing and desirous that this investigation shall be proceeded with. That has been my position from the beginning. I stand here now to say that much and to repeat it.

With reference to my rising at this time, I will state that I have been blamed for not speaking. I have also been criticised because it is alleged that I did say something. In justice to my colleague and myself with reference to what has been said in the newspapers (because these things so far are proceeding from newspaper allegations) I thought it my duty to say this much at this time.

(Cong. Rec., vol. 25, p. 137.)

After further discussion Mr. Gorman offered a substitute for the resolution offered by Mr. Hoar; which substitute offered by Mr. Gorman was read, as follows:

"*Resolved*, That the Committee on Privileges and Elections be directed to inquire into and consider the question whether the Senate has authority or jurisdiction to investigate charges made against a Senator as to conduct or offenses occurring or committed prior to his election, not relating to his duty as Senator or affecting the integrity of his election."

(Cong. Rec., vol. 25, pp. 137, 138.)

The resolution and the substitute therefor introduced by Mr. Hoar and the substitute introduced by Mr. Gorman were the subject of debate in the Senate April 14, 1893, and April 15, 1893 (Cong. Rec., vol. 25, pp. 137, 138, 140–154, 155–159, 160–164), but no vote was taken thereon.

[Extracts from remarks of Mr. Chandler in support of the substitute offered by Mr. Hoar for the resolution directing an inquiry into the charges against Senator Roach. Found in the Congressional Record, vol. 25, pp. 148, 149.]

* * * * * * *

"Mr. President, I know I have taken too much of the time of the Senate in bringing the precedents in England and in this country to the notice of Senators. I believe that upon all these precedents that it can not be fairly contended that it is a principle of American constitutional law that under no circumstances shall there be an investigation into the conduct of members committed before their election to Congress.

* * * * * * *

"The facts in relation to Mr. Roach are to be found, in the first place, in the New York Recorder of March 14, 1893. The same facts are stated in the Philadelphia Press of March 15, 1893. The facts narrated in those two newspapers are taken from an interview in the Evening Star of August 15, 1879, with Mr. J. A. J. Creswell, then president of the Citizens' National Bank, of Washington, D. C. There is an interview in the Recorder with Mr. Jacob Tome, an owner of two-thirds of the stock in the bank, which corroborates the statements made in that paper.

"There is also contained in the Recorder an interview with Mr. Thomas C. Pearsall, who succeeded Mr. Roach as cashier of the Citizens' National Bank, and he confirms the narrative.

"Moreover, the facts are to be found upon the records of the Government in the office of the Comptroller of the Currency, in the reports made by the Citizens' National Bank to that officer. Further, there has been published in the newspaper interviews with the Senator from North Dakota [Mr. Roach]. There is an interview in the Recorder, and also one in the New York Sun of March 21, 1893. In the Recorder interview the Senator from North Dakota first said he had nothing to say; later he said he remembered the Creswell interview in the Star, but had forgotten the details; that if he had had any controversy with the bank it had all been settled. Then the following questions and answers appear:

"'It is stated that the larger part of the money taken was returned to the bank?

"'Yes, I believe it was.

"'Has it all been returned?

"'I think so, but it was a long time ago and I can not say positively.

"'No indictment was ever brought?

"'No; there was never any attempt to prosecute.'

"The New York World of March 15, 1893, has a half-column interview with the Senator from North Dakota, where he says nothing pertinent to the issue presented by the resolution of the Senator from Massachusetts, except that he has not been a fugitive from justice and that the printed story is 'full of absurdities and extravagances.' There is no other denial.

"The New York Sun is, I suppose, recognized as a Democratic paper, friendly to the Democratic party, to the majority upon this floor, and to the present Administration, and in an editorial in this Democratic paper, the Sun, of Tuesday, March 21, 1893, all the facts in reference to the Senator from North Dakota are reiterated, and the question whether or not he ought to hold his seat in the Senate is discussed.

* * * * * * *

"I will take occasion to read from the New York Sun, not the full statement which is there contained, because I do not wish and I have not wished to anticipate the facts, but this portion of the Sun's statement:

"'In October, 1879, the report of the Comptroller of the Currency presented the sworn statement of the officers of the Citizens' National Bank containing this item: "Defalcation of late cashier, $18,483.54."'

* * * * * * *

"I ask again, are not these facts sufficient to require an investigation by the Senate if they are to be taken as true? Here is a grave breach of trust alleged; here is a large embezzlement alleged upon the part of an officer of a national bank.

* * * * * * *

"I do not believe that even my State's rights friend from Texas [Mr. Mills], who I see is honoring me with his attention, and the Senator from South Carolina [Mr. Butler], who have hitherto announced their belief in the doctrine that it is beyond the power of the Senate of the United States to inquire into the acts of Senators before they are members, will be willing, when they come to consider the subject, to affirm it as a proposition of constitutional law that there can be no investigation, under any circumstances, into the acts of a Senator committed before he was a Senator.

* * * * * * *

"The elevated character of the Senate forbids the announcement of any such fatal doctrine as this. A few short weeks ago the Vice-President, upon taking the chair as presiding officer of the Senate, uttered a high tribute to the Senators before him. With his advent to the position came also a great political change, but I do not believe that the majority which now prevails here will be any less solicitous than the minority to maintain the reputation and character of the Senate.

"We shall differ on questions of finance and tariff and on measures of public administration; not, I trust, on questions which are to determine the estimation in which the Senate is to be held by the wise and the good men of all countries. But to refuse even to investigate the facts alleged against the Senator from North Dakota will turn into a sarcasm and a mockery the eulogium of the Vice-President when he came to preside over the Senate and declared it to be 'the most august deliberative assembly known to man.'"

[Special session of the Senate, March 4, 1893; first session Fifty-third Congress and third session Fifty-third Congress.]

JOSEPH W. ADY v. JOHN MARTIN, *of Kansas.*

The credentials of John Martin as a Senator from the State of Kansas being in due form he was admitted to a seat in the Senate at the beginning of the special session of the Senate, March 4, 1893. Subsequently, a memorial signed by seventy-seven members of the Kansas legislature was presented in the Senate relating to the election of a United States Senator from the State of Kansas to fill the vacancy caused by the death of Hon. Preston B. Plumb. The memorial set out the facts from which it was claimed that the proceedings in the election of Mr. Martin to fill the vacancy aforesaid were irregular and illegal, and also set forth the subsequent election of Joseph W. Ady in a legal and formal manner. The grounds on which it was claimed that the proceedings of the legislature of Kansas in the election of Mr. Martin were illegal, are fully set forth in the remarks of Mr. Chandler in the debate on the case in the Senate as hereinafter set forth.

A resolution authorizing the Committee on Privileges and Elections to investigate the right of Mr. Ady to a seat in the Senate was introduced in the Senate and agreed to. Subsequently a resolution was introduced declaring that Mr. Martin was not entitled to a seat in the Senate as a Senator from the State of Kansas. This resolution was referred to the Committee on Privileges and Elections. Still another resolution of the same import as the one last referred to was afterwards introduced in the Senate and debated, but the Committee on Privileges and Elections made no report on the subject, nor was the matter brought to a vote in the Senate.

The history of the case here given consists of a statement of the proceedings in the Senate relating to it as published in the Congressional Record, with a reference to the debate thereon as contained in the Congressional Record, and extracts from remarks by Mr. Chandler in the course of such debate.

PROCEEDINGS IN THE SENATE.

SATURDAY, *March 4, 1893.*

Mr. Peffer presented the credentials of John Martin, recently elected a Senator from the State of Kansas for the term ending March 3, 1895.

The credentials were read and ordered to be filed, as follows:

"STATE OF KANSAS, EXECUTIVE DEPARTMENT.

"This is to certify that on the 25th day of January, in the year of our Lord 1893, John Martin was duly elected by the legislature of Kansas, a Senator to represent said State in the Senate of the United States for the unexpired term of six years, commencing the 4th day of March, A. D. 1889, and ending March 4, 1895, and to fill the vacancy in said term happening by the decease of the Hon. Preston B. Plumb.

"Witness his excellency, our governor, and our seal hereunto affixed, at Topeka, this 25th day of January, in the year of our Lord 1893, and of the Independence of the United States the one hundred and seventeenth.

"[SEAL.]

L. D. LEWELLING.

"By the governor:

"P. S. OSBORNE, *Secretary of State.*"

Mr. HOAR. The credentials of Mr. Martin seem to be in due form and to entitle him *prima facie* to be admitted to a seat in the Senate. If there be any question as to his title upon the merits, the Senate can deal with it afterwards. I ask that the oath be administered to Mr. Martin.

Mr. Martin was escorted to the Vice-President's desk by Mr. Peffer, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

(Cong. Rec., Vol. 25, p. 2.)

WEDNESDAY, *April 12, 1893.*

Mr. VANCE. I am directed by the Committee on Privileges and Elections to report a resolution, and to ask for its immediate consideration.

The Secretary read the resolution, as follows:

"*Resolved*, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized to investigate the right of Mr. Joseph W. Ady, who claims a seat in this body as Senator from Kansas; and, if in their judgment it be necessary,

to employ a stenographer, send for persons and papers, to administer oaths, and to sit during the recess of the Senate."

The resolution was ordered to be referred to the Committee to Audit and Control the Contingent Expenses of the Senate.

(Cong. Rec., Vol. 25, p. 133.)

THURSDAY, *April 13, 1893.*

Mr. Sherman presented a memorial of seventy-seven members of the Kansas legislature, relating to the election of a United States Senator from Kansas to fill the vacancy caused by the death of Senator Preston B. Plumb.

The memorial was ordered to be referred to the Committee on Privileges and Elections and to be printed as a document.

(Cong. Rec., Vol. 25, p. 135.)

FRIDAY, *April 14, 1893.*

The Vice-President laid before the Senate the resolution introduced by Mr. Vance April 12, 1893, in regard to the investigation of the right of Mr. Joseph W. Ady to a seat in the Senate as a Senator from the State of Kansas.

The resolution was reported from the Committee to Audit and Control the Contingent Expenses of the Senate with an amendment, to add:

The expense thereof to be paid from the contingent fund of the Senate.

The amendment was agreed to and the resolution as amended was agreed to.

(Cong. Rec., Vol. 25, p. 139.)

MONDAY, *August 21, 1893.*

Mr. Chandler submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That there was no lawful election of a United States Senator from Kansas by the joint assembly which met on January 25, 1893; and that John Martin is not entitled to a seat as Senator from the State of Kansas."

(Cong. Rec., Vol. 25, p. 535.)

THURSDAY, *January 31, 1895.*

Mr. Chandler offered the following resolution as a privileged resolution:

"Whereas, at the time of the alleged election of John Martin as Senator from Kansas the legislature of the State had not been duly organized; and

"Whereas, at the joint convention which made such election no majority of the legally elected members of the legislature voted for Mr. Martin: Therefore,

"*Resolved*, That there was no lawful election of a United States Senator from Kansas by the joint assembly which met on January 25, 1893, and that John Martin is not entitled to a seat as a Senator from the State of Kansas."

The Vice-President ruled that said resolution was not a privileged resolution under the circumstances connected with its presentation; and on appeal the decision of the chair was sustained by a vote of 40 yeas to 6 nays.

(Cong. Rec., Vol. 27, pp. 1566, 1567.)

WEDNESDAY, *February 6, 1895.*

The Vice-President laid before the Senate the resolution offered by Mr. Chandler January 31, 1895; which resolution was read and the question of its status was discussed, and thereupon the resolution was withdrawn. Subsequently, and on the same day, Mr. Chandler offered the same resolution; which was read and ordered to go over and be printed.

(Cong. Rec., Vol. 27, p. 1816.)

THURSDAY, *February 28, 1895.*

The resolution submittted by Mr. Chandler February 6, 1895, was read and debated, but no vote was taken thereon.

(Cong. Rec., Vol. 27, pp. 2912–2918, 2920, 2922–2925.)

[Extracts from remarks by Mr. Chandler in support of the resolution submitted by him that Mr. Martin was not entitled to a seat as a Senator from the State of Kansas. Found in the proceedings of February 28, 1895, in the Congressional Record, vol. 27, pp. 2916, 2917.]

"Mr. President:

* * * * * * *

"It is impossible successfully to contend that this case has been fairly and justly dealt with by the Senate and its Committee on Privileges and Elections. The prolonged sickness and the death of Senator Vance may have been an excuse for some

delay, but on that very account extraordinary diligence should have been afterwards used to hear and determine the important question of the right of a Senator to a seat in this Chamber.

"That the refusal was decided upon the face of facts which, if they had been confronted, would have required the ejectment from his seat of the sitting member [Mr. Martin], it is the purpose of my additional remarks to show. The facts are not complicated.

"A Kansas legislature was chosen November 8, 1892—40 senators, 125 representatives, 63 being a majority in the house and 83 a majority of the whole 165.

"On Tuesday, January 10, 1893, the members assembled at Topeka. The senate was duly organized as one body without controversy; but two houses were organized, each claiming to be lawful.

"The Douglass house had 64 members holding certificates from the secretary of State. Three other members, holding certificates, afterwards appeared, making 67 members.

"The Dunsmore house had 58 members holding certificates and 10 persons without certificates. These 10 claimed the places of 10 certified members who were in the Douglass house, asserting that of the latter 4 were ineligible because they were postmasters when elected, and that the rest had not been legally elected.

"The senate recognized the Dunsmore house and refused to recognize the Douglass house, and so did the governor of the State.

"On February 25, 1893, the Kansas supreme court decided that the Douglass house was the lawful body, and on February 28 the members of the Dunsmore house joined the lawful body and the Dunsmore house ceased to exist, none of the 10 unlawful members of that house either being admitted or claiming seats in the lawful body at any time.

"On Tuesday, January 24, 1893, the senate voted for United States Senator, no person receiving a majority. The Douglass and Dunsmore houses each voted for United States Senator, Joseph W. Ady receiving a majority in the first and John Martin receiving a majority in the second body.

"On Wednesday, January 25, there was a joint assembly, Lieutenant-Governor Daniels presiding. The senate roll was called; 15 senators did not vote; 24 voted for John Martin and 1 for M. W. Cobun.

"The lieutenant-governor then directed B. C. Rich, clerk of the Dunsmore house, to call the roll. Fifty-six members of the Dunsmore house who had held certificates from the secretary of state voted—51 for John Martin, 3 for Cobun, 1 for Mr. Close, 1 for Mr. Snyder, 1 was absent, and 1 did not vote, making the 58.

"Ten members of the Dunsmore house who did not have certificates from the secretary of state voted—9 for Martin and 1 for Hanna.

"After the call thus made had been completed 2 members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so and voted for Martin.

"The vote then stood: Martin, 86; Cobun, 4; Close, 1; Snyder, 1; Hanna, 1, making 93.

"Before the result of the vote was announced Senator Lucien Baker arose, and in behalf of 15 senators and 65 representatives asked the right to vote. The lieutenant-governor refused to allow them to vote, declared the result to be as above stated, and that John Martin was elected, and then he left the chair.

"Mr. HALE. Let me ask the Senator a question. I have been following the Senator's remarks. Does he mean to say that in the joint convention, where there were rival bodies, two houses of representatives, both present, that the presiding officer, after the roll call of one house had been completed, in order to get votes enough to make a quorum, allowed two members of the other house, which he had not recognized, to vote, and that then after doing that, when other members of that house requested the privilege of voting, he excluded them?

"Mr. CHANDLER. The Senator correctly understands the case. That is exactly what took place, as the language I have read very clearly indicates.

"Mr. HALE. Is that an undisputed fact; and if so, what followed upon that?

"Mr. CHANDLER. I will show the Senator if he will listen a moment. The fact is undisputed that 24 senators voted for Martin; 1 for Cobun; that the roll was then called, and only members of the Dunsmore house voted. I again read:

"After the roll call thus made had been completed two members of the Douglass house, Wilson and Rosenthal, asked to vote; were allowed to do so, and voted for Martin.

"The Senator is correct in the suggestion that it took these two votes to make in joint assembly up to that time 83, being a majority of the whole legislature. I proceed:

"The excluded senators and members continued in session, elected George L. Douglass presiding officer, and proceeded to cast their votes as follows

"Joseph W. Ady, 77; present and not voting, 3.

"And thereupon Mr. Douglass declared that there had been no election of United States Senator, and the assembly adjourned.

"The total votes cast, which justify the conclusion that there was no choice, appear above, as follows:

	Votes.
John Martin	86
Cobun	4
Close	1
Snyder	1
Hanna	1
J. W. Ady	77
	170
Deduct the surplus and illegal votes, being	10
Total legal votes	160
Necessary for a choice	81
Martin received	86
Deduct his illegal votes, being	9
Total legal votes cast for Martin	77

"Or 4 less than were necessary for an election.

"An attempt has been made to show that Martin in the assembly as cut short by the lieutenant-governor was elected without counting the 10 illegal votes, as follows:

	Votes.
Martin	77
Cobun	4
Close	1
Snyder	1
Giving in all	83

"votes cast by legal members; and being exactly a majority of the whole 165 legal members of the legislature.

"But to make this calculation it is necessary to count the 2 votes of Wilson and Rosenthal from the Douglass house, while excluding the 65 other members of that house and the 15 Senators.

"To justify taking in the 2 while excluding the 80 is impossible.

"From the foregoing facts it is not difficult to reach two conclusions: First, the time had not arrived when the legislature of Kansas could lawfully elect a United States Senator. The legislature had not been organized within the meaning of the United States law, which is as follows:

"'SEC. 14. The legislature of each State * * * shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.'

"It is true that there was a lawful senate, and it is true, as appears from the subsequent decision of the supreme court of Kansas, that there was a lawful house. But it is also true that there was, in addition to the lawful house, an unlawful house, and that unlawful house was recognized by the senate and by the governor, while the lawful house received no recognition as such, either from the senate or from the governor.

"Manifestly there was no organization of a legislature within the meaning of the national statute, so that the time began to run at the end of which, by the national law, it was the right and the duty of the members of the legislature to elect a United States Senator. In no just sense could the legislature be said to be organized under the conditions above described. It is not contended that in all cases where a lawful senate and a lawful house are organized it must be shown that they communicate with each other and recognize each other. That fact is to be presumed in the absence of counter proof; but as soon as such counter proof appears and the anomalous condition is shown that the lawful house has made no connection with the senate, but that the senate, on the other hand, is in connection with an unlawful house, there can not be said to be in any proper sense an organization of the legislature within the meaning of the United States statute. This point I do not intend to enlarge upon. I am thoroughly convinced of its validity.

"But, conceding that there was an organized legislature on Tuesday, January 10, 1893, entitled, on the second Tuesday thereafter, namely, on January 24, and on the day after, the 25th, to elect a United States Senator, it seems clear that there was no lawful election. Review the facts. The members of the three houses met in one room. The voting began. A part of the senators voted, the other part omitting to

vote. The members of the unlawful house voted, the members of the lawful house omitting to vote when the roll was called by the clerk of the unlawful house, whom they did not recognize as clerk. Then two members of the legal house asked to vote, and their votes were received. Next, the senators who had not voted and the members of the legal house asked to vote, but the lieutenant-governor refused to receive their votes, although he had received the two votes from the members of the legal house, and then he declared Mr. Martin elected.

"Can it be by any possibility contended that the lieutenant-governor had any right so to deal with the joint assembly; to receive the votes of the members of the illegal house; to receive at his discretion the votes of two members of the legal house, and then to exclude the remaining 62 members of the legal house and 15 senators? The idea is preposterous. The case is clear. Either there was no lawful joint assembly on that day, because the legislature was not organized, or it was the duty of the lieutenant-governor to receive the votes of all the members of the two houses. To base the right of a Senator to a seat upon this floor, as Senator Martin's right is based, solely upon the assumed authority of the lieutenant-governor, as exercised in this case, to receive votes enough to elect Mr. Martin and make a majority of the legal votes of the whole legislature, and then to arbitrarily stop the balloting and declare Mr. Martin to be elected, is as dangerous and vicious a proceeding as has ever been heard of in the history of fraudulent elections."

TUESDAY, *February 12, 1895.*

Mr. Gray, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay, out of the contingent fund of the Senate, to Joseph W. Ady, the contestant of the seat of John Martin, a Senator from Kansas, the sum of $2,000, in full of expenses incurred by the said Joseph W. Ady in his said contest."

(Cong. Rec., vol. 27, p. 2064.)

TUESDAY, *February 19, 1895.*

The foregoing resolution was reported favorably, without amendment, by the Committee to Audit and Control the Contingent Expenses of the Senate.

(Cong. Rec., vol. 27, p. 2369.)

TUESDAY, *February 26, 1895.*

Mr. Gray, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay, out of the contingent fund of the Senate, to John Martin, a Senator from the State of Kansas, the sum of $1,000, in full of compensation and all expenses incurred by him in the contest for his seat in the Senate by Joseph W. Ady."

(Cong. Rec., vol. 27, p. 2748.)

THURSDAY, *February 28, 1895.*

Mr. HOAR. I ask unanimous consent for the consideration of the resolution in the case of Mr. Ady.

The PRESIDING OFFICER (Mr. Hill in the chair). The resolution will be read.

The Secretary read the following resolution reported from the Committee to Audit and Control the Contingent Expenses of the Senate on the 12th instant [error for 19th instant]:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay, out of the contingent fund of the Senate, to Joseph W. Ady, the contestant of the seat of John Martin, a Senator from Kansas, the sum of $2,000, in full of expenses incurred by the said Joseph W. Ady in his said contest."

The resolution was considered by unanimous consent, and agreed to.

(Cong. Rec., vol. 27, p. 2901.)

THURSDAY, *February 28, 1895.*

Mr. Jones, of Arkansas, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the following resolution submitted by Mr. Gray on the 26th instant, reported it without amendment:

"*Resolved*, That the Secretary of the Senate be, and he is hereby, authorized and directed to pay, out of the contingent fund of the Senate, to John Martin, a Senator from the State of Kansas, the sum of $1,000, in full of compensation and all expenses incurred by him in the contest for his seat in the Senate by Joseph W. Ady."

Mr. HOAR. I now ask for the consideration of the resolution relating to the payment of the expenses of the Senator from Kansas [Mr. Martin].

The resolution was read, considered by unanimous consent, and agreed to.

(Cong. Rec., vol. 27, p. 2901.)

[Fifty-third Congress, third session.]

WARREN T. REESE, *of Alabama.*

During the third session of the Fifty-third Congress and on the 1st day of February, 1895, the credentials of Warren T. Reese were presented to the Senate, certifying to the election of said Warren T. Reese as a Senator from the State of Alabama for the term of six years, commencing on the 4th day of March, A. D. 1895, being the same term which was afterwards filled by Hon. John T. Morgan in due course. After discussion the credentials of Mr. Reese were ordered to lie on the table, but were not afterwards taken from the table, debated, or acted upon.

The history of the case as here given consists of a statement of the proceedings in the Senate as published in the Congressional Record.

FRIDAY, *February 1, 1895.*

Mr. ALLEN. I present the credentials of Warren T. Reese, a Senator elect from the State of Alabama, and ask that they be read and placed on the files.

The VICE-PRESIDENT. The Secretary will read the credentials.

The Secretary read as follows:

"STATE OF ALABAMA, EXECUTIVE DEPARTMENT.

"This is to certify that on the 28th day of November, in the year of our Lord 1894, Warren T. Reese was duly elected by the legislature of Alabama a Senator to represent said State in the Senate of the United States for the term of six years, commencing the 4th day of March, A. D. 1895.

"Witness: His excellency our governor, R. F. Kolb, and our seal hereunto affixed, at Montgomery, Ala., this 8th day of December, in the year of our Lord 1894, and of the Independence of the United States of America the one hundred and eighteenth.

R. F. KOLB, *Governor.*

"By the governor:

"J. C. FONVILLE, *Secretary of State.*"

Mr. GRAY. I move that the communication just read be referred to the Committee on Privileges and Elections.

Mr. ALLEN. I hope that the Senator from Delaware will withdraw that motion and allow the credentials to take the usual course.

Mr. GRAY. What is the usual course, may I ask the Senator from Nebraska?

Mr. ALLEN. I suppose it is to place them on the files the same as other credentials. I do not know that the credentials should go to the Committee on Privileges and Elections unless there is some contest.

Mr. GRAY. I do not think that would be the usual course for a communication of this kind. I think the reference I propose is the proper one.

Mr. ALLEN. It does not occur to me that it is proper at this time. If a contest comes up here I suppose the Committee on Privileges and Elections will have to consider it. I hope the Senator from Delaware will not insist on his motion.

* * * * * * *

Mr. GRAY. I have no objection to letting the paper lie on the table for the present.

Mr. ALLEN. I simply desire to state that there is or will be a contest regarding a seat in the Senate from the State of Alabama. That fact can not be any longer ignored.

Mr. GRAY. Such a contest can not be made in the present Congress nor at the present session.

After further discussion the credentials presented by Mr. Allen were ordered to lie on the table.

(Cong. Rec., vol. 27, pp. 1604, 1605.)

[Fifty-fourth Congress, first and second sessions.]

HENRY A. DU PONT, *of Delaware.*

On the third day of the first session of the Fifty-fourth Congress Henry A. Du Pont, of Delaware, presented to the Senate of the United States his claim to a seat in the Senate as a Senator from the State of Delaware, duly elected to serve as such for the term of six years, commencing on the 4th day of March, 1895. In support of this claim Mr. Du Pont filed a certificate signed by the speaker of the Delaware house of representatives and attested by the clerk of said house, stating and asserting that on the 9th day of May, 1895, at a session of the senate and house of representatives of the State of Delaware, convened in joint assembly for the purpose of electing a Senator from said State, a ballot was duly taken for the election of a Senator, as aforesaid; that on such ballot Henry A. Du Pont received 15 votes, Edward Ridgely received 10 votes, John E. Addicks received 4 votes, and Ebe W. Tunnell received 1 vote; that one of the ten votes so received by the said Edward Ridgely in said joint assembly was given by William T. Watson; that upon the organization of the senate of said State of Delaware upon the first Tuesday of January, A. D. 1895, said William T. Watson was duly elected and qualified as the speaker of the senate, and that on the 9th day of April, A. D. 1895, the said William T. Watson duly took the oath of office as governor of said state of Delaware in place of Joshua H. Marvil, deceased; that upon his qualifying and entering upon the exercise of the office of governor, as aforesaid, the said William T. Watson ceased to have the right to act as a member of the senate of said State, or to vote in said joint assembly for the election of a Senator in Congress, as aforesaid; that said vote so given for said Edward Ridgely by said William T. Watson was given illegally and in violation of the constitution of the State of Delaware; and that Henry A. Du Pont on said ballot having received 15 votes, and Edward Ridgely having received only 9 legal votes, John E. Addicks having received 4 votes, and Ebe W. Tunnell having received 1 vote, the said Henry A. Du Pont having thereby received a majority of the votes of all the senators and representatives then constituting the legislature of the State of Delaware, they being all present and voting, was duly elected a Senator from the State of Delaware, and was duly declared elected to that office by the speaker of the house of representatives of the State of Delaware.

The claim of Mr. Du Pont and the aforesaid certificate were referred to the Committee on Privileges and Elections. Subsequently certain affidavits and portions of the senate journal of the legislature of the State of Delaware were also referred to the same committee.

The report of the committee affirmed the right of Mr. Du Pont to a seat in the Senate, and was accompanied by a resolution that Mr. Du Pont was entitled to a seat in the Senate as a Senator from the State of Delaware for the full term commencing March 4, 1895. Afterwards a minority report was filed, signed by four members of the committee, declaring that Mr. Du Pont was not legally elected to the Senate.

After a debate extending, at intervals, over a period of several months, Mr. Du Pont was declared by a vote of 31 to 30 not to be entitled to a seat in the Senate.

Subsequently, and during the second session of the Fifty-fourth Congress, Mr. Du Pont presented to the Senate a memorial praying that all the papers and documents in the case be taken from the files and again referred to the Committee on Privileges and Elections, with directions to reinvestigate such election and reconsider the same in all particulars. This memorial was referred to the Committee on Privileges and Elections, which committee afterwards filed a report recommending that the case be not reopened.

The history of the case here given consists of a statement of the proceedings of the Senate in the case as published in the Congressional Record, the report of the Committee on Privileges and Elections, the views of a minority of the committee, a statement of the days on which the question was debated in the Senate, with a reference to the record of the same as published in the Congressional Record, extracts from remarks of Senators in such debate, the vote on agreeing to the amendment to the resolution submitted by the Committee on Privileges and Elections, and the vote on agreeing to the resolution as amended, the proceedings in the Senate with reference to the memorial subsequently presented by Mr. Du Pont, and the report of the Committee on Privileges and Elections recommending that the case be not reopened.

PROCEEDINGS IN THE SENATE.

WEDNESDAY, *December 4, 1895.*

Mr. Mitchell, of Oregon, presented the petition of Henry A. Du Pont, of Delaware, claiming a seat in the Senate for the full term commencing March 4, 1895, by virtue of his election by the legislature of the State of Delaware. He also presented a certificate of the election of Mr. Du Pont, signed by the speaker of the Delaware house of representatives and attested by the clerk of the house. Both the claim and the certificate aforesaid were read and ordered to be printed and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 28, pp. 29, 30.)

WEDNESDAY, *January 15, 1896.*

Mr. Gray presented the affidavits of Robert J. Hanby, William T. Records, Charles A. Hastings, John B. Pennington, and Edward D. Hearne, citizens of the State of

Delaware, which were referred to the Committee on Privileges and Elections and ordered to be printed.

Mr. Mitchell, of Oregon, presented sundry affidavits and also portions of the senate journal of the legislature of the State of Delaware, all relating to the question of the election of Mr. Du Pont by the legislature of the State of Delaware, which were referred to the Committee on Privileges and Elections and ordered to be printed as a document.

(Cong. Rec., vol. 28, p. 686.)

FRIDAY, *January 24, 1896.*

Mr. Mitchell, of Oregon, presented an affidavit relative to the case of Henry A. Du Pont, claiming to have been elected a Senator from the State of Delaware. It was ordered that the affidavit be printed as a document and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 28, p. 956.)

WEDNESDAY, *January 29, 1896.*

Mr. Gray presented certain affidavits in the matter of the claim of Henry A. Du Pont to a seat in the United States Senate; which were referred to the Committee on Privileges and Elections and ordered to be printed.

(Cong. Rec., vol. 28, p. 1065.)

THURSDAY, *January 30, 1896.*

Mr. Gray presented the affidavit of Samuel Alrichs, of Delaware, in the matter of the claim of Henry A. Du Pont to a seat in the United States Senate; which was referred to the Committee on Privileges and Elections and ordered to be printed.

(Cong. Rec., vol. 28, p. 1096.)

THURSDAY, *February 13, 1896.*

Mr. Turpie presented a certified copy of the return of the election of William T. Watson as senator for the county of Kent in the general assembly of the State of Delaware.

The paper was ordered to be printed and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 28, p. 1675.)

MONDAY, *February 17, 1896.*

Mr. Mitchell, of Oregon, from the Committee on Privileges and Elections, submitted a report relative to the claim of Henry A. Du Pont to a seat in the Senate from the State of Delaware. To this report was appended a resolution, as follows:

"*Resolved*, That Henry A. Du Pont is entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895."

After a brief discussion the report and resolution were temporarily withdrawn.

(Cong. Rec., vol. 28, p. 1781.)

TUESDAY, *February 18, 1896.*

Mr. Mitchell, of Oregon, in behalf of the Committee on Privileges and Elections, presented the resolution and report submitted by him on the preceding day and temporarily withdrawn, in the matter of the claim of Henry A. Du Pont, of the State of Delaware, to a seat in the Senate from that State.

Mr. Turpie submitted the views of the minority of the committee.

It was ordered that the report and the views of the minority of the committee be printed in the Record and also printed together as a document.

(Cong. Rec., vol. 28, 1827, 1828.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Mitchell of Oregon (chairman), Hoar, Chandler, Burrows, Pritchard, Gray, Pugh, Turpie, and Palmer.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 18, 1896.—Ordered to be printed.

Mr. Mitchell, of Oregon, from the Committee on Privileges and Elections, submitted the following report (to accompany S. Res. 133):

The Committee on Privileges and Elections, to whom was referred the petition of

Henry A. Du Pont, of the State of Delaware, claiming a seat in the Senate from that State in virtue of an election by the legislature thereof on May 9, 1895, having had the same under consideration, beg leave to submit the following report:

STATEMENT OF FACTS.

There is in this case no material contention as to the facts. It is conceded the petitioner, Henry A. Du Pont, was, at the date of his alleged election, a citizen of the United States and an inhabitant of the State of Delaware, over 30 years of age, and in all respects qualified to become a Senator.

The legislature of the State of Delaware consists of a senate, composed of 9 senators, 3 of whom are elected from each of the three counties of the State, and a house of representatives of 21 members, 7 of whom are elected from each of the three counties of the State. When there are no vacancies in the membership, and all are present in joint assembly of the two houses for the purpose of electing a United States Senator, such joint assembly is composed of 30 members, thus requiring the votes of 16 members to elect.

In the event of one vacancy caused either by death, resignation, inability to act, or for any other reason, then the joint assembly, all others being present, would be composed of 29 members, in which event the votes of 15 members would be sufficient to elect.

At the meeting of the joint assembly of the legislature of Delaware on the 9th day of May, 1895, which assembly, it is conceded, was in all respects regularly called and held in pursuance of law, the final vote was as follows:

"Joint meeting proceeded to another ballot, which resulted as follows:

Mr. Alrichs, of the senate, voted for	H. A. Du Pont.
Mr. Fenimore	Ed. Ridgley.
Mr. Hanby	J. Edward Addicks.
Mr. Harrington	Ed. Ridgley.
Mr. Moore	H. A. Du Pont.
Mr. Pierce	H. A. Du Pont.
Mr. Pyle	Ed. Ridgley.
Mr. Records	Ed. Ridgley.
Mr. Speaker	Ed. Ridgley.
Mr. Ball, of the house, voted for	J. Edward Addicks.
Mr. Brown	H. A. Du Pont.
Mr. Burton	H. A. Du Pont.
Mr. Daly	Ed. Ridgley.
Mr. Davis	Ed. Ridgley.
Mr. Fleming	H. A. Du Pont.
Mr. Jolls	H. A. Du Pont.
Mr. Killen	Ed. Ridgley.
Mr. Money	H. A. Du Pont.
Mr. Moore	John Edward Addicks.
Mr. Morgan	H. A. Du Pont.
Mr. Mustard	Ebe W. Tunnell.
Mr. Pyle	H. A. Du Pont.
Mr. Reybold	H. A. Du Pont.
Mr. Robbins	J. Edward Addicks.
Mr. Sypherd	Edward Ridgley.
Mr. Townsend	H. A. Du Pont.
Mr. Walker	H. A. Du Pont.
Mr. Watson	Ed. Ridgley.
Mr. Wilson	H. A. Du Pont.
Mr. Speaker	H. A. Du Pont.

"The vote as above ascertained having been announced, as follows:

	Votes.
H. A. Du Pont had	15
Ed. Ridgley had	10
J. Edward Addicks had	4
Ebe W. Tunnell had	1

There being present in such joint assembly, and each casting a vote, 30 persons, each claiming to be a member of the legislature of the State of Delaware and entitled to vote for United States Senator.

It is conceded by Mr. Du Pont, and by your committee, that if this contention is true—that is, if each of the 30 persons so present in such joint assembly, and each of

whom cast a vote for Senator, was a duly qualified member of the legislature of the State of Delaware, and under no disability, as such, which would deprive him of his right to a seat in such assembly, and to cast a vote for Senator—then Mr. Du Pont was *not* elected Senator, and is not entitled to a seat in the Senate.

It is admitted upon the part of Mr. Du Pont, and such is the fact, that of the 30 persons so present and claiming a right to vote as aforesaid, 29 of them were so qualified. It is contended, however, that 1 of the 30, namely, William T. Watson, claiming to be a senator from the county of Kent, and claiming to be the speaker of the senate, and claiming the right, as such senator, to be present and participate in the proceedings of such joint assembly, and to cast his vote for Senator, was *not* entitled, under the constitution of the State of Delaware and the laws of the land, to be present in such joint assembly, had no right to be counted therein in making up the number present, and had no right to cast his vote in such assembly for any person for senator.

If this contention upon the part of Mr. Du Pont is correct, then it is conceded, provided the right to inquire into Watson's qualifications to vote in such assembly now exists, that, inasmuch as in that event there were but 29 members of the legislature of the State of Delaware present entitled to vote, and as it is conceded Mr. Du Pont received the votes of 15 of such members, no one of which was that of Mr. Watson, thus receiving a clear majority of all the votes cast, entitled to be cast, he was duly elected Senator, and is entitled to his seat.

The whole question involved, then, in this case is as to the right of Watson to be present in such joint assembly, and to be counted therein in making up the number present, so as to require the votes of 16 members to make an election.

The ground upon which it is claimed upon the part of Mr. Du Pont that Mr. Watson was ineligible to a seat in such joint assembly, and should not have been counted therein in making up the number constituting the same, is based on the fact that, although he had been duly elected a senator from the county of Kent, and from the commencement of the session in January, 1895, until April 9 of that year, had held and occupied a seat in the senate, and had been elected speaker thereof, and served in that capacity, he had, on the 9th day of April, 1895, the governor of the State of Delaware, Joshua H. Marvil, having died the day previous, succeeded to the governorship of the State in virtue of a provision of the constitution of that State, and from that date until the 9th day of May following had continued to exercise the functions and duties of executive of the State, and has ever since and still continues to exercise the office of governor of said State, and that, therefore, on that date, May 9, 1895, he, then holding the office of and being the governor of the State of Delaware, was ineligible to a seat in said joint assembly, and had no right whatever, under the provisions of the constitution of the State and of the laws of the land, to be present, either to participate by his vote or otherwise, or to be counted therein.

Your committee hold that this contention on the part of Mr. Du Pont is well founded.

The clause in the Delaware constitution in pursuance of which Mr. Watson, as speaker of the senate, became governor on April 9, 1895, and which will be commented on later in this report, is found in section 14 of Article III, and is as follows:

"Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified."

It is conceded a vacancy in the office of governor occurred on April 8, 1895, by the death of the then governor of the State, Joshua H. Marvil; also that Senator Watson was then and on April 9, 1895, speaker of the senate, and that on this latter date he took the required oaths, was inaugurated, and entered upon the exercise of the office of governor, and has continued to hold and exercise such office ever since.

PROCEEDINGS OF THE LEGISLATURE.

The legislature of the State of Delaware met in biennial session on the first Tuesday of January, 1895, and on that day organized by the election of speakers and other officers for the senate and house of representatives. There were at that time 9 members of the Senate and 21 members of the house of representatives, 3 senators and 7 representatives having been chosen from each of the three counties in the State. At the organization of the senate William T. Watson was duly elected speaker and continued in the discharge of his official duties as speaker of the senate, save during occasional absences, until the 9th day of April, 1895, the day following that on which Joshua H. Marvil, governor of the State of Delaware, died.

This legislature being charged with the duty of electing a Senator of the United States for the constitutional term of six years commencing on the 4th day of March, 1895, and having failed to elect such Senator on the second Tuesday after the meeting and organization of such legislature, convened in joint assembly on the next day, being

the 16th day of January, pursuant to the provisions of the act of Congress entitled "An act to regulate the times and manner of holding elections for Senators in Congress," approved July 25, 1866, and proceeded to vote for a United States Senator.

No one having been elected to that office on that day, the legislature, pursuant to the provisions of said act, convened in joint assembly on the following and succeeding days, Sundays excepted, until and including Thursday, the 9th day of May, 1895. No one was elected United States Senator prior to the day last named. On the 9th day of April aforesaid, immediately after the joint assembly of the two houses had separated, Senator William T. Watson, who at the time of the death of Governor Marvil, which occurred on the preceding day, had been speaker of the senate, took the official oaths prescribed for the governor of the State of Delaware, and forthwith entered upon the exercise of that office.

It is conceded that from the commencement of the voting for a United States Senator until and including the 9th day of April, Senator William T. Watson took part in such voting except during occasional absences.

Furthermore it is a conceded fact, and if not conceded, fully borne out by the journal entries and other testimony, that from the time he took the oaths of office and assumed the functions of governor in the exercise of such office until the final joint assembly of the two houses on the 9th day of May, Governor Watson did *not* upon any occasion take any part either in the proceedings of the senate or of the joint assembly.

And, further, it is clear to your committee from the record and other evidence submitted that from the hour of his inauguration as governor, by taking the constitutional oaths required of a governor, his name was dropped from the roll call of the senate and was never once called, either as of speaker or as of a senator, on any roll call had on any bill, resolution, or motion until the final adjournment of the senate. Senator Alrichs, in his affidavit of date January 28, 1896 (Doc. 9, part 6, p. 1), shows this conclusively, and it is not contradicted by any affidavit filed in the case. The following is Senator Alrichs's affidavit in full:

AFFIDAVIT OF SAMUEL ALRICHS.

"STATE OF DELAWARE, *Newcastle County, ss:*

"On this 28th day of January, A. D. 1896, before me, Edward G. Cook, a notary public for the State of Delaware in and for Newcastle County, personally comes Samuel Alrichs, who, being by me first duly sworn according to law, deposes and says:

"That he is a member of the senate of the State of Delaware, as stated by him in a previous affidavit made in the above matter; that he took his seat in said senate on the 1st day of January, A. D. 1895, for a term of four years; that, *after William T. Watson took the oath of office as governor of the State of Delaware* upon the death of Governor Marvil, to wit, on the 9th day of April, A. D. 1895, to the expiration of the last session of the senate on the 9th day of May of said year, *the clerk of the senate did not call the name of William T. Watson as a member of the senate. He was neither on the call of the roll at the assembling of any session, nor upon the taking of any roll call upon bill, resolution, or other motion. He was not reported by the clerk as either present or absent; neither was his name called or recorded upon the taking of any yea or nay vote as being present or absent. William T. Watson's name was thus dropped from the rolls after he became governor by reason of no special order, or action, or motion, or otherwise, taken in respect thereto by the senate.* It must have been done by the order of the speaker *pro tempore. It was, however, in accordance with the general understanding of the members of the senate that William T. Watson was no lonyer a member of that body.*

"SAMUEL ALRICHS.

"Sworn to and subscribed before me the day and year first above written, as witness my hand and official seal.

"[SEAL.] EDWARD J. COOK, *Notary Public.*"

It is conceded, however, that Governor Watson did, on the 9th day of May aforesaid, enter the final joint assembly and assume the right to be counted as a member of such assembly, and the right to vote therein for a United States Senator. During this final assembly 28 ballots were had for United States Senator. The vote upon each ballot as shown by the record of such assembly was as follows:

	Votes.
Henry A. Du Pont	15
Ed. Ridgely	10
J. E. Addicks	4
E. W. Tunnell	1

Willliam T. Watson, then governor of the State of Delaware, as aforesaid, cast his vote each time for Ed. Ridgely.

THE VITAL QUESTION.

It will be seen, therefore, the whole question of the right of Mr. Du Pont to a seat in the Senate, as claimed, turns upon the single question: Had William T. Watson, then holding and exercising the office of governor of the State of Delaware, a right under the constitution of that State and the laws of the land, to exercise the office of State senator, and as such to sit in the joint assembly on May 9, 1895, to be counted therein in making up the number constituting such joint assembly, and to vote therein for a United States Senator? Your committee are clearly of the opinion he had not.

PROPOSITIONS INVOLVED.

In determining this question three different propositions are presented for our consideration:

First. Did the offices of senator and speaker of the senate, held by William T. Watson from the commencement of the session of the Delaware legislature in January, 1895, until April 9, 1895, become *absolutely vacant* on the inauguration of said William T. Watson as governor of the State by taking the oaths of office required of a person entering upon the exercise of that office? Or,

Second. If such offices of senator and speaker of the senate did *not* become *absolutely vacant* upon such inauguration as governor, was the right of Watson *to exercise the functions* of both speaker of the senate and senator held in abeyance and *suspended* for and during the time he should continue to hold and exercise the office of governor. Or,

Third. While holding and exercising the office of governor did said William T. Watson not only continue to hold the offices of senator and speaker of the senate, but did his right to exercise all the functions of such senator and speaker of the senate while holding and excercising the office of governor continue to exist?

The answer to either or both of the first two propositions in the affirmative settles the question in favor of the right of Mr. Du Pont to a seat, while an affirmative answer to the third proposition, which of course negatives the other two, would be a denial of his right to a seat.

In discussing these several propositions, therefore, it becomes, in the view taken by your committee, wholly unnecessary, in reaching a correct conclusion as to the merits of the present controversy, to determine the question as to whether the offices of senator and speaker of the senate became *absolutely vacant* upon the accession of the speaker of the senate to the office of governor, so as to entitle the electors of Kent County to fill such vacancy by election, or so as to prevent his resuming his place as senator and speaker at the termination of his term of office, and of his right to exercise the office of governor, as it is clear, if the right of Watson, while holding the office of governor and exercising that office, to exercise the functions of a senator, whether for the reason that his office as such senator had *ipso facto* become vacant, or for any other reason, based on a fair construction of the various provisions of the constitution of the State of Delaware, and the well-known rule of law relating to incompatible offices, *was suspended*, then in *either* of such events the presence of Governor Watson in the joint assembly May 9, 1895, and his voting for a United States Senator therein while holding and exercising the office of governor, were *wholly illegal*, and in such event his vote in such joint assembly *should not be counted.*

WHETHER THE OFFICES HELD BY MR. WATSON AS SENATOR AND SPEAKER OF THE SENATE DID OR DID NOT BECOME ABSOLUTELY VACANT ON HIS BECOMING GOVERNOR, IT IS CLEAR THAT WHILE HOLDING AND EXERCISING SUCH EXECUTIVE OFFICE HIS RIGHT TO EXERCISE ANY OF THE FUNCTIONS, EITHER OF THE OFFICE OF SENATOR OR SPEAKER OF THE SENATE, WAS ABSOLUTELY SUSPENDED.

Whether the offices held by Mr. Watson as senator and speaker of the senate did or did not become absolutely vacant on his becoming governor, it is clear that while holding and exercising such executive office his right to exercise any of the functions, either of the office of senator or speaker of the senate, was absolutely suspended.

This conclusion is based on what seems to your committee to be—

First. The only reasonable and fair construction of various provisions of the constitution of the State of Delaware;

Second. Because it is sustained and supported by the well-recognized rule of the common law which inhibits either the holding or exercising simultaneously by the same person two incompatible offices, and also by the principles of our American system that legislative and executive offices are incompatible; and,

Third. Because the uniform unbroken usage observed in Delaware by its governors,

legislators, and people for more than one hundred years is to this effect, that is to say, that the right to exercise the offices of senator and speaker of the senate is suspended and held in abeyance during the time he is exercising the office of governor, and that both offices can not by such person be exercised simultaneously, and in perfect harmony with the constitutional provisions of the State which, in our judgment, *expressly* forbid the simultaneous exercise by the same person of the offices of governor and State senator.

LEGAL PROPOSITIONS.

Before proceeding to analyze these various constitutional provisions in their application to the present controversy, your committee respectfully submit the following propositions, the soundness of which it will endeavor to maintain:

First. It is a well-settled rule of the common law that the same person shall not exercise simultaneously two incompatible offices; and further, the acceptance of one is *ipso facto* a resignation of the other.

Second. Under the American system, executive and legislative offices are incompatible, and the same person can not exercise both simultaneously in the absence of either express or clearly implied statutory or constitutional authority, and the acceptance of a second such is *ipso facto* a resignation of the first.

Third. There is no *express* or *implied* authority in the Delaware constitution for the simultaneous exercise by the same person of the offices of governor and senator; on the contrary, the constitution *expressly interdicts* such exercise of those two offices, and therefore at the time when Mr. Du Pont received 15 votes in the joint assembly, Mr. Watson being then governor of the State, holding and exercising that executive office, was incapable of exercising the office of senator.

Fourth. The theory that Mr. Watson can exercise the office of governor of the State and State senator simultaneously involves innumerable constitutional repugnancies, perplexing difficulties, and endless absurdities, while the opposite theory reconciles and harmonizes all the provisions of the Delaware constitution relating to the subject under consideration.

Fifth. Whether or not the offices of State senator and speaker of the senate became *absolutely vacant* when Speaker Watson took the oaths of office, was inaugurated governor of the State, and entered upon the exercise of that office, there can be no doubt on a fair construction of the several constitutional provisions of the State of Delaware, that his right to *exercise the office of senator or speaker of the senate*, or any of the *functions connected therewith* while he continued to hold and exercise the office of governor, was *absolutely suspended.*

Sixth. That Governor Watson's exercise of the office of senator in the joint assembly, and of the office of president of the joint assembly, was illegal, and his vote for United States senator a *nullity.*

Seventh. The journal entries of the proceedings of the Delaware senate on May 9, 1895, are conclusive as to the number and names of senators present, the motions submitted, the votes cast, and of all the proceedings had, and can not be contradicted by *ex parte* affidavits.

Eighth. The right which undoubtedly belongs exclusively to the Delaware senate to judge of the elections, returns, and qualifications of its members, does not vest in such senate any such exclusive right as would conclude the Senate of the United States, to determine by construction whether the constitution of the State does or does not recognize a certain seat as *subject to occupation*, nor does it include the power to admit members to seats *not recognized by the constitution of the State as subject to occupation*, or if subject to occupation, to fill them in a manner or *by a person which the State constitution forbids.*

This latter proposition will receive first consideration at the hands of your committee.

PROVISIONS OF THE DELAWARE CONSTITUTION.

The following are the several more important provisions of the constitution of the State of Delaware, which have, as it is believed, any bearing upon this controversy. They are all, for convenience of the Senate, inserted here, and will be considered and construed in *pari materia.* Certain other clauses will be cited and commented on later in this report:

"ART. 2. SEC. 1. The legislative power of this State shall be vested in a general assembly, which shall consist of a senate and house of representatives.

"ART. 3. SEC. 1. The supreme executive powers of the State shall be vested in a governor.

"ART. 6. SEC. 1. The judicial power of this State shall be vested in a court of errors and appeals, a superior court, a court of chancery, an orphan's court, a court of over

and terminer, a court of general sessions of the peace and jail delivery, a register's court, justices of the peace, and such other courts as the general assembly, with the concurrence of two-thirds of all the members of both houses, shall, from time to time, establish."

Section 14, of Article III, is as follows:

"SEC. 14. Upon any vacancy happening in the office of governor, by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office *until a governor elected by the people shall be duly qualified*. If there be no speaker of the senate, or upon a further vacancy happening in the office, by his death, removal, resignation, or inability, the speaker of the house of representatives shall exercise the office *until a governor elected by the people shall be duly qualified*. If the person elected governor shall die, or become disqualified before the commencement of his term of office, or shall refuse to take the same, the person *holding the office* shall continue to exercise it *until a governor shall be elected and duly qualified*. If, upon a vacancy happening in the office of governor, there be no other person who can exercise said office within the provisions of the constitution, the secretary of state shall exercise the same until the next meeting of the general assembly, who shall immediately proceed to elect, by joint ballot of both houses, a person to exercise the office *until a governor elected by the people shall be duly qualified*. If a vacancy occur in the office of governor, or if the governor-elect die or become disqualified before the commencement of his term, or refuse to take the office, an election for governor shall be held at the next general election, unless the vacancy happen within six days next preceding the election, exclusive of the day of the happening of the vacancy and the day of the election; in that case, if an election for governor would not have been held at said election without the happening of such vacancy, no election for governor shall be held at said election in consequence of such vacancy. If the trial of a contested election shall continue longer than until the third Tuesday of January next ensuing the election of a governor, the governor of the last year, or the speaker of the senate or of the house of representatives, who may then be in the exercise of the executive authority, shall continue therein until a determination of such contested election. The governor shall not be removed from his office for inability but with the concurrence of two-thirds of all the members of each branch of the legislature."

Section 12, Article II, provides as follows:

"SEC. 12. * * * No person concerned in any army or navy contracts, nor Member of Congress, nor any person *holding* any office under this State or the United States, except the Attorney-General, officers usually appointed by the courts of justice respectively, attorneys at law, and officers in the militia holding no disqualifying office shall, during his continuance in Congress or in office, *be a Senator or Representative*."

Section 5 of Article III:

"SEC. 5. No member of Congress, nor person holding any office under the United States, or this State, shall exercise the office of governor."

The following is the oath of office taken by each of the governors of the State of Delaware upon his accession to office. It is prescribed by Article VIII of the constitution.

"Members of the general assembly and all officers, executive and judicial, shall be bound by oath or affirmation to support the constitution of this State and to perform the duties of their respective offices with fidelity."

The following are the journal entries of the Delaware senate of proceedings therein on April 9, 1895:

"The Hon. James L. Wolcott then administered, in the presence of the members of the senate, to Hon. William Tharp Watson, speaker of the senate, the following oaths of office as governor, to wit: 'I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will support the Constitution of the United States of America. So help me God.'

"'I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will support the constitution of the State of Delaware. So help me God.'

"'I, William T. Watson, do solemnly swear, on the holy evangels of Almighty God, that I will perform the duties of the office of governor of the State of Delaware with fidelity. So help me God.'

"Thereupon the speaker called Mr. Pyle to the chair and retired from the senate chamber."

Section 1, Article VI, of the constitution is as follows:

"SEC. 1. The judicial power of this State shall be vested in a court of errors and appeals, a superior court, a court of chancery, an orphans' court, a court of oyer and terminer, a court of general sessions of the peace and gaol delivery, a register's court, justices of the peace, and such other courts as the general assembly, with the

concurrence of two-thirds of all the members of both houses, shall from time to time establish."

It is provided in Article III, section 3, that—

"The governor shall hold his office during four years from the third Tuesday in January next ensuing his election, and shall not be eligible a second time to said office."

And in Article III, section 4, that—

"SEC. 4. He shall be at least thirty years of age, and have been a citizen and inhabitant of the United States twelve years next before the first meeting of the legislature after his election, and the last six of that term an inhabitant of this State, unless he shall have been absent on the public business of the United States, or of this State."

Article III, section 11, provides as follows:

"He shall, from time to time, give to the general assembly information of affairs concerning the State, and recommend to their consideration such measures as he shall judge expedient."

It is further provided in section 9, of Article III of the constitution, as follows:

"SEC. 9. He shall have power to remit fines and forfeitures and to grant reprieves and pardons, except in cases of impeachment. He shall set forth in writing, fully, the grounds of all reprieves, pardons, and remissions, to be entered in the register of his official acts and laid before the general assembly at their next session."

The following are the provisions of the constitution of the State of Delaware bearing upon the election of senators and the constitution of the senate of that State:

"ART. 2. SEC. 3. The senators shall be chosen for four years by the citizens residing in the several counties. * * *

"There shall be three senators *chosen* in each county. When a greater number of senators shall by the general assembly be judged necessary, two-thirds of each branch concurring, they may by law make provision for increasing their number; but the number of senators shall never be greater than one-half nor less than one-third of the number of representatives.

"SEC. 2. The representatives shall be chosen for two years by the citizens residing in the several counties. * * *

"There shall be seven representatives chosen in each county, until a greater number of representatives shall by the general assembly be judged necessary; and then, two-thirds of each branch of the legislature concurring, they may by law make provision for increasing their number."

The qualifications of a senator of the legislature of the State of Delaware are prescribed by section 3 of Article II of the constitution of that State, as follows:

"No person shall be a senator who shall not have attained to the age of twenty-seven years, and have, in the county in which he shall be chosen, a freehold estate in two hundred acres of land, or an estate in real or personal property, or in either, of the value of one thousand pounds at least, and have been a citizen and inhabitant of the State three years next preceding the first meeting of the legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen, unless he shall have been absent on the public business of the United States or of this State."

While the qualifications of a representative in the legislature of the State of Delaware are set forth in section 2 of Article II, as follows:

"No person shall be a representative who shall not have attained the age of twenty-four years, and have been a citizen and inhabitant of the State three years next preceding the first meeting of the legislature after his election, and the last year of that term an inhabitant of the county in which he shall be chosen, unless he shall have been absent on the public business of the United States, or of this State."

While section 1 of Article IV provides that—

"All elections for governor, senators, representatives, sheriffs, and coroners shall be held on the Tuesday next after the first Monday in the month of November of the year in which they are to be held, and be by ballot."

Section 2 of Article II provides that—

"The representatives shall be chosen for two years by the citizens residing in the several counties."

Section 3 of Article II provides that—

"That senators shall be chosen for four years by the citizens residing in the several counties."

Section 4 of Article II provides that—

"The general assembly shall meet on the first Tuesday of January, biennially, unless sooner convened by the governor. The first meeting of the general assembly under this amended constitution shall be on the first Tuesday of January, in the year of our Lord one thousand eight hundred and thirty-three, which shall be the commencement of biennial sessions."

It is provided in Article II, section 6, that—

"Each house shall judge of the elections, returns, and qualifications of its own members."

While Article V, sections 1 and 2, are as follows:

"ARTICLE V.

"SECTION 1. The house of representatives shall have the sole power of impeaching; but two-thirds of all the members must concur in an impeachment. All impeachments shall be tried by the senate; and when sitting for that purpose the senators shall be upon oath or affirmation to do justice according to the evidence. No person shall be convicted without the concurrence of two-thirds of all the senators.

"SEC. 2. The governor, and all other civil officers under this State, shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office. Judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit under this State; but the party convicted shall nevertheless be subject to indictment, trial, judgment, and punishment according to law."

It is provided in Article III, section 14, as follows:

"The governor shall not be removed from his office for inability but with the concurrence of two-thirds of all the members of each branch of the legislature."

Article II, section 5, provides that—

"Each house shall choose its speaker and other officers; and also each house, whose speaker shall exercise the office of governor, may choose a speaker *pro tempore*."

Article II, section 7, provides that—

"Each house may, * * * with the concurrence of two-thirds, expel a member, etc."

Article VII, section 3, provides that—

"The legislature, two-thirds of each branch concurring, may vest the appointment of sheriffs and coroners in the governor."

Article III, section 14, is as follows:

"If upon a vacancy happening in the office of governor there be no other person who can exercise said office within the provisions of the constitution, the secretary of state shall exercise the same until the next meeting of the general assembly, who shall immediately proceed to elect, by joint ballot of both houses, a person to exercise the office until a governor elected by the people shall be duly qualified."

A PRELIMINARY QUESTION.—THE SENATE OF THE UNITED STATES MAY INQUIRE INTO THE RIGHT OF GOVERNOR WATSON TO A SEAT IN THE JOINT ASSEMBLY AND TO VOTE FOR A UNITED STATES SENATOR THEREIN.

At the threshold in this investigation we are confronted with the question, Has the Senate of the United States the constitutional power to inquire into the question as to the right of Watson, then governor of the State, to a seat in the State senate, and to be present in the joint assembly, and to vote for a United States Senator?

Those opposing the claim of Mr. DuPont insist no such power exists, and the reason advanced in support of this contention is that the senate of Delaware passed judgment upon Watson's qualifications as a member of that body, and that such decision is conclusive.

Counsel, in opposition to the claim of Mr. DuPont, cite section 6, Article II, of the constitution of the State of Delaware, as follows:

"Each house shall judge of the elections, returns, and *qualifications* of its own members."

Then, conceding that in order to conclude the United States Senate, the State senate must have either *actually* or *constructively* acted, and *rendered judgment* upon the question of his right to a seat therein, it is by the opposition assumed, and the declaration is made, that such action was had, such *judgment* in this case *was rendered*, and hence the Senate of the United States is concluded.

Your committee deny this contention. They deny that the Delaware senate ever at any time after Watson became governor, either *actually* or *constructively*, passed upon his qualifications to a seat in that body. And it is upon this branch of the case there is any controversy whatever as to the facts.

It is conceded by your committee that Governor Watson, after having studiously refrained from attempting to exercise any of the functions of senator or speaker of the senate from the date of his inauguration as governor, April 9, 1895, until May 9, 1895, a fact also conceded by those opposing the claim of Mr. Du Pont, did on this

latter date, May 9, 1895, the legislature being about to adjourn *sine die*, enter the senate chamber a few minutes before the hour of 12 o'clock meridian, at which time the senate was to proceed to the hall of the house of representatives to meet the members of the house in joint assembly for the purpose of electing a United States Senator, and after conversing with two or more members until a few moments before 12 o'clock meridian, did then, the president *pro tempore* leaving the chair, take the chair of speaker of the senate, all the business of the senate having been concluded, and immediately made this announcement:

"The hour of 12 having arrived, the senate will proceed to take part in the joint assembly."

That, while occupying the chair as speaker of the senate, Governor Watson took no part whatever in any of the legislative functions of the senate, other than what related to proceeding to the hall of the house of representatives by the senate for the purpose of attending the joint assembly to elect a United States Senator. These are the facts and *all the facts* in reference to this matter, as found by your committee.

THE SENATE JOURNAL ENTRIES ARE CONCLUSIVE AS AGAINST EX PARTE AFFIDAVITS AS TO WHAT OCCURRED IN THE SENATE MAY 9, 1895.

This brings us to a consideration of the seventh proposition hereinbefore stated, namely: That the journal entries of the proceedings of the Delaware senate on May 9, 1895, are conclusive as to the number and names of senators present, the motions submitted, the votes cast, and of *all the proceedings had*, and can not be contradicted by *ex parte* affidavits.

The law is well settled by more than 120 adjudicated cases in the courts of last resort in more than twenty of the States in the American Union, as also by the Supreme Court of the United States, that where a State constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative journals, those journals are conclusive as against, not only a printed statute published by authority of law, but also against a duly enrolled act. The principle now contended for falls far short of going to this extent.

The question involved in the case under consideration is not whether the legislative journals are conclusive against a printed statute or an enrolled act, but whether they are conclusive as against *ex parte* affidavits by which such journals are sought to be contradicted.

Your committee, without indulging in argument upon this point, beg to attract attention to the following authorities, national and State, which hold to the doctrine that legislative journals are conclusive as against a duly enrolled act. Surely, if this be so, it can not be otherwise than they are conclusive against *ex parte* affidavits, the reason for this application of the rule being infinitely stronger than for the other.

The following is a list of the authorities, 124 in number, relied on. It is believed few Federal or State authorities can be found to conflict with these. Decisions can be found, as, for instance, in Field *v.* Clark (143 U. S., 649–678), to the effect that where the constitution contains no provision requiring entries on the journal of particular matters, such, for example, as calls of the yeas and nays on a measure in question, the enrolled acts can not in such case be impeached by the journals. That, however, is a very different proposition from the one involved here.

The authorities are as follows:

Alabama.—28 Ala , 466; 43 id., 721; 48 id., 115; 54 id., 599; 57 id., 49; 58 id., 546; 60 id., 361; 77 id., 597; 77 id., 608; 78 id., 411; 78 id., 517; 82 id., 562.

Arkansas.—19 Ark., 250, 27 id., 266; 28 id. 317; 31 id., 701; 32 id., 496; 33 id., 17; 35 id., 237; 40 id., 200; 41 id., 471; 44 id., 536; 48 id., 370; 49 id., 325; 51 id., 559.

California.—8 Sawyer, 238; 54 Cal., 111; 69 id., 479; 80 id. 211.

Colorado.—5 Colo., 525; 11 id , 489.

Florida.—20 Fla., 407; 24 id., 293.

Illinois.—14 Ill., 297; 17 id., 151; 19 id., 283; 19 id., 324; 25 id., 181; 35 id., 121; 38 id., 174; 43 id., 77; 44 id., 91; 45 id., 119; 62 id., 253; 63 id., 157; 68 id., 160; 70 id., 166; 70 id., 659; 74 id., 361; 77 id., 11; 81 id., 288; 93 id., 191; 98 id., 156; 120 id., 332; 122 id., 420; 94 U. S., 260; 103 U. S., 683; 103 U. S., 697; 105 U. S., 667.

Kansas.—12 Kans., 384; 15 id,, 194; 17 id., 62; 24 id., 700; 26 id., 724; 28 id., 243; 35 id., 545; 41 id., 200.

Maryland.—41 Md., 446; 42 id., 203; 48 id., 292.

Michigan.—2 Gibbs, 287, 1 Douglass, 351; 2 id., 191, 13 Mich., 481; 16 id., 254; 22 id., 104; 47 id., 520; 55 id., 94; 59 id., 610; 64 id., 385; 72 id., 446; 79 id., 59; 79 id., 595; 80 id., 598; 83 id., 13, 84 id., 408..

Minnesota.—2 Minn., 330; 24 id., 78; 31 id., 472; 38 id., 143; 45 id., 451.

Missouri.—60 Mo., 33; 71 id., 266.

Nebraska.—4 Nebr., 503; 9 id., 125; 9 id., 462; 17 id., 389; 18 id., 236; 20 id., 96; 21 id., 647; 24 id., 586.
Ohio.—5 Ohio, 358; 3 Ohio State, 475; 20 id., 1; 44 id., 348; 45 id., 254.
Oregon.—11 Oreg., 67, 71; 14 id., 365.
South Carolina.—2 S. C., 150; 11 id., 262; 12 id., 200; 13 id., 46.
Tennessee.—3 Lea, 332; 4 id., 608; 6 id., 549; 86 Tenn., 732; 87 id., 163.
United States.—94 U. S., 260; 103 id., 683; 103 id., 697; 105 id., 667.
Virginia.—79 Va., 269.
West Virginia.—5 W. Va., 85.
Wisconsin.—20 Wis., 501; 45 id., 543; 64 id., 323.
Wyoming.—1 Wyo., 85; 1 id., 96.

The constitution of Michigan contained the following clause:

"No public act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct, by a two-thirds vote of the members elected to each house."

In People *v.* Mahany (13 Mich., 481, 492) Mr. Justice Cooley, delivering the opinion of the court, said:

"As the court are bound judicially to take notice of what the law is, we have no doubt it is our right, as well as our duty, to take notice not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. The printed statute is not even prima facie valid, when other records, of which the court must equally take notice, show that some constitutional formality is wanting."

The constitution of California contained the following provision:

"No bill shall become a law without the concurrence of a majority of the members elected to each house."

In the Railroad Tax Case (8 Sawyer, 238, 293) Judge Sawyer, with the concurrence of Mr. Justice Field, said:

"On March 4 the house considered the senate amendment, and, upon a call of the yeas and nays, as required by the constitution, *thirty-nine* members voted for the amendment, and *thirty-two* against it, there being four paired and not voting; thus the votes in favor of the amendment were two less than a majority of members elected to the house, and the bill failed. * All this appears upon the journal. * The bill, therefore, was never constitutionally passed, and never became a law. Under the decisions of the courts, upon constitutional provisions in all respects similar to that in the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature."

In Spangler *v.* Jacoby (14 Ill., 297, 300) the court said:

"The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law. But the journal of the house of representatives fails wholly to show that it was ever put upon its final passage in that house; in other words, it does not appear that it passed with the concurrence of a majority of the members elect of that body. The act did not become a law in pursuance of the provisions of the constitution, and it is therefore null and void. The judgment is reversed."

In Berry *v.* R. R. Co. (41 Md., 446, 463, 465), Judge Alvey, delivering the opinion of the court, said:

"The question has repeatedly arisen in several of the State courts of the highest authority, and in all cases, with but few exceptions, it has been held that neither the printed statute book nor the ordinary authentication of the statute after its passage would preclude the inquiry into the fact whether the statute, as published, had in truth passed the legislature; and, as evidence upon the question, the legislative journals and the bills as acted upon by the legislative assemblies have been consulted. * We can have no doubt whatever that the third section of the act in question, as that act was sealed and approved by the governor, is materially different from the third section of the act as it passed the two houses of the legislature, and we must therefore declare that particular section of the act to be null and void."

The constitution of the State of Delaware, Article II, section 17, contains the following clause:

"No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence by two-thirds of each branch of the legislature."

This provision requires the yeas and nays to be recorded in the journals on the passage of every new act of incorporation.

THE DELAWARE SENATE DID NOT, EITHER ACTUALLY OR CONSTRUCTIVELY, JUDGE OF THE QUALIFICATIONS OF GOVERNOR WATSON TO A SEAT IN THE SENATE AT ANY TIME SUBSEQUENT TO HIS BECOMING GOVERNOR OF THE STATE.

As bearing upon the question as to what occurred either of a legislative or quasi judicial character in the Delaware senate on May 9, 1895, Mr. Du Pont presents a certified copy of the senate journal entries of the proceedings of the senate of that date (Doc. 9, Part II, pp. 431), and insists such journal entries are conclusive upon that question. Mr. Du Pont, however, as is his right, presents also the *ex parte* affidavits of certain State senators and others, not for the purpose, however, of contradicting but *confirming* such journal entries; while those opposing Mr. Du Pont present certain *ex parte* affidavits tending strongly to *impeach* and *contradict* such journal entries in certain respects.

Should these affidavits tending to impeach the journal entries be considered as competent evidence, then there is a slight conflict of testimony in respect to the exact time and manner in which Governor Watson attempted to resume and did resume his seat as speaker of the senate on said 9th day of May, 1895.

Your committee, however, while protesting such *ex parte* affidavits can not be considered *in so far as they tend to impeach the journal entries*, regard this conflict as immaterial and as not in any manner materially affecting the merits of the case, whatever view may be taken of the testimony.

Upon the part of those opposing Mr. Du Pont and denying his right to a seat in the senate it is contended, which contention it is sought to maintain by these *ex parte* affidavits contradictory of the senate journal entries, and which is, in the judgment of your committee, not sustained, but, on the contrary, clearly contradicted by the senate journal entries and other evidence submitted, except so far as hereinbefore conceded, that Governor Watson entered the senate chamber on said 9th day of May "*between* the hours of 11 and 12 o'clock"—just how long before 12, whether fifty-nine minutes or five seconds before, is not stated in any of the affidavits filed—the senate being in session, and took the chair as speaker of the senate; that he presided over the senate until 12 o'clock m., the hour for the two houses to convene in joint assembly; how long he so presided, whether fifty-nine minutes or *one* minute or *one second*, is not stated in any of the affidavits filed, nor is it disclosed by the record; that while he presided over the senate, it is claimed in one or more of these affidavits, he "voted in the affirmative *upon at least one corporation bill*," and declared that such bill had passed the senate, it having received the required constitutional majority. What corporation bill it was which it is alleged he so voted on is not disclosed, either by the affidavit of Governor Watson himself, which is filed in the case, or by any other testimony.

It is further claimed he, while presiding in the senate, "put motions made by senators;" but what motion or motions he so put si not stated either in briefs of counsel or in any of the evidence submitted. In so far as these several affidavits filed in opposition to Mr. Du Pont relate to the exact time when Governor Watson assumed the speaker's chair in the senate they are not contradictory of the affidavits filed by Mr. Du Pont. The latter say it was after all the legislative business was ended and just as the senate was about to proceed to the hall of the house of representatives to take part in the joint assembly (which all agree was 12 m.), while the former are to the effect that he entered the senate chamber *between the hours of 11 and 12 o'clock*—how many moments before 12 m. is not stated—and that he, of course, subsequently took the chair.

That precisely what Governor Watson says on this subject may be readily seen, your committee present herewith his affidavit in full:

"AFFIDAVIT OF WILLIAM T. WATSON, SPEAKER OF THE SENATE OF THE STATE OF DELAWARE.

"STATE OF DELAWARE, *Kent County, ss:*

"Be it remembered that on this 28th day of January, A. D. 1896, personally came before me, William E. Riggs, jr., a notary public of the State of Delaware, resident in Kent County, William T. Watson, who, being by me duly sworn according to law, did depose and say that he was elected speaker of the senate on the 1st day of January, A. D. 1895, and on the 9th day of April of the same year, after the death of Joshua Marvil, the duly elected and qualified governor of the State of Delaware, assumed the exercise of the office of governor; that on the 9th day of May, A. D. 1895, *between the hours of 11 and 12 o'clock m.*, this affiant entered the senate chamber, whereupon William T. Records, speaker pro tempore, vacated the chair, and he, this affiant, took the same and presided over the senate until the hour for the two houses to assemble in joint meeting arrived, and then announced the same and proceeded at

the head of the senators into the hall of the house of representatives, where he presided over the joint assembly from the beginning to the end thereof and voted upon all questions which arose during the session, no objection having been made to his so presiding or voting until at or about the time the last ballot was taken, when *Senator Alrichs read a written protest against his right to so vote and preside;* that while he presided over the senate on that day in its chamber he *voted upon one bill at least and announced its passage by the senate;* that he received and put motions made by senators and was addressed as speaker of that body, and that no objection from any quarter was made to his acting as presiding officer of the senate and otherwise participating in the proceedings thereof while in session during the hour aforesaid.

"WILLIAM T. WATSON.

"Sworn to and subscribed before me the day and year aforesaid.

"[SEAL.] "WILLIAM E. RIGGS, JR.,
"*Notary Public.*"

It will be seen Governor Watson admits in this affidavit his right to vote and preside in said joint assembly was challenged in writing.

SENATE JOURNAL ENTRIES AND EX PARTE AFFIDAVITS.

As bearing upon this question of fact Mr. Du Pont has presented the following testimony:

(1) A copy of the journal entries of the proceedings of the senate of that date. (See Senate Document No. 9, part 2, first session Fifty-fourth Congress.) And also, in corroboration of and support of senate journal entries, the following:

(2) The affidavit of John M. C. Moore, a State senator of the Delaware senate from Sussex County. (See Doc. id., 31.)

(3) The affidavit of George F. Pierce, a State senator of the Delaware senate from Sussex County. (Doc. id., 33.)

(4) The affidavit of Samuel Alrichs, a State senator of the senate of Delaware from Newcastle County. (Doc. id., 34.)

(5) The affidavit of Edgar T. Hastings, clerk of the house of representatives of the State of Delaware. (Doc. id., 35.)

(6) The affidavit of John S. Prettyman, jr. (Doc. id., 36.)

(7) The affidavit of Frank Reedy. (Doc. id., 37.)

(8) The affidavit of George L. Townsend. (Doc. id., 38.)

(9) The affidavit of William Michael Byrne. (Senate Doc. 9, Fifty-fourth Congress, first session, part 4, pp. 1–3.)

(10) Second affidavit of State Senator Samuel Alrichs. (Doc. 9, part 6, p. 1.)

While in opposition to these journal entries, and *contradictory thereof* and of these several affidavits, those opposed to the claim of Mr. DuPont have presented the following:

(1) The affidavit of Robert J. Hanby, State senator in the senate of Delaware from the county of Newcastle. (Doc. 9, part 3, p. 1.)

(2) The affidavit of William T. Records, State senator from Sussex County and speaker pro tempore of the Delaware senate. (Doc. 9, part 3, p. 2.)

(3) The affidavit of Charles A. Hastings, clerk of the senate of the State of Delaware.

(4) The affidavit of John B. Pennington. (Doc. 9, part 3, p. 2.)

(5) The affidavit of Edward D. Hearne, assistant to Charles A. Hastings, the clerk of the senate. (Doc. 9, part 3, p. 4.)

(6) The affidavit of William T. Watson, claiming to be speaker of the senate of the State of Delaware. (Doc. 9, part 5, p. 1.)

(7) The affidavit of Cyrus Cort, chaplain of the senate of the State of Delaware for the session of 1895. (Doc. 9, part 5, p. 2.)

For the convenience of the Senate this copy of the senate journal entries of the proceedings of the senate of the State of Delaware on May 9, 1895, also these affidavits, also the certificate of the election of Mr. DuPont, signed by the speaker of the Delaware house of representatives and attested by the clerk of the house (see Doc. 9, pp. 1–5), together with the affidavits of Edgar T. Hastings, clerk of the Delaware house of representatives, Henry McMullen, speaker of said house, and Samuel Alrichs, a State senator, attached thereto (Doc. 9, pp. 3–8), are printed together in an appendix hereto attached, marked A, and made a part of the report of your committee.

It will be observed from an inspection of the journal entries of the proceedings of the Delaware senate of May 9, 1895, that at the convening of the senate at 11 o'clock a. m., Thursday, May 9, 1895, but 8 senators were present, including "Mr. Speaker

pro tempore." No mention is made of the presence of Senator Watson or Speaker Watson (Doc. 9, part 2, p. 4), while the names making up the 8 senators alleged to be present are all given, as follows: Messrs. Alrichs, Fenimore, Hanby, Harrington, Moore, Pierce, Pyle, Mr. Speaker *pro tempore.*

It will be noticed, furthermore, that the yeas and nays were taken that date on but six different measures, as follows:

(1) On house bill entitled "An act to amend sections 5 and 10 of the act entitled 'An act to incorporate the town of Frederica.'"

On this question there were, yeas, 8; nays, 0.

(2) On house bill entitled "An act to incorporate the Acetyline Light Company."

On the passage of this bill the vote was, yeas, 8; nays, 0.

(3) On house bill entitled "An act to incorporate the Silverbrook Cemetery Company," on the passage of which the vote was, yeas, 8; nays, 0.

(4) On substitute for house bill entitled "An act to incorporate the Masonic Hall Company of Lewes."

On the passage of this bill the vote was, yeas, 7; nays, 0—Senator Hanby being either absent or not voting. The 7 voting for the bill did not include the name of Watson.

(5) On house bill entitled "An act relating to certain lands of the Wellman Iron and Steel Company, in Newcastle County."

On the passage of this bill the vote was, yeas, 8; nays, 0.

(6) On house bill entitled "An act to incorporate the Calhoun-Jones Company, of Georgetown, Sussex County."

On the passage of this bill the vote was, yeas, 8; nays, 0.

The foregoing were the *only* bills placed upon passage in the senate on May 9, 1895, on which the yeas and nays were taken and entered on the journal; and in each instance, except one, there were but 8 votes cast in all, including the speaker *pro tempore*, so called, and entered on the journal; and Watson was not present, either as senator or speaker of the senate, nor is his name anywhere mentioned, nor is his vote recorded on any of these bills, nor is he named as putting any motion to the senate or transacting any other business whatever.

In the one case above mentioned—that is, on the passage of the house measure entitled "An act to incorporate the Masonic Hall Company of Lewes"—there were but 7 votes cast, including the speaker *pro tempore*, Senator Hanby not voting. Watson was not present or voting.

The only other proceedings had in the senate on that date, May 9, 1895, subsequent to the vote on the last house bill, on which the yeas and nays were called as above—that is, on the house bill entitled "An act to incorporate the Calhoun-Jones Company, of Georgetown, Sussex County" (Doc. 9, part 2, p. 7)—are best stated by quoting in *hæc verba* the whole of the subsequent journal entries of the proceedings of that day, as follows:

"*Ordered*, That the house be informed thereof, and the bill returned to that body.

"Mr. Hastings, clerk of the house, being admitted, informed the senate that the house had passed and requested the concurrence of the senate in the following house bill entitled 'An act to divorce Benjamin O. Jacobs from his wife, Victoria W. Jacobs.'

"Mr. Hastings, clerk of the house, being admitted, presented for the signature of the speaker of the senate the following duly and correctly enrolled house bills, the same having been signed by the speaker of the house:

"An act to incorporate the Silverbrook Cemetery Company.

"An act relative to bonds, undertakings, and other obligations with surety or sureties, to the acceptance as surety or guarantor thereupon of companies qualified to act as such and to provide a uniform system of procedure by and standard of qualifications for such companies.

"Mr. Hastings, the clerk of the house, being admitted, returned to the senate the following duly and correctly enrolled senate bill, the same having been signed by the speakers of both houses:

"An act to divorce Ellen Tatem Pusey from her husband, Joshua B. Pusey.

"Mr. Hastings, clerk of the house, being admitted, informed the senate that the house had passed the following senate bills:

"An act relating to certain lands of the Wellman Iron and Steel Company, in Newcastle County.

"An act to incorporate Calhoun-Jones Company, of Georgetown.

"An act to incorporate the North American Construction Company.

"An act to divorce Elzey D. Richardson from his wife, Jennie A. Richardson.

"And returned the same to the senate."

From the above record it will be observed no further measures were placed upon their passage, either by a call for the yeas and nays or otherwise. It was simply ordered that the house be advised of the passage of the above-named house bills.

The clerk of the house informed the senate—

(1) That the house had passed a bill to divorce Benjamin O. Jacobs from his wife, Victoria W. Jacobs.

(2) He presented for the signature of the speaker two bills.

(3) He announced that two certain bills had been signed by the speakers of both houses.

(4) He informed the senate that the house had passed four senate bills, and he returned the same to the senate.

From the beginning, therefore, until the end of the journal entries of the proceedings of the Delaware senate on May 9, 1895, there is not only no mention of the fact that Governor Watson was present and voted on any corporation or any other bill, either in the affirmative or negative, or that he put any motion or announced any result, but, on the contrary, the record discloses the fact that he was not present, or at least did not vote on any roll call, during that entire day.

The only other bills placed on their passage in the senate May 9, 1895, other than those above mentioned, on which the yeas and nays were taken, and not one of which was a corporation bill, and all of which were acted upon *prior* to the action upon any one of the bills above named, on which the yeas and nays were called, were the following:

(1) An act relating to the salary of the attorney-general. (Doc. 9, part 2, p. 4.)

(2) An act for the relief of Robert Cook, deceased. (Id.)

(3) Joint resolutions in relation to paying William T. Smithers, and John D. Hawkins, secretary of state. (Id.)

(4) An act to prevent bogus sales within the State of Delaware, etc. (Doc. id.)

Your committee, therefore, in response to the contention of those opposing Mr. DuPont, to the effect that the Delaware senate, as a matter of fact, *acted upon* and *passed judgment* May 9, 1895, on the *qualifications* of Governor Watson to a seat in the senate, say:

First. This is a question which can alone be determined by an inspection of the record of the journal entries of the senate, which record can not be contradicted by *ex parte* affidavits; and that such record is not merely silent on the subject, but affirmatively shows that Governor Watson took no part whatever, either as senator or speaker of the senate, in any of the proceedings of the senate on May 9, 1895, and furthermore that no question as to his qualifications to a seat in the senate was submitted or acted upon, either *directly* or *constructively;* and

Second. Were it proper to admit *ex parte* affidavits in opposition to the record, a proposition denied by your committee, even then, giving to such affidavits every consideration and weight which should be accorded to them as competent testimony in the case, and taking into consideration all the evidence presented on both sides, the preponderance of such evidence is clearly to the effect that, as a matter of fact and law, the Delaware senate did *not*, on May 9, 1895, in any manner act or pass judgment, either *actually* or *constructively*, upon the qualifications of Governor Watson to a seat in the senate, and hence, for this reason, the Senate of the United States is not concluded from determining, in its own right, as to his qualifications to such seat.

THE JOINT ASSEMBLY HAD NO POWER TO ADJUDICATE UPON THE QUALIFICATIONS OF THE GOVERNOR TO A SEAT IN THE STATE SENATE, DID NOT ATTEMPT TO DO SO, BUT PROTESTED AGAINST HIS RIGHT.

The joint assembly for the purpose of electing a Senator had no power to judge of the right of the governor to a seat in the State senate; no power whatever resided in that body to judge of his qualifications, and his presence there and voting and presiding could not possibly have conferred any rights, even if there had been acquiescence on the part of the joint assembly. But there was no acquiescence, but, on the contrary, a *vigorous protest.*

The record shows (see affidavit of Senator Alrichs, *supra*) that he, on behalf of himself and fourteen other members of the joint assembly who had voted for Mr. DuPont, presented in said joint assembly the following protest:

"After the last ballot had been taken in said final joint assembly and before the two houses separated I, on behalf of myself and the fourteen other senators voting for the said Henry A. DuPont, arose and presented the following challenge, protest, and demand:

"'I very respectfully challenge the correctness of the announcement of this vote and divers preceding votes, and do now most respectfully insist and demand that Henry A. DuPont be now declared elected Senator for the unexpired term of six years commencing on the fourth day of March, A. D. 1895, inasmuch as it is now respectfully insisted that this joint assembly consists of twenty-nine members, the

honorable gentleman now undertaking to preside and participate therein being governor of the State, and not now a senator.'

"After the presentation of the foregoing challenge, protest, and demand, and without taking any further ballot, the joint assembly finally separated, with a declaration from William T. Watson that no person had been elected Senator in Congress for said term.

"SAMUEL ALRICHS.

"Sworn and subscribed before me this twenty-fifth day of November, A. D. 1895. And witness my hand and official seal.

"[SEAL.] JOHN H. FRAZER, *Notary Public.*"

Even had Watson been senator and speaker of the senate on May 9, 1895, both *de facto* and *de jure*, he would not from these circumstances have had any *preference right* over that of any other member of the joint assembly to preside over that body. He would have been there simply as a senator, without any authority whatever in virtue of any law to preside, except by the consent of his associates. This consent was not given, but protested against.

THE SENATE OF THE UNITED STATES IS NOT CONCLUDED BY ANY CONSTRUCTION PLACED UPON THE CONSTITUTION OF THE STATE OF DELAWARE CONCERNING THE QUESTION AS TO WHETHER A CERTAIN SEAT IN THE SENATE IS, UNDER THE CONSTITUTION OF THAT STATE, OPEN TO OCCUPATION, AND THE RESULTANT RIGHT OF THE GOVERNOR TO OCCUPY SUCH SEAT.

But your committee respectfully insist that any judgment, either *actual* or *constructive*, of the Delaware senate as to the right of a person to a seat in such senate to be conclusive on the Senate of the United States, must relate to a seat in the senate *subject to occupation.*

The senate of the State of Delaware, while possessing the exclusive right to determine as to the *qualifications of its members* to all seats *open to be filled*, does not include the right or power upon the part of such senate to judge as to the *number* of seats in that body, or as to what shall constitute a *constitutional vacancy* or a *constitutional suspension* of the right of a particular seat to be filled by anyone, either temporarily or permanently.

The authority given the senate in virtue of the constitutional provision is to judge of the qualifications of members *who apply for admission to seats*, which seats are provided for *by the constitution*, and *not* by the *judgment of the senate.*

If, therefore, the senate undertakes to determine either that there is a *tenth* place in the Senate open to occupation by a member, and proceeds to fill that *tenth* place with a member, when the constitution declares that the senate shall consist of but *nine* members, or if it undertakes to declare that one of the nine seats is open to occupation, and proceeds to fill that seat, when the constitution declares that, by reason of the senator who occupied that seat having under the constitution become governor, *such seat is not open to occupation, and can not be held or its functions exercised by such governor while he continues to hold and exercise the office of governor*, then, in either of such cases, it is respectfully submitted, the judgment of the senate of the State of Delaware, however formal and solemn such a judgment may have been, does *not* conclude the Senate of the United States.

THE DISTINCTIONS BETWEEN THE DUPONT CASE AND THE TURPIE CASE.

The question for consideration here is widely different from that presented to this committee in the Turpie case in the first session of the Fiftieth Congress.

In that case there was no statutory, much less constitutional, question involved as to the *number* of seats in the Indiana senate *open to occupation.* The rights of two sets of claimants to two different seats confessedly open to occupation were in issue. There was no question, constitutional, statutory, or otherwise, as to their right to be filled or as to the duty upon the part of the senate to fill them, provided persons having the requisite qualifications were legally elected and returned. It was not only the right, but the duty of the Indiana senate, under the constitutional provisions in that State, to judge as to which set of claimants was legally elected and returned, and whether these had the proper qualifications. In the performance of this duty the Indiana senate held the two sitting members were *not* entitled to their seats and that the two persons claiming the same *were*, and the sitting members were ousted and the claimants seated. And this committee and the Senate very properly held that in such case the action of the State senate was conclusive.

Here the question rises to one of infinitely greater importance, involving an inquiry

not only as to the *qualifications* of a person *claiming a seat*, but the question as to whether, under the constitution of the State of Delaware, *there was any seat to be occupied*. Argument to show the distinction between the two cases is unnecessary. The mere statement of the difference in the cases carries with it all the argument required.

But still further. In the Indiana case it was not questioned that the senate of Indiana had *actually* passed upon the question and judged *actually* of the right of the two claimants who were admitted to the seats to which they were admitted, while here it is clear there was no judgment of the senate of the State of Delaware, either *actual* or *constructive*, upon the right of the governor of the State of Delaware to hold or exercise the duties of senator.

THE SEAT FILLED BY GOVERNOR WATSON IN THE STATE SENATE OF DELAWARE, MAY 9, 1895, WAS NOT, IN ANY CORRECT INTERPRETATION OF THE DELAWARE CONSTITUTION, OPEN TO OCCUPATION ON THAT DATE.

It is clear, if under the constitution of the State of Delaware, as your committee believe it is, that one of two things is true: Either that the office of senator held by Mr. Watson became absolutely vacant on his accession to the office of governor, or, otherwise, that his right to exercise the functions of senator was *held in abeyance and absolutely suspended for and during the time he should continue to exercise the functions of governor*. Then, in the former case, there was a vacancy in the office of senator which could only be filled by election, and the right of the governor to fill it was one not open to the consideration or determination of the senate, because that matter is already determined by the constitution, while in the latter case there is by the provisions of the constitution *no seat open to occupation*. It can not in such case be filled by *anyone*, much less by *the governor*, and if the senate undertakes to fill it, either with the governor or anyone else, it is a judgment that is *ultra vires* and does not conclude the Senate of the United States.

In this connection it may be conceded that instances might occur where the judgment of a State senate as to the qualifications of one of its members may be binding on the Senate of the United States, although confessedly the effect of such judgment may be to admit a person to a seat who is lacking in an essential qualification. But it proceeds upon the theory that when certain facts are found to exist, although such finding may be erroneous, the judgment is binding. As, for instance, the constitution of the State of Delaware prescribes as a qualification for State senator that he shall be 27 years of age. Suppose the senate admit a person to a seat in the senate who, as a matter of fact, is but 20 years of age, but there is nothing in the record, nothing in the judgment of the senate passing upon his qualifications that discloses the fact that he was but 20 years of age. In such case it is believed the judgment of the senate would conclude the United States Senate. But in such case suppose the record, the judgment of the senate upon the question of qualification, found as a *fact* that the applicant was but 20 years of age, and then on such finding admitted him to a seat, is it not entirely clear that such a judgment would *not* be conclusive upon this body?

But three other States, namely, Pennsylvania, Maine, and Colorado, have ever had constitutions embracing in corresponding provisions the same qualifying words of the Delaware constitution, namely, "*during his continuance in office.*" Therefore it is that in those States only can we look for judicial decisions or authorities on the question whether Governor Watson can exercise the office of senator during his incumbency of the office of governor.

On the 14th of January, 1830, Joshua Hall was chosen president of the Maine senate. Soon thereafter the governor died, and he became the governor. Sixteen senators, including Mr. Hall, had been admitted and sworn. On the 26th of January the senate decided that there were four vacancies. Under the constitution these vacancies were to be filled by a joint assembly of the two houses of the legislature. On February — the house of representatives sent a message to the senate requestiug that body to meet the house in joint assembly for the election of senators to fill the vacancies. On the 2d of February, the senate being in session, a senator moved an adjournment to enable the senate to meet the representatives in joint assembly. Mr. Hall, who was then exercising the office of governor, appeared in the senate and claimed the right to act as president. The vote was taken by yeas and nays. Hall voted in the negative. His vote being counted the result was, yeas 8, nays 8, and the motion was lost. On the 13th of February Mr. Jonathan G. Hunton, having been in the meantime elected governor, submitted certain questions to the supreme court, in pursuance of the Maine constitution. One of these questions was the following:

"2d. Has the president of the senate, when the office of governor is vacant, and

when he ought to be acting as governor, a right to *preside* and *vote* at the senate board?"

The answer to this question was given by the chief justice, with the concurrence of the other justices, in the following words:

"As to the second question my opinion is that, while the president of the senate, in virtue of his office as such, is clothed with the power of exercising the office of governor, he has *no* right to *preside* over the senate or to *vote as a member of that body*. (Opinion of the justices, 7 Greenleaf, 483.)"

The provision of the Maine constitution, it will be seen, is in substance and effect, in fact almost literally, similar to that of the Delaware constitution.

It is as follows:

"ART. IV, SEC. 14. Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be qualified."

There is a provision of the Maine constitution which to some extent impairs, but by no means destroys, the value of the decision of the Maine court, *supra*, as an authority in the case now under consideration. It is to the effect that while the president of the senate exercises the office of governor his *duties* as *president of the senate* shall be suspended and a president *pro tempore* elected. The provision is not that his *powers and duties* as president of the senate shall be suspended, but merely that his *duties* as such shall be suspended. It is very clear, of course, that if a man's power to perform certain acts is suspended his obligation to perform them must also be suspended. He can not be charged with the *obligation* while stripped of the *power* to perform them. But it is not so clear that the suspension of the *obligation* is also the suspension of his *power* to perform the acts. He may have the power without being *required to exercise it, except at his discretion or convenience*. It is not clear that the suspension of the obligation to act as president of the Maine senate did not leave it in the power of the officer to perform or not perform, at his discretion or convenience, the duties, not of *senator*, but of *president of the senate*.

But if this peculiar provision of the Maine constitution does, in truth, suspend the acting governor's *power and duty* to preside over the senate, it certainly does not suspend or purport to suspend his *power*, or his *duty*, to *vote* as senator. If his power or duty to *vote* as senator is suspended, it must be suspended by some other provision of the State constitution. That other provision is to be found in a clause, which is common to both the Maine and the Delaware constitutions, to the effect that "no person holding any office, under the State, shall, during his continuance in office, *be a senator* or representative." And this gives great value and weight to the Maine decision as an authority in the case under consideration, for it makes the Maine case and the Delaware case, so far as this point is concerned, closely analogous. The prohibition against *voting as senator* is the same in both constitutions.

The following is the provision of the Maine constitution, which suspends the duty of the governor *to preside* over the senate:

"ART. 4, SEC. 14. Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified; and, in case of the death, resignation, removal from office, or other disqualification of the president of the senate so exercising the office of governor, the speaker of the house of representatives shall exercise the office until a president of the senate shall have been chosen; and when the office of governor, president of the senate, and speaker of the house shall become vacant, in the recess of the senate, the person acting as secretary of state for the time being shall, by proclamation, convene the senate, that a president may be chosen to exercise the office of governor. And whenever either the president of the senate or speaker of the house shall so exercise said office, he shall receive only the compensation of governor; but his *duties* as president or speaker shall be suspended; and the senate or house shall fill the vacancy until his duties as governor shall cease."

THE CONSTITUTIONAL STATUS OF THE OFFICE OF A DELAWARE SENATOR WHO HAS SUCCEEDED TO THE OFFICE OF GOVERNOR IS ESSENTIALLY THE SAME AS THAT OF THE OFFICE OF A SENATOR OR REPRESENTATIVE IN CONGRESS DURING THE INTERVAL BETWEEN THE 4TH OF MARCH, THE COMMENCEMENT OF HIS TERM, AND THE DATE OF HIS RESIGNATION OF ANOTHER FEDERAL OFFICE HELD BY HIM AT THE COMMENCEMENT OF HIS TERM.

The constitutional status of the office of a Delaware senator who has succeeded to the office of governor would seem to be essentially the same as that of the office of a Senator or Representative in Congress during the interval between the 4th of March,

the commencement of his term, and the date of his resignation of another Federal office held by him at the commencement of his term. In each case the office is in *abeyance*, whether it be characterized as a *temporary vacancy* or as a *suspension*. If in one case the office of State senator remains in abeyance during the State senator's continuance in the office of governor, so in the other case does the office of Federal Senator or Representative remain in abeyance during the Federal Senator's or Representative's continuance in the prior Federal office.

It is true that in one case the prior office has been actually exercised while in the other it has not. But this difference would not seem to affect the principle involved, for the following reasons:

First. The constitutions of Delaware and the United States are, on this point, substantially identical. The words of the Delaware constitution are—

"No * * * person holding any office under * * * this State shall, during his continuance * * * in office, be a senator or representative."

The following is the corresponding clause of the Federal Constitution:

"No person holding any office under the United States shall be a member of either House during his continuance in office."

Second, the seat in the Delaware senate which had been occupied by the governor must, during his incumbency of the latter office, be either (1) *subject to occupation*, or (2) *absolutely vacant*, or (3) *in abeyance*. There is no other possible status of the senatorial office from which the speaker of the senate is transferred to the office of governor. So also the seat of the Federal Senator or Representative must, during the interval between the 4th of March and his resignation of his other office, be either (1) *subject to occupation*, or (2) *absolutely vacant*, or (3) *in abeyance*. If the office of the State senator is subject to occupation by the governor, while he is governor, so also is the office of Senator or Representative in Congress subject to occupation by the holder of another Federal office while he holds such office. If the office of Federal Senator or Representative becomes absolutely and permanently vacant so also does the office of State senator become absolutely vacant. If the office of the Federal Senator or Representative is in *abeyance*, and the right to exercise it *suspended*, so also is the office of the State senator in *abeyance* and the right to exercise it *suspended*.

The law provides for the payment of the salaries of the Federal Representatives from the commencement of their terms on the 4th of March. This means that they hold their office from that date, provided they hold no other Federal offices. But they are not sworn and do not exercise their office until Congress meets after the lapse of eight months. If they hold other Federal offices on or after March 4, their office of Representative is not absolutely vacated, but is only placed *in abeyance*. It is then in abeyance for precisely the same reason for which the office of State senator is in abeyance when he exercises the office of governor. In each case the office is in abeyance because of the temporary exercise of another office. The Federal Representative may not be sworn until the expiration of eight months after his term begins. But the oath does not confer the office. It is not a prerequisite to the tenure of the office. It is only a prerequisite to the exercise of the office.

The decisions of the Senate and House of Representatives of the United States, fixing the status of the office of Senator or Representative during the interval between the 4th of March and the resignation of another Federal office held on that day, will therefore be valuable authorities for the case now under consideration.

James H. Lane was chosen United States Senator by the Kansas legislature in April, 1861. On the 20th of June, 1861, he was appointed brigadier-general of volunteers by the President, and he accepted the office. On the 4th of July, 1861, he took his seat in the Senate, having previously resigned the office of brigadier-general. On the 8th of July, 1861, the governor of Kansas, assuming that Mr. Lane's acceptance of the office of brigadier-general had vacated his office of Senator, appointed Frederic P. Stanton to fill the vacancy. Mr. Stanton presented his credentials and claimed the seat, but the Senate awarded the seat to Mr. Lane. Numerous cases in the National House of Representatives are to the same effect and recognize the same principle.

NO QUESTION OF FACT IN THIS CASE UPON WHICH THE DELAWARE SENATE WAS CALLED UPON TO ACT.

In the case under consideration there is no question of fact upon which the Delaware senate could act or did act, and which action, although erroneous, would conclude the Senate of the United States; upon the contrary, the senate, assuming for the present it passed judgment on the qualifications of Watson, and taking the facts as they were and are, open, notorious, conceded by all, and disclosed as well by the journals of the senate, and in reference to which there can be no dispute, namely, that Senator and Speaker Watson was then governor, essayed to place him in a seat

in the senate which the constitution on these conceded facts declares to be *not subject to occupation*, any more than would be a *tenth* seat in the senate when the constitution declares the senate shall consist of but *nine* members. Hence this is such a judgment, it is believed, as is *not* binding on the United States Senate. The Senate is not concluded by such a judgment any more than it would be concluded by a judgment which on its face disclosed the fact that the senate of the State of Delaware had on the 9th day of May, 1895, instead of admitting Governor Watson to a seat, had admitted President Cleveland or a *tenth* member to that body.

While it is the exclusive right of the senate of Delaware to determine, or, in the language of the Constitution, *judge*, as to the *qualifications* of a Senator, this does not include the right or power on the part of such senate to declare the *kind* or *number* of qualifications a person must have to entitle him to a seat in the Senate. These are *determined by the Constitution itself*. The senate can neither add to nor detract from them, can neither increase, reduce, nor modify their *number* or *character*. What the senate *can* do, what it has a *constitutional right* to do, is to *judge* whether a *particular person* is possessed of the *qualifications* which the *Constitution and the statutes have prescribed*. Hence it is if the Constitution declare that a certain person for any reason is ineligible to a seat in the Senate, and the judgment of the senate discloses on its face this fact of constitutional ineligibility, and the senate thus admits to a seat a person whom the Constitution declares is debarred, then such judgment, however formal or solemn, it is submitted, does *not* conclude the Senate of the United States.

As bearing upon and in support of this view, your committee attract attention to the following authorities:

AUTHORITIES.

In Prouty *v.* Stover (11 Kans., 235) the validity of the election of a State printer by a joint assembly of the Kansas legislature was assailed. The question arose whether the action of the State senate, admitting and retaining certain senators, was made conclusive of their right to sit in the senate and vote in the joint assembly by the constitutional provision which made each house "the judge of the elections, returns, and qualifications of its own members." This action of the senate practically construed the law of Kansas to recognize certain seats in the senate as subject to occupation. It was claimed that this was conclusive on the courts. But the court held that the power of the senate to judge of the elections, returns, and qualifications of its own members did not include the power to conclusively construe the law to recognize the seats as subject to occupation, or to admit or retain the occupants of those seats. Judge Brewer, now an associate justice of the Supreme Court of the United States, delivering the opinion of the court, said:

"Defendants claim that this court can not look beyond the action of the house to inquire whether persons, admitted as members, were legally entitled to seats. Article 2, section 8, declares that each house "shall be judge of the elections, returns, and qualifications of its own members." Its determination is not the subject of repeal or review. It is final and concludes everyone. But what is included in this power? Does the power to judge of the qualifications of its members *include the power to increase such membership? Can it enlarge its members without limit?* Is it like an academy of science, or a lodge of Odd Fellows, capable of *indefinite expansion? If* the *law* fixed the number of senators *at twenty-five*, could those *twenty-five admit twenty-five more, on pretense of judging "of the elections and qualifications of its own members," and thus create a senate of fifty members? If this power exists, how easily could a partisan majority secure to itself a two-thirds vote, by simply admitting new members.* To create a representative, or senatorial district requires a law—the consent of both houses. Neither house, by itself, can create a district and then admit someone to represent it. The district must exist before it can be represented."

In State *v.* Frances (26 Kans., 724) it was contended that a certain act of the legislature had failed to receive a constitutional majority of votes, and was, therefore, void.

The question was whether four of the representatives whose votes were decisive in favor of this act, in the house, were lawful members of that body. The *house of representatives*, by its action admitting and retaining these four members, *had construed the law and constitution to recognize their seats as subject to occupation at the time.* The court *overruled this construction*, held that there were no seats in the house for these four representatives, and declared the act in question to be void. The court said:

"Therefore, whenever the house of representatives consists of more than one hundred and twenty-five members some of such members must be there illegally. Such was the case in 1879. The house of representatives, at that time, consisted of one hundred and twenty-nine members. Four of these members, to wit, the four from

Rooks, Rush, Harper and Kingman counties, who were not provided for by law, and who were the last members admitted to seats, were not entitled to their seats. And the act in controversy was passed only by the assistance of their votes. Except for their votes, or at least three of their votes, the act would not have received a constitutional majority of the votes of the members of the house; and, not counting their votes, the act did not receive a constitutional majority. Now, we do not think that their votes should be counted; and, therefore, we think the act in controversy must be held as not having passed the house of representatives, and as void."

In Yard *v.* Meeser (44 Penn. St., 341) the common council of Philadelphia, which was invested with the power to judge of the elections, returns, and qualifications of its members, had construed the law to recognize two seats as subject to occupation by representatives of the Fifth Ward, and had admitted a second member from that ward. The court, in an action to restrain the payment of the salary of the second councilman from this ward, overruled the construction given to the law by the common council, held that the law did not recognize the second seat, and declared that its occupant was not a lawful member of the common council. The court said:

"This court has no authority to judge whether the election was regulary conducted or not, for that duty is assigned by law to the councils. Our duty must be confined to the decision of the question whether there was an office or vacancy to be filled."

Judge Cooley, in his Constitutional Limitations, pages 52–55, says:

"It follows, therefore, that every Department of the Government, and every official of every Department, may, at any time when a duty is to be performed, be required to pass upon a question of constitutional construction. Sometimes the case will be such that the decision, when made, must, from the very nature of things, be conclusive and subject to no repeal or review, however erroneous it may be, in the opinion of other Departments or of other officers; but, in other cases, the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by the Constitution, a particular question is plainly addressed to the discretion of some one Department or officer, so that the interference of any other Department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the Constitution has confided the decision would be impertinent and intrusive. * * * *But there are cases in which the question of construction is equally addressed to two or more Departments of the Government*, and it then becomes important to know whether the decision by one is binding upon the others, or whether each is to act upon its own judgment. * * * But setting aside now those cases to which we have referred, when from the nature of things, and perhaps from explicit terms of the Constitution, the judgment of the Department or officer acting must be final, we shall find *the general rule to be that, whenever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and, as the court must finally settle the particular controversy, so also will they finally determine the question of constitutional law.*"

This is a case, therefore, if there can be said to be any question open to construction in which, in the language of Judge Cooley, "the question of construction is *equally addressed to two or more departments of the Government.*" It is in all respects similar in principle to that class of cases referred to by this eminent jurist wherein action is taken which may become the *subject of a suit or proceeding in court.* Any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and the court must finally settle the particular controversy; so also will they determine the question of constitutional law. Here the Senate of the United States being called to *act judicially* under the constitutional grant authorizing it to judge of the elections and qualifications of its members—and this necessarily involves a construction of the Delaware constitution—hence, it is *not* bound, it is respectfully submitted, by any judgment of the Delaware senate on that subject.

If, as a matter of constitutional law, the office of senator and speaker of the senate held by Watson became absolutely vacant when he succeeded to the executive office, any judgment of the State senate seeking to clothe him with power to hold or exercise the office of State senator would be a mere *brutem fulmen*, an act in all respects *ultra vires*, for the plain reason it would be a judgment assigning him a seat in the senate which, under the constitution, is not assignable or subject to occupation. Such an act upon the part of the Delaware senate would be something infinitely *more in scope and effect* than simply to *judge* of the *qualifications of* a person to a seat in the senate. It would be to declare a seat *subject to occupation* which the constitution declares shall *not* be occupied.

And this view is equally applicable to this case whether the office of senator becomes absolutely vacant on the speaker of the senate becoming governor, or whether the right to exercise the office of senator while exercising the office of governor is merely

held in abeyance and suspended. And any such judgment, it is respectfully submitted, is not binding on the Senate of the United States, and can not deprive that body under its power to judge of the qualifications of its members, of determining whether under the constitution of the State of Delaware the governor of that State can be permitted to hold or exercise the office of senator at the same time he holds and exercises the office of governor.

AT COMMON LAW THE SAME PERSON SHALL NOT HOLD OR EXERCISE SIMULTANEOUSLY INCOMPATIBLE OFFICES.

In support of our first proposition that it is a well-settled rule of the common law that the same person shall not exercise simultaneously incompatible offices, and, further, that the acceptance of an office incompatible with the one held is *ipso facto* a resignation of the other, we attract attention to the following authorities:

In the case of Milward *v.* Thatcher (2 T. R., 81) it was held that accepting the office of town clerk vacated the office of jurat of the corporation of Hastings, although the office of clerk was inferior to that of jurat, the jurats sitting as judges of a court of record; and the court, Mr. Justice Bulwer, in announcing the opinion said:

"Now, if the offices be incompatible, his being a jurat before is no objection to his election; and if they be incompatible, the election to the latter office is good, because the acceptance of the second vacates the first office. * * * The case of the King *v.* Sir W. Trelawney, so far as the question was entered into, is an authority. There the court did not distinguish between a superior and inferior officer; but Lord Mansfield expressly said that 'if the two officers were incompatible the acceptance of the latter would imply a surrender of the former.'"

Mr. Justice Bulwer further, in the opinion in that case, said:

"If two offices can not be held by the same person at the same time, the acceptance of the latter office vacates the former."

In the King *v.* Pateman (2 Durnf. and East, 777), Lord Chief Justice Kenyon said:

"If an alderman be also a magistrate, and the town clerk act ministerially under him, then, indeed, these two offices can not be held by the same person. Now, here is a question whether the town clerk's accounts are not allowed by the alderman; if they are, I think the two offices are incompatible, and this information should be for the purpose of trying that fact."

In The King *v.* Tizzard (9 B. and C., 418), Mr. Justice Bailey gives the following as one definition of incompatible offices:

"The two offices are incompatible when the holder can not *in every instance* discharge the duties of each."

And further says Mr. Justice Bailey:

"The acceptance of the second office therefore vacates the first. So a man shall lose his office if he accepts another office incompatible."

Can it be said that any man can *in every instance* discharge the duties of both governor and State senator, much less those of governor, senator, and speaker of the senate?

Chief Justice Appleton, in Stubbs *v.* Lee (64 Me., 195), decided in 1874, in discussing what constituted incompatible offices, and also the effect of the acceptance of an office incompatible with one already held, referred to the common law doctrine, and citing the foregoing English authorities, says:

"'The offices in question must be regarded as incompatible. I think,' remarks Baily, J., in The King *v.* Tizzard (9 B. and C., 418), 'that the two offices are incompatible *when the holder can not in every instance discharge the duties of each.* * * * The acceptance of the second office therefore *vacates the first.* * * * So a man shall lose his office if he accepts another office incompatible; as if one be under the control of the other; as if the remembrancer of the exchequer be made a baron of the exchequer.' (5 Com. Dig., tit. 'Officer' (K. 5.) The appointment of a person to a second office incompatible with the first is not absolutely void, but on his subsequently accepting the appointment and qualifying, the first office is *ipso facto* vacated. (The People *v.* Carrique, 2 Hill, 93.)

"A vacancy may arise in an office from an *implied resignation*, as by the incumbent's accepting an incompatible office (Van Orsdale *v.* Hazard, 3 Hill, 243). The acceptance of the office of constable of a town by a person holding at the time the office of justice of the peace is *of itself a surrender of the latter office* (Magie *v.* Stoddard, 25 Conn., 565)."

Mr. Justice Appleton, in further discussing this question in case *supra*, says:

"Where one has two incompatible offices, both can not be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance or to the uncertain and fluctuating whim of the officeholder to determine. The general rule, therefore, that the acceptance of and qualification for an office

incompatible with one then held is a resignation of the former is one certain and reliable as well as one indispensable for the protection of the public.

"The defendant having been appointed and sworn as a deputy sheriff must be regarded as having accepted that office. By that acceptance he surrendered the office of trial justice, a judicial office incompatible with that of a deputy sheriff. His judicial authority, therefore, as a trial justice was at an end."

Justice Cowen in discussing the question as to the effect of the acceptance of one office upon the other, in The People *v.* Carrique (2 Hill, 97), says:

"This is an absolute determination of the original office, and leaves no shadow of title to the possessor, so that neither quo warranto nor a motion is necessary before any other may be elected (*vide* Millcock on Municipal Corporations, 240, pl. 617; to the same point Lord Mansfield, in Rex *v.* Trelawney, 3 Burr., 1616; Butler, J., in Milward *v.* Thatcher, 2 T. R., 87)."

Also in Van Orsdall *v.* Hazard (3 Hill, 248), the court said:

"A vacancy sometimes arises from a mere *implied resignation* by accepting an office incompatible with that which is claimed to be vacated."

THE AMERICAN RULE IS THAT LEGISLATIVE AND EXECUTIVE OFFICES ARE INCOMPATIBLE.

Your committee recognize the doctrine as enunciated in the foregoing authorities as being the well-settled common law and American rule upon the subject of incompatible offices, both as to what constitutes incompatibility and as to the effect of the acceptance of an incompatible office in operating *ipso facto* a resignation of the former. A vacancy in such case is at once created, and it is not necessary there should be any legislative or judicial declaration to that effect. It is such a vacancy as may be filled at once by the proper appointing power. And your committee further hold that the American rule is that legislative and executive offices are incompatible; that this general rule, so far from being weakened, is strengthened and confirmed by the fact that in a number of instances, for *special reasons*, the same person, and sometimes the same legislative body, is, by specific constitutional or legislative provision, clothed partially with both legislative and executive powers.

John M. Clayton, a leading and influential member, as stated by counsel in their brief in opposition to Mr. Du Pont, of the constitutional convention of the State of Delaware of 1831, recognized and strongly urged recognition of this doctrine by that convention. He said:

"I have a high opinion of the Senators as men; but I object to the principle of conferring on them executive powers. It is highly important to keep as distinct as possible the legislative and executive departments. This principle is recognized in all our bills of rights. But here we should be blending legislative and executive powers."

THERE IS NO EXPRESS OR IMPLIED AUTHORITY IN THE DELAWARE CONSTITUTION FOR THE SIMULTANEOUS EXERCISE BY THE SAME PERSON OF THE OFFICES OF GOVERNOR AND STATE SENATOR.

There is no *express* or *implied* authority in the Delaware constitution for the simultaneous exercise by the same person of the offices of governor and senator. On the contrary, the constitution *expressly* inhibits such exercise of those two offices, and therefore, at the time Mr. Du Pont received 15 votes in the joint convention, Mr. Watson being then governor of the State, holding and exercising that executive office, was incapable of exercising the office of senator.

Section 12 of Article II of the Delaware constitution, among other things, provides as follows:

"SEC. 12. * * * No person concerned in any army or navy contracts, nor member of Congress, nor any person holding any office under this State or the United States, except the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers in the militia holding no disqualifying office shall, during his continuance in Congress, or in office, *be* a senator or representative."

Your committee regard this provision as *absolutely disqualifying the governor of the State of Delaware*, whether elected by the people or having succeeded to the office to fill a vacancy caused by the death of the governor, from *being* a senator, or from *exercising any of the functions of a senator*. The provision is clear and specific, open to no ambiguity in its declaration that no person *holding* any office under the State, or of the United States, with certain exceptions, which are stated, shall "during his continuance in such office *be* a senator or representative."

Mr. Watson was, on the 9th day of May, 1895, confessedly the governor of the

State of Delaware. He was therefore on that date *holding* an office *under the State of Delaware*. As the governor is not named in the exceptions, namely, "the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers in the militia holding no disqualifying office," he was therefore disqualified from *being a senator* in the senate of the State on that date. In other words, there was a place made vacant in the senate, either *absolutely*, or for and *during the time the speaker of the senate should continue to exercise the office of governor*, which, by *express constitutional provision*, he, the governor of the State, *was prohibited from filling*—a vacancy such as was open only to occupation, if at all, by a person elected by the qualified electors of Kent County.

But not only so. It is further provided, in section 5 of Article III of the Delaware constitution, as follows:

"SEC. 5. No member of Congress nor person holding office under the United States or this State shall exercise the office of governor."

What is the effect of this provision? Is it not clear, unambiguous, specific, to the effect, among other things, that no person holding any office under the State of Delaware shall exercise the office of governor; or, in other words, no senator (because a senator holds an office *under the State*) shall *be* governor or shall *exercise the office of governor?*

A senator under the constitution of Delaware may be and is by specific provision *eligible* to the office of governor, but once the office of governor is *accepted*, its *duties entered upon* by such senator, he unquestionably, in virtue of section 12 of Article II of the Delaware constitution, *ceases to be a senator*, either *absolutely* or by *suspension*.

He ceases to be a senator for two reasons:

(1) Because section 12, Article II, of the constitution declares that no person holding office under that State (and the governor holds office under the State) shall *be* a senator; and

(2) Because the moment he becomes governor he necessarily—the two offices being incompatible—ceases to be senator. Otherwise, moreover, under section 5 of Article III of the constitution, he can not, if he is a senator, *exercise the office of governor*.

There is no conflict or repugnance between these two clauses of the constitution of the State of Delaware, unless an unreasonable construction should be given to them. Should they be construed as to make one, a declaration that the senator who happens to be speaker of the senate when the governor dies shall thereupon become governor, and the other a declaration that no senator *shall ever become governor*, then there would be a repugnance and a gross incongruity. Such a construction therefore should not be given if they are susceptible of another construction more reasonable and which would harmonize the two provisions.

In the judgment of your committee the two clauses taken together mean simply this:

In the event of a vacancy in the office of governor, the speaker of the senate is *eligible* to become governor. He is not empowered to exercise the office of governor *ex officio*, but he is *eligible* to fill the office of governor. If he takes the oath and enters upon the duties of the office of governor, then he ceases to be senator, if not *absolutely*, by *suspension for such time as he shall exercise the office of governor*, because the constitution declares, in substance and effect, that inasmuch as he then holds the office of governor, that being an office under the State, he can no longer, at least not so long as he continues to exercise the office of governor, *be a senator*.

The constitution of Delaware, taken as a whole, maintains with great distinctness the lines of separation between the three great branches of government—legislative, executive, and judicial—and this upon the well-recognized principle in America that legislative, executive, and judicial offices are incompatible with each other, and are not to be *exercised* simultaneously by the same person. While in a few instances there is slight encroachment in one sphere of these branches upon another, there is no instance in which the constitution authorizes the same individual to exercise the power of governor and that of either judge or legislator simultaneously.

This general rule and requirement of the constitution of that State as keeping distinct and separate the three branches of government are but emphasized and strengthened by the exceptions provided for in the constitution, as, for instance, it is provided that in case of a tie vote in the election of a governor by the people the two houses of the legislature are by joint ballot to choose one of the candidates to be governor.

Again, contested elections of governor are to be determined by a joint committee of one-third of all the members of each branch of the legislature.

Again, each house of the legislature is made the judge of the elections, returns, and qualifications of its own members.

And still further, all impeachments are to be tried by the senate.

But still further, section 14 of Article III of the Delaware constitution provides, as we have seen, that—

"Upon any vacancy happening in the office of governor by his death, etc., * * * the speaker of the senate shall exercise the office *until a governor elected by the people shall be duly qualified.*"

There is nothing in this clause or any other clause of the constitution which declares affirmatively or by fair inference that the person thus exercising the office of governor shall continue to exercise the office of speaker or of senator.

SOME ADDITIONAL CITATIONS FROM THE DELAWARE CONSTITUTION SHOWING THE INCOMPATIBILITY OF THE OFFICES OF GOVERNOR AND STATE SENATOR.

For instance, Article VI, section 14, provides that—

"The governor may, for any reasonable cause, in his discretion, remove any of them (judges) on the address of two-thirds of all the members of each branch of the general assembly."

If the governor can be governor and senator at the same time, exercising *both offices simultaneously*, then he may be one of the senators making up the two-thirds of all the members of each branch of the general assembly to *address the governor*, in virtue of *which address alone* he as governor acquires jurisdiction to remove a judge.

Again, Article III, section 11, provides that the governor—

"Shall, from time to time, give to the general assembly information of affairs concerning the State, and recommend to their consideration such measures as he shall judge expedient."

It would be rather an anomaly in our American system of government to permit a governor to vote in favor of measures in the senate which he as governor deemed expedient and had recommended to the senate.

But still further, Article III, section 12, provides that the governor may—

"In case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding three months."

Hence it is, if the governor can also be senator at the same time, and exercise both offices simultaneously, he is clothed with power to create a disagreement between the two houses by his vote in the senate, *which fact alone* would give him jurisdiction as governor to adjourn the general assembly to such time as he should think proper.

Article III, section 1, provides as follows:

"The supreme executive powers of the State shall be vested in a governor."

While, therefore, the constitution designates the speaker of the senate as an *eligible person* to fill the office of governor, and as *the* person to fill it in the event of a vacancy, it is clear he can not and does not fill the office *as senator*, or because of the fact that he is *speaker of the senate*, for the reason that the supreme executive powers of the State are by the constitution vested in a *governor* and *not* in the *speaker of the senate*.

Again, it is provided in Article V, section 1, that—

"All impeachments shall be tried by the senate; and when sitting for that purpose the senators shall be upon oath or affirmation to do justice according to the evidence. No person shall be convicted without the concurrence of two-thirds of all the senators."

The governor, moreover, is, in virtue of this same article, *subject to impeachment* by the house of representatives. If Watson was governor on May 9, 1895, and is yet, *and this is conceded*, then he was and is liable to impeachment, and under the theory that he is still senator, and eligible as such to *exercise the functions of senator*, he would *sit in judgment on himself*, and by his vote might defeat a two-thirds vote in the senate and thus render a verdict of not guilty as impeached. Can such incompatibility in office receive the sanction of the Senate?

Article II, section 7, provides:

"Each house may * * * with the concurrence of two-thirds, expel a member."

While Article III, section 14, provides that—

"The governor shall not be removed from his office for inability, but with the concurrence of two-thirds of all the members of each branch of the legislature."

Here again, if permitted to exercise the office of senator while exercising the office of governor, he may by his vote in the senate defeat a two-thirds vote necessary to remove him as governor for disability.

It is also provided, in Article II, section 16, of the Delaware constitution, that—

"In case of vacancy in the office of State treasurer in the recess of the general assembly, either *through omission of the general assembly* to appoint, or by the death, removal out of the State, resignation, or inability of the State treasurer, * * * the governor shall fill the vacancy by appointment to continue until the next meeting of the general assembly."

It is obviously obnoxious to all sense of governmental propriety to permit a governor in such case to act as a legislator, and thus by his vote, and, what is infinitely more potent, by his *executive influence* in the senate, defeat the election of the head of the exchequer in the State, and thus enable him to appoint a man of his *sole* choice to the office.

Again, Article VII, section 1, provides that—

"Certain officers * * * may be removed * * * *on the address of both* houses of the legislature;"

While Article VI, section 14, provides that—

"The governor may for any reasonable cause in his discretion remove any of the judges *on the address of two-thirds of all the members* of each branch of the general assembly."

Here again the gross impropriety is made clearly apparent in recognizing a construction that will enable the governor of the State to exercise his vote and his influence as governor of the State in the State senate *in making up the two-thirds vote* that will enable him as governor to remove or appoint judges and a number of other officers of the State.

WHAT HAS BEEN THE USAGE, AND WHAT ARE THE PRECEDENTS.

While in the judgment of your committee there is no such uncertainty or ambiguity in the different provisions of the constitution as to require resort to usage or precedents in giving construction, it is well to consider just what the precedents and usage have been.

Since 1792 nine speakers of the senate and one speaker of the house of representatives have succeeded to the office of governor, pursuant to the provisions of section 14 of Article III of the Delaware constitutions of 1792 and 1831. Four of these were under the constitution of 1792 and six under the constitution of 1831—the present constitution.

In *not one of these ten cases cited* has any person who has succeeded to the governorship *in the last one hundred and four years* in virtue of this section 14, which, so far as this question is concerned, is substantially similar in the constitutions of 1792 and 1831, whether speaker of the senate or speaker of the house of representatives, *taken any part whatever during his continuance in the governor's office in the proceedings of the senate or of the house of representatives, with the single exception of the present governor of Delaware, Mr. Watson*, and whose act in thus breaking over the precedents of one hundred years' standing, has involved the people and the legislature of the State of Delaware, and the Senate of the United States in this controversy. During all this time the ten persons, including Governor Watson, thus exercising the office of governor have, during such time, drawn the governor's salary and have not drawn the salary of senator or member.

THE FACT THAT THE DELAWARE CONSTITUTION PROVIDES FOR THE ELECTION OF A SPEAKER *pro tempore* OF THE SENATE WHEN THE SPEAKER SUCCEEDS TO THE GOVERNORSHIP DOES NOT IMPLY THAT THE LATTER CONTINUES TO BE SPEAKER OF THE SENATE.

Counsel in opposition to the claim of Mr. Du Pont contend that the use of the words, "speaker *pro tempore*," in the clause of the Delaware constitution which provides "That either house whose speaker shall exercise the office of governor may choose a speaker *pro tempore*," carries with it the implication of the contemporaneous official existence of *another* speaker; and it is also contended that the use of the words, "*may choose*," in the latter part of such clause implies simply a *discretion in*, and not a *duty upon*, the part of the senate to elect a speaker *pro tempore* in such a case.

Your committee can not concede either of these propositions as the result of a proper legal construction of such provision, even if the provision stood alone, and still much more difficult would it be to consent to such a construction when considered, as the clause must be, in connection with other clauses of the constitution. And as bearing upon the latter proposition it may be properly said that inasmuch as the *public interests* are involved, it being unquestionably for the *public interest* that the senate should at *all times* have a presiding officer, and as it is plain to all that the governor of a State, if he would properly discharge the duties of executive, could not possibly, in the very nature of things, for *any part of the time*, much less *at all times*, be present and preside over the senate, it follows, under the well-settled rule of law, that the word "*may*," as used in that clause, should be construed as "*shall*."

"The rule is," said the court in Rex *v.* Inhabitants of Derby (Skinner, 370), and

in Rex et Regina *v.* Barlow (2 Salkeld, 609), "where a constitution or a statute directs the doing of a thing for the sake of justice or *the public good* the word '*may*' is the same as the word '*shall.*'"

This rule has been followed both in England and the United States without any respectable dissent.

A statute of Illinois reads as follows: "The board of supervisors *may*, if *deemed advisable*, levy a special tax," etc., and the Supreme Court of the United States, in construing this statute in the case of Supervisors *v.* The United States (4 Wall., 435), opinion by Mr. Justice Swayne, said:

"The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, where the *public interest* or *individual rights* call for its exercise, the language though *permissive in form* is in fact *peremptory.*"

In Steines *v.* Franklin Co. (48 Mo., 167), the court held that when a statute provides that the county court "*may*" submit the question to the voters, before incurring certain expenses, it must do so. In Mitchell *v.* Duncan (7 Flor., 13), it is held that "*may*" is to be construed "*shall*" where a statute directs the doing of a thing *necessary to the ends of justice.*

In People *v.* Brooklyn (22 Barb., 404), it is held that "*may*" will be construed "shall" where *the good sense of the entire enactment* requires it. In Mayor *v.* New York (3 Hill, 612), the Supreme Court said:

"Where a public body or officer has been clothed by statute with power to do an act which concerns *the public interest*, or the rights of third persons, the execution of the power may be insisted on as a *duty*, though the phraseology of the statute be *permissive* merely."

The theory that provision in a statute or constitution for the election of a speaker *pro tempore* implies the existence at the same time of *another* speaker is wholly dissipated by the precedents of the innumerable American instances of the election of a speaker *pro tempore* when there is no regular speaker. A speaker *pro tempore* is simply a speaker for the occasion—for the time being. There may or may not be another speaker in existence at the same time. A speaker *pro tempore* may be, and frequently is, chosen, and so designated and called when there is no other speaker. There is, therefore, no argument in opposition to the theory of this report to be drawn from the use in the provision quoted either of the words "*may choose*" or *pro tempore.*

To hold the same person could exercise and discharge the duties and functions of governor and State senator and speaker of the senate simultaneously would be to strike down ruthlessly the line that separates the executive and legislative branches of the government and to declare an union of these two branches in the same person. This could not be so under the well-recognized American rule, even in the absence of express prohibitory clauses; but in this case such prohibitory clauses exist, as we have shown.

The constitutional provision is not that no person holding any office under the State of Delaware shall be *elected* governor by the people, but that no person holding such office shall "*exercise the office of governor.*"

It is quite immaterial how he comes to be governor, whether by *election by the people* or by virtue of the *constitutional provision making the speaker of the senate eligible* in a certain contingency; in *either* case it is conceded he *is the governor of the State*, in every conceivable sense of the term, and hence it is clear he can not, while exercising such office of governor, hold any other office under the State of Delaware. He therefore can not be a senator; he can not *exercise senatorial functions* while *exercising executive functions.*

THE DELAWARE COURT OF APPEALS.

The court of errors and appeals of the State of Delaware in the case of Rice *v.* Foster (4 Harrington, 485–487), drew with clearness and distinctness the line of separation between the three branches of the government established by the constitution of the State of Delaware, and among other things said:

"If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes shall terminate here in the same fatal effects which they produced in those republics. To guard against these dangers and the evil tendencies of a democracy, our republican Government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times is that none of the powers of sovereignty are exercised by the people, but all of them by separate, coordinate branches of government in whom those powers are vested by the Constitution. These coordinate branches are intended to operate as balances, checks, and restraints, not only upon each other, but upon the people themselves; to guard them against their own rash-

ness, precipitancy, and misguided zeal, and to protect the minority against the injustice of the majority. * * *

"The legislative, executive, and judicial powers compose the sovereign power of a State. The people of the State of Delaware have vested the legislative power in a general assembly, consisting of a senate and house of representatives; the supreme executive powers of the State in a governor; and the judicial power in the several courts mentioned in the sixth article. The sovereign power, therefore, of this State resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people can not resume or exercise any portion of it. To do so would be an infraction of the constitution, and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. It is equally clear that neither the legislative, executive, nor judicial department, separately, nor all combined, can devolve on the people the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so would be usurpation. The department arrogating it would elevate itself above the constitution, overturn the foundation on which its own foundation rests, demolish the whole frame and texture of our republican form of government, and prostrate everything to the worst species of tyranny and despotism, the ever-varying will of an irresponsible multitude."

IT IS CONCEDED WATSON WAS GOVERNOR OF THE STATE OF DELAWARE MAY 9, 1895, AND HAD BEEN SINCE APRIL 9, 1895, IN THE FULL SENSE OF THAT TERM.

It is not denied but *conceded by counsel*, in opposition to the claim of Mr. Du Pont, that William T. Watson was, on the 9th day of May, 1895, and had been since April 9, 1895, *governor of the State*. In their able and elaborate brief filed in the case (p. 30), in a reference to certain statements in the brief of counsel for Mr. Du Pont, we find the following:

"Thus counsel devote thirty pages of their brief (pp. 34–63) to a demonstration of the fact that the speaker of the senate, in case of a vacancy in the office of governor, becomes governor of the State. The matter counsel present on this head attests their industry and may interest the curious, *but it supports a proposition which we do not contest.*"

It is conceded, therefore, by those opposing the claim of Mr. Du Pont, that Mr. Watson, on his inauguration as governor, *became the governor of the State*. He was not merely to exercise the office of governor *ex officio*. Not merely to *act as governor* in the manner the President *pro tempore* of the United States Senate would have acted in the case of vacancies in the offices of President and Vice-President under the act of 1792. The distinction is this: If an office be *appendant*, as the expression is in 1 Leon, 321, to another office, the determination of the first office will determine the second. This is where a person holding any office is *ex officio* entitled to perform the functions of some other office, as was the case perhaps of President *pro tempore* of the United States Senate under the act of 1792. In such case the right to exercise the functions of the second office ceases upon the determination of the office held in virtue of which he exercises such *ex officio* functions of the second office.

If however, the nomination or appointment to an office, as it is in the case under consideration by *descriptio personam*, of one who holds another office by the title of which he is described, and who, on a contingency, is to enter and fill another office, he answering the description at the time the contingency arises, designates him as the person who is to fill the office, and when, as thus designated, he enters into the office, he holds it in his *natural* and not in his *official* capacity. And hence in this case of Watson, even in the absence of any affirmative constitutional declaration, he would continue to hold the office of governor—if the term continued—*after his term of senator had expired*, his office of governor not being *appendant to that of senator*. But in this case the Delaware constitution, recognizing this principle, declares, in section 14, Article III, not that he shall exercise the office of governor *so long as his term of senator shall continue*, but "*until a governor elected by the people shall be duly qualified.*" (Chadwick *v.* Earhart, 11 Oregon, 394.)

GOVERNOR WATSON DID NOT RESUME THE CHAIR OF SPEAKER OF THE SENATE ABOUT 12 M., MAY 9, 1895, AFTER A CONTINUED ABSENCE OF A MONTH FROM DATE OF HIS INAUGURATION AS GOVERNOR, ON APRIL 9, 1895, AS THE RESULT OF A *sense of public duty* OR *believing he had any right to do so*, BUT AS AN AFTERTHOUGHT AND AS *the*

result of pressure from political associates and of a partisan conspiracy, AND FOR THE *sole* PURPOSE OF DEFEATING THE ELECTION OF A REPUBLICAN UNITED STATES SENATOR.

Senator John M. C. Moore, in his affidavit of January 14, 1896 (see appendix), states that Governor Watson said to him in the senate chamber on May 9, 1895, shortly before he resumed the speaker's chair:

"Mr. Moore, I want to talk with you. I believe you will tell me just as it is. Is Mr. Massey out of this thing?" (Mr. Massey was one of the Republican candidates being voted for for United States Senator.) Senator Moore states he said to him in reply: "Governor, we are not going to cast another ballot for Mr. Massey nor no other who has been balloted for except Henry A. Du Pont. He will be elected on first ballot in the joint session," to which the governor replied to me: 'If that be the case, I shall take my seat.' Against this I remonstrated, and said to him: 'Governor, I hope you will not do it; I think too much of you as a man for you to do it.' That was the last of our conversation. He made no reply to my remonstrance. He arose and went over to the desk of George Fisher Pierce, a senator and one of my colleagues from Sussex County, where I saw him take a seat near Senator Pierce."

Senator George Fisher Pierce in his affidavit filed herein, of date January 13, 1896 (see appendix), says:

"About ten minutes before the hour of noon, May 9, 1895, William T. Watson, governor of the State of Delaware, being in the chamber (the senate being presided over by William T. Records, its speaker), came and took a seat alongside of this deponent and said to him: "I am going into the joint assembly and vote for a Senator." This deponent said: "*You are going to do what?*" He answered: "I am going to preside over the joint assembly to-day and vote for a United States Senator." This deponent then said: "Do you think that is right?" Governor Watson answered: "*No, I do not, but my party has overruled me.*" This deponent answered: "Then, I suppose, there is nothing I can say now that would change your mind;" to which Watson replied, "No, my mind is fully made up."

J. S. Prettyman, jr., in his affidavit filed herein, dated January 14, 1896 (see appendix), after reciting that he met and walked with Governor Watson from the railroad station at Milford, Del., into the center of the town, a distance of about one-quarter of a mile, about 6.45 o'clock p. m., May 9, 1895, the day the Delaware legislature adjourned, says: "During this walk Governor Watson said to me that when he went to Dover on the morning of that day *he did not expect to preside as speaker of the senate, believing that he did not have a legal right to act as governor and senator.* After reaching Dover, in response to the *influence of party leaders, he reversed this decision and consented to enter the senate and claim his rights as speaker.* In doing this he said *he put aside his own judgment,* and acted upon the judgment of those whom he regarded as well qualified to advise." This witness further states in this affidavit that on the Friday following the above conversation he had another conversation with Governor Watson, when the latter, becoming somewhat excited, drew from his pocket a paper, and handed it to witness, saying, "Read this!" Deponent says: "I took the paper and read the writing through. It was an agreement between Robert J. Hanby, Newall Ball, Charles Moore, and John Robbins, members of the Delaware legislature, signed with their names, and to the effect that they would vote for J. Edward Addicks for United States Senator, and that they would *not* vote for anyone else, *even though no Senator should be elected.* As I passed the paper back to the governor, he said: 'Wouldn't you have acted as I did, under such circumstances?' I evaded his question by saying, 'Are the signatures genuine?' and he replied, 'Of course they are; look again;' and he passed the paper to me for the second time. I read it through again, and examined the signatures, remarking that I was not familiar with the autographs of these men, but that the names were in different handwritings. He said he was not familiar with the autographs of the men, but that he was sure the names were genuine. The governor also said *that this agreement was brought to him to induce him to take part in the last joint assembly of the legislature, and, influenced by it, through the advice of others, he consented to preside as speaker of that body, and did so preside on the day mentioned.*"

He further said that "the Republicans had every opportunity to elect a Senator, and had failed to do so, and of course he preferred that the Democratic party should have a representative in the United States Senate from Delaware, rather than the Republican party."

Frank Reedy, in his affidavit of date January 23, 1896, filed herein (see appendix), states that he had a similar conversation with Governor Watson on May 10, 1895, in which he showed him the same or a similar paper.

From the foregoing *uncontradicted* testimony it is clearly evident Governor Watson did not reenter the speaker's chair and the joint assembly May 9, 1895, *from any sense of public duty,* or in the *belief that he had any legal right to do so,* but rather in pur-

suance of a *partisan conspiracy* and for the *sole* purpose of defeating the election of a Republican to the United States Senate."

IT IS CONCEDED A CERTIFICATE OF DUPONT'S ELECTION FROM THE GOVERNOR OF DELAWARE IS NOT AN ESSENTIAL REQUISITE.

Mr. Du Pont's election is not certified by William T. Watson, then holding the office of governor of the State of Delaware, but is certified to by Henry H. McMullen, speaker of the house of representatives, and attested by Edgar T. Hastings, clerk of the house of representatives. (See Senate Ex. Doc. No. 9, first session Fifty-fourth Congress.)

It is conceded, however, and, in fact, in view of the precedents, could not well be contested by those opposing the claim of Mr. Du Pont to a seat in the Senate, that his title to such seat is not impaired by the fact that he fails to present a certificate of election from Mr. Watson, the then governor of the State, as evidence of his election, provided he received a majority of the legal votes cast in the joint assembly. (See argument in opposition to Mr. Du Pont's claim, p. 5.)

THE UNION OF EXECUTIVE AND LEGISLATIVE FUNCTIONS IS *absolutism* OR *despotism* ON THE ONE HAND AND *slavery* ON THE OTHER, WHETHER UNITED IN ONE MAN OR THE MANY.

Dr. Lieber, in his work on Civil Liberty and Self-Government, says:

"A principle and guaranty of liberty, so acknowledged and common with the Anglican people that few think of its magnitude, yet of really organic and fundamental importance, is the division of government into three distinct functions, or rather the keeping of these functions clearly apart.

"It is, as has been mentioned, one of the greatest political blessings of England that from a very early period her courts of justice were not occupied with 'administrative business,' for instance, the collection of taxes, and that her Parliament became the exclusive legislature, while the Parliaments of France united a judicial, legislative, and administrative character. The union of these functions is absolutism or despotism on the one hand and slavery on the other, no matter in whom they are united, whether in one despot or in many, or in the multitude, as in Athens after the time of Cleon the tanner. The English political philosophers have pointed out long ago the necessity of keeping the three powers separate in a 'constitutional' government. Those, however, who have no other definition of liberty than that it is equality, discard this division, except, indeed, so far as the mere convenience of transacting business would require." (Pages 154, 155.)

MR. WEBSTER'S VIEWS ON MAINTAINING CONSTITUTIONAL RESTRAINTS AND JUST DIVISIONS OF POLITICAL POWER.

Counsel for Mr. Du Pont, in their brief, quote the following statement from a speech of Mr. Webster in the Senate of the United States, May 7, 1834, on the "Presidential protest," which your committee deem worthy of consideration in connection with the questions involved in this case:

"The first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretense of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions.

"The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defenses, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages that are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is *our* liberty, if we will rightly understand and preserve it. Every free government is necessarily complicated, because

all governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches and have but one branch; if we will abolish jury trials and leave all to the judge; if we will then ordain that the legislator himself shall be that judge, and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all forms—a pure despotism. *But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and doubtless the continuance of regulated liberty depends on maintaining these boundaries.*" (Works of Daniel Webster, Vol. IV, p. 122.)

And still further:

"Mr. President, the contest for ages has been to rescue liberty from the grasp of executive power. Whoever has engaged in her sacred cause, from the days of the downfall of those great aristocracies which had stood between the king and the people to the time of our own independence, has struggled for the accomplishment of that single object. On the long list of the champions of human freedom there is not one name dimmed by the reproach of advocating the extension of executive authority; on the contrary, the uniform and steady purpose of all such champions has been to limit and restrain it. To this end the spirit of liberty, growing more and more enlightened and more and more vigorous from age to age, has been battering for centuries against the solid butments of the feudal system. To this end all that could be gained from the imprudence, snatched from the weakness, or wrung from the necessities of crowned heads has been carefully gathered up, secured, and hoarded, as the rich treasures, the very jewels of liberty.

"To this end popular and representative right has kept up its warfare against prerogative with various success; sometimes writing the history of a whole age in blood, sometimes witnessing the martyrdom of Sidneys and Russells, often baffled and repulsed, but still gaining on the whole, and holding what it gained with a grasp which nothing but the complete extinction of its own being could compel it to relinquish. At length the great conquest over executive power in the leading western states of Europe has been accomplished. The feudal system, like other stupendous fabrics of past ages, is known only by the rubbish which it has left behind it. Crowned heads have been compelled to submit to the restraints of law, and the *people*, with that intelligence and that spirit which make their voices resistless, have been able to say to prerogative, "Thus far shalt thou come, and no farther." I need hardly say, sir, that into the full enjoyment of all which Europe has reached only through such slow and painful steps we sprang at once by the Declaration of Independence and by the establishment of free representative governments; governments borrowing more or less from the models of other free states, but strengthened, secured, improved in their symmetry and deepened in their foundation by those great men of our own country whose names will be as familiar to future times as if they were written on the arch of the sky.

"Through all this history of the contest for liberty executive power has been regarded as a lion which must be caged. So far from being the object of enlightened popular trust, so far from being considered the natural protector of popular right, it has been dreaded, uniformly always dreaded, as the great source of its danger.

"And now, sir, who is he, so ignorant of the history of liberty, at home and abroad; who is he, yet dwelling in his contemplations among the principles and dogmas of the Middle Ages; who is he, from whose bosom all original infusion of American spirit has become so entirely evaporated and exhaled that he shall put into the mouth of the President of the United States the doctrine that the defence of liberty *naturally results to* executive power and is its peculiar duty? Who is he that, generous and confiding toward power where it is most dangerous, and jealous only of those who can restrain it; who is he that, reversing the order of the state and upheaving the base, would poise the pyramid of the political system upon its apex? Who is he that, overlooking with contempt the guardianship of the representatives of the people, and with equal contempt the higher guardianship of the people themselves; who is he that declares to us, through the President's lips, that the security for freedom rests in executive authority? Who is he that belies the blood and libels the fame of his own ancestors by declaring that *they*, with solemnity of form and force of manner, have invoked the executive power to come to the protection of liberty? Who is he that thus charges them with the insanity or the recklessness of putting the amb beneath the lion's paw? No, sir. No, sir. Our security is in our watchfulness of executive power. It was the constitution of this department which was infinitely the most difficult part in the great work of creating our present Government. To give to the executive department such power as should make it useful and yet not such as should render it dangerous; to make it efficient, independent, and strong, and yet to prevent it from sweeping away everything by its union of military and

civil authority; by the influence of patronage, and office, and favor; this, indeed, was difficult. They who had the work to do saw the difficulty, and we see it; and if we would maintain our system we shall act wisely to that end by preserving every restraint and every guard which the Constitution has provided. And when we and those who come after us have done all that we can do, and all that they can do, it will be well for us and for them if some popular executive, by the power of patronage and party, and the power, too, of that very popularity, shall not hereafter prove an overmatch for all other branches of the Government." (Works of Daniel Webster, Vol. IV, pp. 133, 134, 135.)

Montesquieu in his "Spirit of Laws," volume 1, page 152, says:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

CONCLUSIONS OF LAW AND FACT.

(1) It is a well-settled rule of the common law that the same person shall not exercise *simultaneously* two *incompatible offices;* and further, the acceptance of one is *ipso facto* a resignation of the other.

(2) Under the American system *executive* and *legislative* offices are *incompatible*, and the same person can not exercise both simultaneously in the absence of either *express* or *clearly implied* statutory or constitutional authority; and the acceptance of the second is *ipso facto* a resignation of the first.

(3) There is no *express* or *implied* authority in the constitution of the State of Delaware for the simultaneous exercise by the same person of the offices of governor and senator; on the contrary, such constitution *expressly* interdicts such exercise of those two offices.

(4) Whether or not the offices of State senator and speaker of the senate became *absolutely vacant* when Speaker Watson took the oath of office, was inaugurated governor of the State, and entered upon the exercise of that office, there can be no doubt, on a fair construction of the several constitutional provisions of the State of Delaware, that his right to *exercise the office of senator or speaker of the senate*, or any of the *functions connected therewith* while he continued to hold and exercise the office of governor, was *held in abeyance and absolutely suspended.*

(5) The theory that Mr. Watson can exercise the office of governor of the State and State senator *simultaneously*, involves innumerable constitutional repugnancies, perplexing difficulties, and endless absurdities; while the opposite theory reconciles and harmonizes all the provisions of the Delaware constitution relating to the subject under consideration.

(6) That Governor Watson's exercise of the office of senator in the joint assembly on the 9th day of May, 1895, and of the office of president of such joint assembly was illegal, and his vote therein for United States Senator a *nullity.*

In determining the above propositions, your committee reach the further following conclusions:

(7) In determining the question as to whether the Delaware senate on May 9, 1895, acted upon or *judged*, either *actually* or *constructively*, the qualifications of Governor Watson to a seat in the senate, the *journal entries* of the proceedings of the Delaware senate of that date are *conclusive* as to the number and names of senators present, the motions submitted, the votes cast, and of *all the proceedings had*, and *can not* be contradicted by *ex parte* affidavits.

(8) The right which undoubtedly belongs *exclusively* to the Delaware senate to *judge* of the elections, returns, and *qualifications* of members, does not vest in such senate any such *exclusive right* as would conclude the Senate of the United States to determine by construction whether the constitution of the State of Delaware does or does not recognize a certain seat in the senate as *subject to occupation;* nor does it include the power to admit members to seats *not recognized by the constitution of the State as subject to occupation*, or, if subject to occupation, to fill them in a *manner* or by *a person* which the State constitution forbids.

(9) Your committee, applying these rules, find as a matter of fact the Delaware

State senate never *judged* of the qualifications of Governor Watson to a seat in the senate, either on the 9th day of May, 1895, or at any other time subsequent to the date of his inauguration as governor.

(10) That on May 9, 1895, the date on which Mr. Du Pont claims to have been elected, the legislature of the State of Delaware consisted of but 29 members; there were in the joint assembly on that date but 29 members of such legislature entitled to seats in such joint assembly and entitled to be counted and vote therein. As Mr. Du Pont received 15 votes, being a majority of the whole number entitled to be cast in such joint assembly, and a majority of all the *legal* votes cast therein, he was *legally elected* Senator from the State of Delaware for the full term commencing March 4, 1895, and is entitled to be seated.

(11) The fact that such election is not certified by the governor of the State in pursuance of the statute on that subject, does not invalidate such election in any respect.

Your committee, therefore, report to the Senate the following resolution and recommend its adoption:

Resolved, That Henry A. Du Pont is entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895.

VIEWS OF THE MINORITY.

Mr. Turpie, from the Committee on Privileges and Elections, submitted the following views of the minority in the case of Henry A. Du Pont:

The legislature of the State of Delaware is composed of 30 members—9 senators and 21 representatives. The senators are elected for four years, the representatives for two years.

A regular biennial session of the general assembly of said State began, in pursuance of law, on the first Tuesday in January, 1895, upon which devolved the election of the United States Senator to fill a vacancy made by the expiry of the term of Hon. Anthony Higgins, upon which day aforesaid all the members of each house appeared, and both houses were duly organized for the transaction of business.

Among the members of the senate so appearing was the Hon. William T. Watson, who had been duly elected, at the general election held in November, 1892, a senator from the county of Kent, in said State, for the term of four years, who was duly sworn and admitted to a seat in the senate on the last day aforesaid, and was subsequently, on the same day, chosen speaker of the senate.

Afterwards, upon April 9, 1895, the legislature having been officially informed of the death of the Hon. Joshua H. Marvil, governor of Delaware, the speaker of the senate, upon whom devolved, under the constitution, the duty "to exercise the office of governor" until a governor should be elected by the people, was in open senate, and in the public session thereof, sworn to support the Constitution of the United States, of the State of Delaware, and to perform "the duties of the office of governor with fidelity."

On the same day, immediately thereafter, the senate elected the Hon. William T. Records, a senator from the county of Sussex, as speaker of the senate pro tempore, in accordance with the provision of the constitution of the State, "Each house whose speaker shall exercise the office of governor may choose a speaker pro tempore." The speaker pro tempore thus chosen presided while and whenever the speaker of the senate was absent during the remainder of the session.

The members of the two houses so organized met in joint convention on the second Tuesday after their organization, pursuant to the law of Congress July 25, 1866, to elect a Senator of the United States. Two ballots were taken on that day, and at the close of each the announcement was made by the speaker of the senate, who acted as president of the joint convention, and who continued so to act whenever he was present at the sessions of the same, "that no person having received a majority of all the votes cast for United States Senator, there was no election."

On each succeeding day of the session, except Sundays, the members of the two houses met in joint convention, voted for United States Senator, up to and including the 9th day of May, 1895, which was the last day of the session.

On this last day of the session 28 ballots were taken for United States Senator, and at the close of each ballot the same result of no election, for the same reason, was declared in the same words as those above quoted.

The last ballot cast for United States Senator, on the last day of the session aforesaid, is recorded as follows:

	Votes.
For J. Edward Addicks	4
For E. W. Tunnell	1
For H. A. Du Pont	15
For Ed. Ridgley	10

It shows that there were 30 votes cast, and of these votes Mr. Du Pont received 15, an equal number of votes were cast for other persons—for Mr. Addicks 4, for Mr. Tunnell 1, and for Mr. Ridgley 10.

Thereupon the speaker of the senate declared no person having received a majority of all the votes cast for United States Senator, there was no election, and the two houses adjourned sine die.

In this opinion, action, and decision of the joint convention, that there was no election, we concur. It is not conceived how 15 can be a majority of 30.

That a majority of all the members of the legislature is necessary to a choice when all are present and voting we think is clear, not only from the act of July 25, 1866, but from the language of the Constitution itself upon this subject, prescribing that "two Senators from each State shall be chosen by the legislature." Such a choice is made by preference and is only indicated by a number of votes greater than that cast for all or any others voted for.

OBJECTIONS TO THE VALIDITY OF THE ACTION AND VOTE OF THE SPEAKER OF THE SENATE.

The record shows that Hon. Mr. Watson, the speaker of the senate, appeared, qualified, and took his seat in the senate on the first day of the session, without protest or objection, and continued to act as a senator and as speaker of the senate; whenever he was present, up to the time of the final adjournment.

The action of the senate in allowing him to be qualified and seated as a senator from the county of Kent was in effect an adjudication of the most public and solemn character that he was a senator, a member of the senate, and entitled to act as such. Such adjudication remains unchanged. There are only three ways in which he could lose or be deprived of his right to vote or act as a senator, and, by consequence, of his right to vote and act as a member of the joint convention. One of these is the act of God—death; the second is by his own act—resignation; the third is by the action of the senate adjudging the vacation of his seat, either by ouster or expulsion, for such causes as the senate of the State of Delaware might adjudge sufficient to disqualify him as a senator. There has been neither death, resignation, nor adverse adjudication in his case, and he remains in all respects a senator, as fully qualified and as lawfully entitled to act as such as upon the day when he first appeared and was sworn as a senator.

It is claimed that when the exercise of the office of governor devolved upon him as speaker of the senate, that, ipso facto, he lost the office and rights of such senator. That these dual functions are incompatible.

We think it clear, from the language of the constitution of the State of Delaware, that these dual functions are expressly made compatible and competent by the terms of that instrument. We do not think incompatibility, in legal terms or effect, such as to oust a man from one office and to confer upon him another, is to be derived from general considerations resting in nubibus; but that such incompatibility must be plainly inferred from the text of the constitution or statutes of the State or Government to be affected thereby.

Besides this, nothing is more familiar to us in American legislation than the enactment of statutes in contravention of the common law. Statutes in aid of the common law are quite frequent, but we think that statutes in contravention thereof are more numerous.

It was formerly held at common law that one could not be a witness in any case where he had a pecuniary interest. The common law held that there was a sharp and neutral incompatibility, founded upon grounds of the highest public policy, between the two positions of a witness in a cause and an interested party therein. In direct contradiction to this principle, and in complete neutralization of its effects, statutes now provide that parties in suits, and all others, notwithstanding their interest therein, may testify as witnesses. So that the question is not what may be incompatible at common law, but what is the statute in any given case. The statute takes the place of the common law and abrogates it.

The constitution of the State of Delaware is a statute of the highest character, enacted by the people themselves.

It was entirely competent for the makers of that instrument, and for the people in its adoption, to abrogate any common law of incompatibility, if such existed, and to make it competent that the speaker of the senate should, notwithstanding any natural or common-law incompatibility, take upon himself for the time "the exercise of the office of governor," still retaining his office of senator and speaker. In any conceivable case the common law must yield to the statute—much more must it give way to a constitutional enactment.

The constitution of Delaware does not provide that the speaker of the senate, on the death of the governor, shall either be or become governor, but only that such speaker "shall exercise the office of governor." It does not provide that he shall, in such an event, cease to be speaker, or cease to be senator, or that a vacancy exists in either position; and we do not think that we can amend the constitution of a State by the process of an argument in a contested seat here.

Not only is no vacancy created in such instance by the devolution of "the exercise of the office of governor" upon the speaker of the senate, but the constitution of the State expressly provides that "each house, whose speaker shall exercise the office of governor, may choose a speaker pro tempore"—that is, a temporary speaker to preside in the room of the permanent speaker when he may be absent, thus plainly implying that there is no vacancy in the office of speaker, and that there is no vacancy in the office of senator or representative (as no one could be speaker except a member of one of the houses) by this devolution of the exercise of the office of governor.

In section 14 of the constitution, where it is provided that the speaker of the house "shall exercise the office of governor" if there be no speaker of the senate, the distinction between the speaker of either house exercising the office of governor, and the governor as such, is very clearly implied in the phrase, "until a governor elected by the people shall be duly qualified." And in the same section, afterwards, the person elected governor is distinguished from the temporary occupant exercising the office of governor by the recurrence three times of the phrase, "the person who exercises the office of governor." And when the contingency arises of a vacancy in the office of governor, and there be no other person who can exercise the office of governor within the provisions of the constitution, the general assembly shall proceed to elect "a person to exercise the office of governor until a governor elected by the people shall be qualified."

This person so chosen is not called governor, but a "person to exercise the office of governor."

And when, in the case of a contested election, someone is to be designated to perform gubernatorial duties, it is provided "that the speaker of the senate or the speaker of the house who may then be in the exercise of executive authority" shall continue therein until a determination of the contest. It is manifestly expressed that the person exercising the executive authority is not the governor, but that he is, and remains, and must continue to be speaker of the senate, or speaker of the house, notwithstanding the fact that the "exercise of the office of governor" may for the time being devolve upon him.

If this interpretation of the constitution of the State were at all doubtful, it is abundantly sustained by practical, contemporaneous, and continuous construction in the actual administration of the government of Delaware. Three persons, upon each of whom at different times devolved, under this clause, the exercise of the office of governor (John Sykes, Jacob Stout, and Caleb Rodney), speakers of the senate, who temporarily exercised the executive authority as such speakers, after they had exercised the office of governor ad interim, returned to the senate and served out the terms for which they had been elected as senators in the senate. No suggestion was made that they had vacated their office as senators or had become governors of the State of Delaware by reason of the temporary exercise of executive duties imposed upon them by section 14, article 3, of the constitution.

As to the provisions of section 2, article 12, of the constitution, and section 5 of article 3, we think there is no real conflict between them and the other provisions cited, as to the succession of the executive authority.

One of the main provisions in the constitution of Delaware, declared and provided for by three fundamental clauses in the instrument, is that in certain contingencies the speaker of the senate "shall exercise the office of governor" for the time being therein designated. To say that a provision that no senator shall be governor, or that no governor shall be senator at the same time is not in any conflict with the provisions for the temporary exercise of the executive authority by the speakers of either house.

Section 12 of article 2 and section 5 of article 3 evidently relate to the regular elective term of the offices therein named, and provide that such official terms of these positions shall not be held by the same person at the same time. They do not at all relate to casual vacancies in the executive office or to the constitutional means of supplying them. As these two sections contain no allusion to temporary vacancies, so they are not and can not be in conflict with the provisions of the instrument elsewhere appearing intended to provide for such contingencies.

Besides, we understand it to be well-settled law that the different clauses of a written instrument, even those of an ordinary contract, must be always construed so as to be consistent with each other. With such a grave public State paper as the

constitution of Delaware the rule is yet more imperative. We submit, therefore, that a proposed construction of this constitution which makes a direct and unavoidable conflict and contradiction between the clauses and sections of the same must be false and unfounded.

It is not to be presumed, and indeed it is in our view preposterous, that the people of that State should have placed in their organic law contradictory provisions on any subject.

WHO ARE LAWFUL JUDGES OF QUALIFICATIONS AND INCOMPATIBILITY.

The senate of the State of Delaware is made by law the judge of the elections, returns, and qualifications of its own members. In the case presented by Mr. Du Pont against the legality of the vote of Mr. Speaker Watson as a member of the joint convention, no question is made as to the election and return of Mr. Watson as a senator. The whole case rests upon the question of his qualifications. And even upon the subject of qualification, it is not denied that at the time he took his seat in the senate, he was fully and legally qualified to act and vote therein; but it is earnestly insisted that after he had taken his seat, he did and performed certain acts and duties which deprived him of his legal qualifications, and had rendered him unqualified, disqualified, and incompetent to vote or act as a member of the senate or of the joint convention.

This position of the claimant, Mr. Du Pont, raises the most serious question in this case, which is, as to who can lawfully decide and determine as to whether or not the acts of Mr. Speaker Watson referred to destroyed or suspended his qualifications as a senator, and by consequence as a member of the joint convention.

We think that the senate of the State of Delaware, whereof he was a member, is the sole tribunal which could either hear or determine lawfully these objections to the qualifications of Senator Watson.

It is charged that he was absent from the senate from the 9th day of April, 1895, until the day of the joint convention. If he were absent in discharge of any duties, executive or official by the law of Delaware, incompatible with the office of senator, or if his absence was contumacious and perverse, this might have constituted a cause for the judgment of the State senate for his ouster from the senate, his supension as a senator, or the vacation of his seat. If, whether present or absent, during his term, he had committed any act in violation of the laws and constitution of his State, or of the United States, this might have constituted a cause for the judgment of the State senate against him for his suspension or for his expulsion; the vacation of his seat and office, and for the issuing of a writ of election for the choice of his successor as senator from the county of Kent.

Causes for judgment of suspension, ouster, vacation, or expulsion against a sitting member or senator are not, however well founded, judgments. They have legally none of the force or effect of judgments or adjudications. There is no judgment or adjudication shown in the record or journal of the senate of Delaware on any of these objections to the qualifications of Mr. Watson as a member of that body.

If these charges or objections to his qualifications had been presented and heard in the State senate and judgment of suspension, ouster, and vacation had been rendered against him the case of Mr. Du Pont might have been fully made out. This Senate and court of the United States would have been bound thereby. If such a hearing had terminated in his favor the same result would have followed. The judgment of the State senate is a finality.

As there was no hearing or judgment in respect to such charges in the State senate the seat and office of Senator Watson remains undisturbed and unaffected thereby.

Because the State senate did not pass upon these charges or objections to the qualifications of their fellow-member we in this body are not by law in any way authorized to take jurisdiction. We have no authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State, or to revise or review their action or nonaction in the premises.

These considerations rest upon the great doctrine of the due distribution of powers, and of the distinctive provinces of independent powers, to which the claimant in this case has so strongly appealed, and which we now justly invoke as showing the error of his position.

The constitution of Delaware, like that of the other States, and of the United States, declares that "each house shall judge of the elections, returns, and qualifications of its own members."

Each House of Congress is a court in such cases for the judgment of its own members, but neither is a court or can be in any form a tribunal to judge of the qualifications of any member of the State legislature.

It would be just as reasonable and lawful that the State senate of Delaware should

adjudge and decide a contested seat in this body from that State as that we should decide here a contested seat in the senate there.

Especially is this the law when it is sought by a kind of ex post facto sentence to unseat by a judgment of the United States Senate a member of the State senate of Delaware after he has acted and voted there.

The Senate of the United States has often considered and decided the question as to which of two bodies claiming to be the legislature of a State is a lawful legislature entitled to hold a joint convention for the election of a United States Senator. The members of this body, sitting as a court, as we are now sitting, has frequently decided as to two contesting branches of a legislature which was the lawful senate or house of the general assembly, but the Senate has always declined to take jurisdiction or to adjudicate the title of any individual member of the State legislature who acted and voted as such in the joint convention.

In Sykes *v.* Spencer (page 611 Senate Election Cases) the following is the opinion of the majority:

"In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But, undoubtedly, the Senate must always inquire whether the body which pretended to elect the Senator was the legislature of the State or not, because a Senator can only be elected by the legislature of a State."

And the minority opinion in the same case, upon the same point, is as follows:

"Each house of the general assembly of Alabama is the exclusive judge of the election returns and qualifications of its members, and any inquiry into such question by the Senate of the United States would be as unwarranted by precedent as it would prove dangerous in practice.

"In a contest like the one now under consideration between two persons elected to the Senate by different bodies, each claiming to be the legislature of the State, the Senate may look into the constitution and laws of the State to ascertain which of the two bodies, if either, has been organized in conformity with their provisions, but it can not rightfully inquire into the election returns and qualifications of the members of either body.

"If the Senate could enter upon such inquiry, where would be the limitation upon its prerogatives? Could it not as legitimately inquire into the manner in which any election officer has performed the duties of his office, and even into the qualification of the electors who had voted for members of the State legislature?

"The undersigned would not restrict the Senate in its constitutional right to judge of the election returns and qualifications of its own members, but would regret its assumption of powers belonging exclusively to the two houses of the State legislature." (Sykes *v.* Spencer, p. 618.)

The case of Sykes against Spencer was heard and determined in 1873 and the principle thus decided has been constantly adhered to since that time. In that case no action or adjudication had taken place upon the contested cases of individual members subsequent to their admission, and the decision of the minority and majority upon this point rests upon the action and recognition of persons voting in the joint convention as members of either the senate or house, and consequently of the legislature.

In the case of David Turpie, decided in May, 1888, the same point is decided where there had been an adjudication by the Indiana State senate unseating one of its members and seating a contestant. This Senate decided that it would not revise such adjudication—that it would not inquire into the motives or purposes of the adjudication.

"The committee are of the opinion that the facts offered, if proved, will not warrant the Senate in declaring the sitting member not entitled to his seat. There can be no doubt that the body in question was the constitutional senate of Indiana.

"The journals of both houses of the legislature of the State have been submitted to us. It appears that the body was recognized as the senate by the governor and by the house of representatives. Statutes to which its constitutional assent was necessary were enacted and have become part of the law of the State.

"We also think that the judgment of the senate of Indiana as to the title of Messrs. Branahan and McDonald, the two members in question, to their seats is binding upon the Senate of the United States. This body is made by the Constitution the judge of the election, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceedings of the electors. But who sustain the characters of electors is to be determined by the legislative body of the State.

"We can not inquire into the motives which control its judgment. In rendering

that judgment, whether it shall give a hearing to parties, permit debate, examine witnesses, act upon evidence or without evidence, are matters within its own discretion. If that discretion were exercised in the manner charged by the remonstrance, a majority think that a public crime was committed, for which the offenders are responsible to the people of Indiana. But we can not try the question." (Case of David Turpie, p. 719.)

It is thus made very plain that the common law of the United States Senate is well settled. When the title of an individual member of the legislature who has once been seated has been determined by a subsequent adjudication of the house to which he belongs, such judgment will not be here disturbed or inquired into. And if there has been no such subsequent adjudication by the State senate or house, the title of the senator or representative rests upon the record of his original credentials and qualifications as a member, and will not here be questioned.

When a person claiming to be a member of the legislative body presents his credentials of election, and the record shows that he was thereupon admitted to a seat and sworn in as a member of the same, his title to the seat is absolute, unquestioned, and so continues until the house of which he is a member has adjudicated that he is not entitled to his seat, or that some other person is entitled thereto; such is the decision of the Senate in the following case:

"The majority of persons having a right to seats in the house of representatives have a right to organize that house and to transact all its lawful business, including the enactment of laws and the election of Senators. Persons who have the certificates of election have such right to seats. Every act of the assembly in which they take part, and to which their consent is necessary, has as absolute validity as if their title had been affirmed by an adjudication of the house itself. Their title is not, as is sometimes carelessly said, a prima facie title. It is an absolute title, continuing until the house itself has adjudicated that some other person be admitted to their place. This adjudication is only operative for the future, and has no retroactive effect whatever. When the house makes the inquiry on the merits, it may treat the credentials as prima facie evidence upon that question. But until the house tries the case the credential is conclusive to all the world." (Case of Clark and Maginnis *v.* Sanders and Power, p. 727.)

These decisions and judgment of the Senate are founded upon the principle that the States, by constitutional ordinances, have made each house of the State legislatures the judges of the elections and qualifications of their own members; it is ultra vires of our powers to revise, review, consider, or pass upon any questions of this character.

If the senate of Delaware had made any adjudication upon the objections alleged against the qualifications of Mr. Speaker Watson, we would have been bound by such adjudication, whether adverse or favorable to his title. If they made none, this does not give the United States Senate any authority to adjudge the case. The jurisdiction of the two houses of the State legislatures, by their own authority, is original and exclusive.

These constitutional enactments have such effect as not only to make the members of each house the judges in each case, but also to forbid that the members of any other tribunal shall be judges therein.

The evidence in this case shows that William T. Watson, on the first Tuesday in January, 1893, held credentials signed and certified by the sheriff of the county of Kent, in the State of Delaware, and by the inspectors of the elections in said county, showing that he had been duly elected senator from said county at the general election held in November, 1892, in said county, for the term of four years—that is, until November, 1896.

The record of the journal of the senate of the State of Delaware shows that on the first Tuesday of January, 1893, aforesaid, the day fixed by law for the meeting for the general assembly, William T. Watson, aforesaid, appeared and presented this certificate of election as the credentials of his seat and title as a senator.

The journal shows that these credentials were read and spread at large upon the record of that day, and that thereupon he, the said Watson, was sworn and admitted as a senator. Mr. Watson yet holds these credentials; the record thereof and the proceedings thereupon are yet remaining; and these credentials so remaining of record are, as is said in the case of Clark and Maginnis *v.* Sanders and Power, an absolute title, and they continue to be a full, complete, and absolute title until the senate of Delaware has for some cause pronounced and adjudged them to be no longer valid.

As the senate of the State of Delaware were lawfully, in the first instance, the exclusive judges of the validity of these credentials, so they continue to be the exclusive judges of their invalidity, if from any cause whatever disqualifications have occurred which might vitiate or destroy their legality. Any adjudication by the Senate of the United States upon such a subject is beyond our province. Such action

upon our part would be an intrusion, an interference, an unwarrantable usurpation of power vested in another body, ruinous to the autonomy of the States and disastrous to the character of this body whose members purport not to be chosen by their own action, but by that of the legislatures of the States.

There is not and has not been up to this day any adjudication by the senate of the State of Delaware adverse to the title of Mr. Watson as a member of that body. A careful search and inspection of the record and journal of the State senate shows no such adjudication. It could only be shown by the record.

The journal does show, as above recited, that he was admitted, sworn, and seated upon his aforesaid credentials. It shows that he was afterwards chosen speaker of the senate; that he continued to act as senator and as speaker whenever he was present, up to and including the last day of the session, when both houses adjourned sine die; that during the entire session, whenever he was present, he voted and acted as a senator in the joint convention of the two houses, and acted as presiding officer of such convention.

If the senate of the State of Delaware were to-day convened, and had adjudged in this case in hearing before them that Mr. Watson's seat was, for any or all of the causes alleged in the claim of Mr. Du Pont, vacant, and that he was no longer a a senator, such a judgment at this time could not affect in any manner his action or vote in the senate or joint convention while he acted as a senator.

No one would contend for a moment that such a judgment is retroactive. The acts of the senator de facto are as valid as if de jure. How much less could any adjudication in this body at this time legally invalidate his former vote, seat, or title as a senator.

We therefore conclude in this case—

First. That if there be any questions as to the lawful qualifications of William T. Watson to act and vote as a senator, and, by consequence, as a member of the joint convention, this is not the place, the time, or the tribunal to either hear or determine such questions.

Second. The senate of the State of Delaware had paramount and exclusive jurisdiction to adjudge such questions, and, whether they exercised such jurisdiction or not, the Senate of the United States has no jurisdiction in the premises.

Third. That Mr. Watson having acted and voted as a senator and as a member of the joint convention at the time when the vote was taken under which Mr. Du Pont claims his election to a seat in this body, he is to be counted as a member of the legislature of Delaware in joint convention assembled; that the whole number of members voting, being the whole number of members of both houses, was 30; that Mr. Du Pont did not receive a majority of this whole number; that we can not make his vote of 15 a majority of such whole number by subtracting therefrom the vote of one whose right and title to vote is not shown by the record to have been adjudged against by the body of which he acted as a member.

DAVID TURPIE.
JAMES L. PUGH.
GEO. GRAY.
JNO. M. PALMER.

(Cong. Rec., vol. 28, pp. 1828–1861.)

[The appendix to the report of the Committee on Privileges and Elections, consisting of a copy of the journal entries of the proceedings of the Delaware senate of dates April 9 and May 9, 1895, the certificate of the election of Mr. Du Pont signed by the speaker of the Delaware house of representatives and attested by the clerk of the house, and certain affidavits, are omitted. These documents may be found in Senate Report No. 289, Fifty-fourth Congress, first session, and also in the Congressional Record, vol 28, pp. 1828–1861.]

The resolution submitted to the Senate by the Committee on Privileges and Elections relative to the right of Mr. Du Pont to a seat in the Senate as a Senator from the State of Delaware was debated in the Senate March 4, 1896 (Congressional Record, vol. 28, pp. 2419, 2420, 2421–2438); March 5, 1896 (ibid., pp. 2477–2485); March 9, 1896 (ibid., pp. 2595–2601); March 10, 1896 (ibid., pp. 2639–2649); March 11, 1896 (ibid., pp. 2684–2691); March 12, 1896 (ibid., pp. 2728–2733); March 18, 1896 (ibid., pp. 2921–2931); March 20, 1896 (ibid., pp. 3004–3009); March 31, 1896 (ibid., pp. 3378–3392); April 1, 1896 (ibid., pp. 3423–3436); April 2, 1896 (ibid., pp. 3469–3479); April 13, 1896 (ibid., pp. 3898–3912); April 14, 1896 (ibid., pp. 3943–3945 and 3946–3954); April 15, 1896 (ibid., pp. 3981–3996); April 16, 1896 (ibid., pp. 4031–4039); May 4, 1896 (ibid., pp. 4768–4772); May 14, 1896 (ibid., pp. 5226–5236); May 15, 1896 (ibid., pp. 5286–5294).

[Extracts from remarks of Mr. Mitchell, of Oregon, in support of the resolution reported by him that Mr. Du Pont was entitled to a seat from the State of Delaware. Found in the proceedings of March 4, 1896, in the Congressional Record, vol. 28, pp. 2421, 2422, 2423, 2424, and 2425.]

"Mr. President:

* * * * * * *

"The legislature of the State of Delaware consists, when each seat is filled, of thirty members. The senate consists of nine members, the house of representatives of twenty-one members. There are in the State of Delaware but three counties in all, namely, Newcastle, Kent, and Sussex. Under the Delaware constitution each of these counties elects three senators and seven representatives to the general assembly of the State, thus constituting a membership in the senate of nine and in the house of twenty-one. The senators are elected for four years and the representatives for two years. A person to be a senator must have attained to the age of 27 years, while to be a representative to 24 years.

"The legislature of the State of Delaware is, by the constitution of that State, designated as a 'general assembly,' consisting of a senate and a house of representatives, and all legislative powers of the State are by such constitution vested in such general assembly.

"A regular biennial session of this general assembly, each of the thirty members of which had been previously duly elected, each having the necessary qualifications, convened at Dover, the capital of the State, on the first Tuesday in January, 1895. The duty of electing a United States Senator to succeed Senator Higgins, then a Senator from the State of Delaware, and whose term was to expire March 4, 1895, devolved upon this general assembly. This general assembly was duly organized on the day it met—that is, the second Tuesday of January, 1895—by the election of William T. Watson, a senator from the county of Kent, as speaker of the senate, and the election of Henry T. McMullen, a member from the county of Newcastle, as speaker of the house of representatives.

"On the second Tuesday after the organization, in accordance with the act of Congress of July 25, 1866, providing the manner of electing United States Senators, the members of the two houses met in joint assembly at 12 o'clock meridian for the purpose of electing a Senator of the United States. Two ballots were taken on that day without anyone having been chosen. On each succeeding day, except Sunday, the members of the two houses met in joint assembly and voted for United States Senator up to and including May 9, 1895, that being the last day of the session of that joint assembly. On the last day of the session, May 9, 1895, 28 separate ballots were taken in the joint assembly. On the last ballot there were 30 votes cast, there being in such joint assembly thirty persons, each claiming to be a member of either the senate or house of the Delaware general assembly, and each claiming the right to a seat in such joint assembly and the right to be included and counted and to vote therein for a United States Senator. On the last ballot four persons were voted for for United States Senator—that is to say, Henry A. Du Pont, Ed. Ridgley, J. Edward Addicks, and Ebe W. Tunnell—each of the persons present claiming to be members voting as follows, and each of the candidates receiving the following votes:

* * * * * * *

"The vote as above ascertained having been announced as follows:

	Votes.
H. A. Du Pont	15
Ed. Ridgley	10
J. Edward Addicks	4
Ebe W. Tunnell	1

"It will be observed there were in this joint assembly and voting on this last ballot 30 persons, each claiming a right to be there and vote as a member of the general assembly of the State of Delaware. It is a fact, as suggested by the Senator from Illinois [Mr. Palmer], that the vote was the same on each of the other 27 ballots taken that day.

"It is furthermore a fact that the claimant, Henry A. Du Pont, received but 15 votes. Consequently, if it is true that each of said 30 persons so present and voting had a right to be present and vote for a United States Senator, then the claimant, Mr. Du Pont, did not receive a majority of those present and voting, and in such event he could not be elected, as it is conceded it requires the votes of a majority of the members of the legislature, provided all who are members and who have a right to vote for Senator are present and voting. If, however, the fact is as it is contended by the committee, and by all those who favor the seating of Mr. Du Pont, that 1 of the 30 persons so present and voting was either not a member of the Delaware sen-

ate, or had no right to exercise the office, or any of the functions of senator, and consequently had no right to be in such joint assembly or to vote for Senator therein, then it follows there were but 29 legal votes cast on said last ballot, and not 30, and consequently, as it is conceded the claimant, Mr. Du Pont, received 15 votes, no one of which was the vote of a person so alleged to be unlawfully present and to have voted illegally, it follows he had a majority of all the legal votes cast, and was therefore duly elected.

"It is contended by the claimant, and the Committee on Privileges and Elections believe such contention to be well founded, that William T. Watson, one of the persons present in such joint assembly and voting for Senator, and at no time voting for Mr. Du Pont, but having on each ballot voted for Ed. Ridgley, and claiming the right to be there as a senator from the county of Kent and as speaker of the Delaware senate, was on said date the governor of the State of Delaware, and therefore, for that reason, he had not on that date, May 9, 1895, any right whatever, under the constitution of the State of Delaware and the law of the land, to exercise the office of State senator, or any of the functions pertaining thereto, and had not, therefore, any right to be present in such joint assembly, no right to vote or be counted therein, and that his presence and voting were illegal, wholly *ultra vires*, and his vote absolutely void.

* * * * * * *

"The constitution of the State of Delaware, section 14, Article III, provides, among other things, as follows:

"'SEC. 14. Upon any vacancy happening in the office of governor, by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office *until a governor elected by the people shall be duly qualified.* If there be no speaker of the senate, or upon a further vacancy happening in the office, by his death, removal, resignation, or inability, the speaker of the house of representatives shall exercise the office *until a governor elected by the people shall be duly qualified.* If the person elected governor shall die, or become disqualified before the commencement of his term of office, or shall refuse to take the same, the person *holding the office* shall continue to exercise it *until a governor shall be elected and duly qualified.*'

* * * * * * *

"This section furthermore states:

"'The governor shall not be removed from his office for inability but with the concurrence of two-thirds of all the members of each branch of the legislature.'

"Before proceeding to discuss the foregoing and the several other provisions of the constitution of the State of Delaware, it is well to inquire precisely what facts are conceded by all parties to this controversy. The following facts I believe are admitted, substantially at least, by those opposing the admission of Mr. Du Pont, including the minority of the Committee on Privileges and Elections:

"First. That William T. Watson, a duly elected and qualified senator from the county of Kent, was, on the first Tuesday of January, 1895, duly chosen speaker of the Delaware senate, entered on his duties as such speaker on that date, and continued to serve as such until April 9, 1895.

"Second. That on April 8, 1895, Joshua H. Marvil, then governor of the State of Delaware, died, thus creating a vacancy in the office of governor by death, which vacancy William T. Watson, speaker of the Delaware senate, became *eligible* to fill under the constitutional provisions I have quoted.

"Third. That on the day following the death of Governor Marvil, namely, on April 9, 1895, said William T. Watson, then speaker of the Delaware senate, was duly inaugurated governor of the State of Delaware, and the following oaths of office, required by the constitution to be administered to the governor of the State on his taking office, were administered to him. I quote as to the record of this ceremony from the journal entries of the Delaware senate of the proceedings therein April 9, 1895:

"'The Hon. James L. Wolcott then administered, in the presence of the members of the senate, to Hon. William Tharp Watson, speaker of the senate, the following oaths of office as governor, to wit:

"'"I, William T. Watson, do solemnly swear on the holy evangels of Almighty God that I will support the Constitution of the United States of America. So help me God."

"'"I, William T. Watson, do solemnly swear on the holy evangels of Almighty God that I will support the constitution of the State of Delaware. So help me God."

"'"I, William T. Watson, do solemnly swear on the holy evangels of Almighty God that I will perform the duties of the office of governor of the State of Delaware with fidelity. So help me God."'

"That immediately upon such oaths being administered, he, William T. Watson, entered upon the exercise of the office of governor, and has ever since continued in such office, and was on May 9, 1895, and still is, governor of the State of Delaware.

"Fourth. That from the date of his inauguration as governor and entering upon the exercise of such office, April 9, 1895, until about noon on May 9, 1895, a period of one month, said William T. Watson, governor of the State of Delaware, did not at any time resume or attempt to resume his seat in the Delaware senate or his seat as speaker of such senate.

"Fifth. That from April 9, 1895, when Speaker William T. Watson was inaugurated governor and entered upon the exercise of such office, his name was dropped from the roll call of the Delaware senate and was never once called thereafter, either as senator or speaker of the senate, on any roll call had on any call of the senate, or on any bill, resolution, or motion during the remainder of such session of the general assembly of the State of Delaware.

"Sixth. That on May 9, 1895, about the hour of 12 meridian, and but a few moments before the members of the general assembly of the State of Delaware were to meet, and did meet, in joint assembly to elect a Senator, William T. Watson, then governor of the State of Delaware, and then exercising such office and all its functions, entered the senate chamber, took the chair of the speaker of the senate, the speaker *pro tempore* having left the chair to enable him to do so, and proceeded with the members of the senate to the hall of the house of representatives, and there assumed to act, and did act, as chairman of the joint assembly, and assumed to vote, and did vote, therein for United States Senator on the several ballots cast on that day, casting his vote on each ballot for Edward Ridgley for United States Senator.

"Seventh. That immediately after the last ballot was taken for Senator in said joint assembly on May 9, 1895, and before said joint assembly dissolved, a protest against the right of Governor Watson to be in and to vote in such joint assembly was presented by Senator Samuel Alrichs, a member of such joint assembly, on behalf of himself and fourteen other members of such joint assembly, all of whom had voted for the claimant, Henry A. Du Pont.

"This challenge, protest, and demand, as it was at the time designated, is given as follows in the affidavit of Senator Samuel Alrichs, of date November 25, 1895.

* * * * * * *

"The declaration was then made by the speaker of the house that Henry A. Du Pont had been elected United States Senator from the State of Delaware for the full term commencing March 4, 1895, and the joint assembly then dissolved *sine die*.

"Eighth. That the election of the claimant, Henry A. Du Pont, as Senator from the State of Delaware, on May 9, 1895, for the full term commencing March 4, 1895, was certified to by Hon. Henry H. McMullen, speaker of the house of representatives of the State of Delaware, and attested by Edgar T. Hastings, clerk of such house of representatives, by a certificate, of which the following is a copy, which I ask may be inserted as a part of my remarks:

* * * * * * *

"Tenth. That since 1792 nine speakers of the senate and one speaker of the house of representatives of the general assembly of the State of Delaware have succeeded to the office of governor, pursuant to the provisions of section 14 of Article III of the Delaware constitutions of 1792 and 1831. Four of these were under the constitution of 1792, and six under the present constitution of the State of Delaware, that of 1831, and in not one of these ten cases has any person, speaker of the senate or speaker of the house, who has in the last one hundred and four years succeeded to the governorship in virtue of section 14 of Article III, which is the same in number, and in so far as this question is concerned substantially the same in the two constitutions of 1792 and 1831, taken any part whatever during his continuance in the office of governor in the proceedings of the senate or the house of representatives, nor attempted to do so, with the single exception of the attempt on the part of the present governor of Delaware, and during this time such persons have drawn the salary of governor and have not drawn the salary of senator or member.

* * * * * * *

"While the precise question involved in this case must, I concede, be determined by a construction of the several provisions of the Delaware constitution as throwing light on the subject, I propose to establish by authority these two propositions:

"First. That it is a well-settled rule of the common law that the same person shall not exercise simultaneously incompatible offices, and that under the common law the acceptance of an office incompatible with the one already held is *ipso facto* a resignation of the other; and

"Second. The office of governor and legislator are, under the American system, incompatible, and the dual functions of the two can not be, and are not, as a general

rule, exercised either in whole or in part simultaneously by the same person, and are never so exercised in the absence of either express or clearly implied constitutional or statutory authority, and the cases in which authority exists constitute the exception and not the rule.

* * * * * * *

"If, therefore, it can be shown by the opposition that there is in the constitution of the State of Delaware either an express or necessarily implied right guaranteed to the citizens of that State to hold and exercise simultaneously, or to exercise simultaneously, the two offices of governor and legislator, then, while I should hold such guaranty to be in conflict with the general letter and spirit of the rule on that subject under our American system, I would not be disposed to deny the simultaneous exercise of such right to the citizens of that State. I, however, not only most emphatically deny that any such right exists, either expressly or inferentially, under the constitution of the State of Delaware, but I confidently lay down the broad propositions, *first*, that the simultaneous exercise of the two offices—those of governor and State senator—is *directly, positively*, and *absolutely* prohibited in the State of Delaware by certain *express specific* provisions of the Delaware constitution.

* * * * * * *

"Section 12, Article II, of the Delaware constitution provides, among other things, as follows:

"'No person concerned in any army or navy contracts, nor member of Congress, nor any person *holding any office under this State* or the United States, except the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers in the militia, holding no disqualifying office, shall, *during his continuance in Congress or in office, be a senator or representative.*'

"While section 5 of Article III is as follows:

"'SEC. 5. No member of Congress, nor person holding any office under the United States or this State, *shall exercise the office of governor.*'

"What, then, is the fair, reasonable, and, in fact, only justifiable construction of this first clause? Reading only the words, but yet all the words, which relate to the question under consideration, it would read as follows:

"'No person *holding* any office under this State shall, during his continuance in office, *be a senator.*'

"This language, and it is the precise language of the constitution applicable, is express, plain, direct, certain, and entirely free from any ambiguity. It declares in direct and unambiguous phrase that no person *holding any office under the State of Delaware* shall *be a senator*. That is to say, no person exercising any office under the State of Delaware shall simultaneously exercise the office of State senator.

"There is no limitation on the language used. There is nothing in, about it, or connected with it that would indicate for one moment that it was only intended to apply to such governors as might be elected by the people, and that it should not apply to such who became governors to fill a vacancy in virtue of the constitutional provision I have quoted. The office of governor is an office under the State of Delaware within the meaning of this constitutional phrase. No one, it would seem, would deny that proposition. Nor will it be denied—on the contrary, it must be conceded—that it is directly admitted by counsel in opposition to the claims of Mr. Du Pont in their printed briefs, whether conceded or not by the minority of the committee, that Watson was, on the 9th day of May, 1895, *governor of the State of Delaware*, the governor in every sense of the term, exercising all the functions of the office, performing its every duty, exercising its every prerogative, entitled to its name and all its emoluments, neither cramped, nor limited, nor circumscribed by any condition, qualification, or limitation whatever—the governor just as much and for every purpose as though he had been elected by the people, instead of having succeeded to the office in virtue of the constitutional provision as speaker of the senate.

"If, therefore, he was and is governor, then, the governorship being *an office under the State of Delaware*, he was, on May 9, 1895, and still is *holding an office under the State*, and so holding such office, he can not, in the face of the first constitutional provision quoted, be a senator or exercise any of the functions of a senator during his continuance in the office of governor."

[Extracts from remarks of Mr. Turpie in opposition to the resolution reported from the Committee on Privileges and Elections that Mr. Du Pont was entitled to a seat from the State of Delaware. Found in the proceedings of March 9, 1896, in the Congressional Record, vol. 28, pp. 2595, 2596, and 2597.]

"Mr. President, the minority of the Committee on Privileges and Elections have taken the position, and will maintain it, that the claimant in this case, Henry A. Du Pont, was not chosen a member of this body, and is not entitled to a seat therein. The majority of the committee have the affirmative of the issue. They have the

burden of proof. The record in the case contained in the journal both of the senate and the house of the State of Delaware shows that on the day and date when it is claimed the petitioner was elected a United States Senator there were 30 members of the legislature of Delaware present in joint convention who took part therein; that there were 30 votes cast for United States Senator; that the claimant received 15 votes; that an equal number, 15 votes, were given to other gentlemen named at that time as candidates, and that there was no election. Such is the record.

* * * * * * *

"It is set up as a reason for maintaining the position of the majority that Mr William T. Watson, a senator of the State of Delaware from the county of Kent, and speaker of the senate, voted and acted in joint convention; and it is alleged against his right to do so that some time before—about a month before that time—the governor of the State of Delaware had died and that the exercise of the duties of the office had devolved upon said William T. Watson, speaker of the senate and a senator from the county of Kent. It is claimed by the majority that by reason of the devolution of the exercise of the office, by the death of the governor, upon this member of the State senate and speaker of the State senate, he ceased at that time either to be a senator or speaker of the senate, and was not therefore entitled to act and vote as a member of the joint assembly.

"The temporary provision for the exercise of executive authority is found in section 14, page 29, of the edition I have of the constitution of the State of Delaware. It reads as follows:

"'Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified. If there be no speaker of the senate, or upon a further vacancy happening in the office by his death, removal, resignation, or inability, the speaker of the house of representatives shall exercise the office until a governor elected by the people shall be duly qualified.'

"Now, sir, I think if any man of ordinary understanding or intelligence (and the constitutions of our States were made by such men and for such men) were asked upon whom devolved the exercise of the executive office of the State upon the death of the governor, he would answer upon the speaker of the senate. If he were asked how long the devolution lasts, he would say until a governor was elected by the people and qualified. If he were asked on the first day of this temporary period, the day the governor died, who is to exercise the executive office, he would answer, the speaker of the senate. If he were asked in the middle of such temporary interim who is to exercise or does exercise the office, he would answer, the speaker of the senate. And if at the very close, on the day before the new governor was inaugurated, such person were asked who was exercising the office of governor now, or who is entitled to exercise it, he would answer, the speaker of the senate.

"The future expression in this phrase 'shall exercise' demands special attention. The phrase is not only imperative, but it is a future imperative, looking beyond the present, and especially when you use the next word in the collocation, 'shall exercise until,' it will be seen that the whole scope of the temporary power—of the exercise of the power—of him who is speaker of the senate is in the future.

"Necessarily, then, the speaker must be and continue for that future period the officer as he is first designated. The speaker must remain speaker; he does remain speaker. It is because he is speaker and remains speaker that he exercises the executive authority, for if, as is contended for by the other side, at the very beginning of the exercise of the executive authority he ceases to be speaker, or is suspended from the office of speaker or the office of senator, how can the speaker be said to exercise the office for the future? How can it be said of him in any way he 'shall exercise;' the speaker must exercise *eo nomine* for that future period the office of governor. If he ceases to be speaker, if he is suspended from his functions as speaker, he would then be no longer the officer designated by the constitution *ipsissimis verbis*, he would no longer be the official designated in the words and letter of the constitution to make the temporary supply in the exercise of the executive office.

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"Now, Mr. President, I ask again with reference to this construction. The constitution in its text in this section 14 does not provide that the speaker of the senate or the speaker of the house in either instance shall be or become governor of the State. Neither officer is anywhere called in this section the governor of the State. Let us look now at the different clauses:

"'Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified.'

"He is there called the speaker of the senate who exercises the office; he is not called governor. He is distinguished in the most emphatic manner from governor, as I shall show in the future.

"The next clause refers to the speaker of the house, and in that case the officer designated is called speaker of the house of representatives exercising the office of governor.

"The next clause provides that—

"'If upon a vacancy happening in the office of governor there be no other person who can exercise said office within the provisions of the constitution the secretary of state shall exercise the same until the next meeting of the general assembly.'

"There is a solid sentence; no comma, no semicolon, no stop at all. The secretary of state shall exercise the office until the meeting of the general assembly. There is a plain limitation on the time he shall exercise the office. It is shorter than the other time—until the meeting of the general assembly. There is no limitation on how long he shall be secretary of state.

"But I ask, with reference to this single sentence in three lines, where the temporary power is conferred on the secretary of state, how could the secretary of state exercise it unless he was secretary of state, and where is there the slightest intimation, the most intangible hint, that he does not continue to be secretary of state while he is in the temporary exercise of the executive authority? But he is not called the governor—he is called the secretary of state who exercises the executive authority.

"Again, there is another contingency:

"'If upon a vacancy happening in the office of governor there be no other person who can exercise said office within the provisions of the constitution, the secretary of state shall exercise the same until the next meeting of the general assembly, who shall immediately proceed to elect, by joint ballot of both houses, a person to exercise the office until a governor elected by the people shall be duly qualified.'

"Here is another person designated to exercise the office by a very high method in a very high manner, selected in the same manner as the members of this body, by a joint ballot of the general assembly. Is he governor? Is he called and designated governor? No, sir; he is called a person to exercise the office. That is all he is called. He is not even named by inference the governor. How easy it would have been to have said, 'Who shall proceed to elect, by joint ballot of both houses, a person to exercise the office until his successor shall be elected by the people.' That is interpolation. Until a governor shall be elected by the people is the language of the constitution. Is not this person who exercises the office a governor? No; he is not. He is not called such. He is not in the gubernatorial succesion. He is not in the rank, order, and dignity of a governor. He is a person who exercises the office of governor by virtue of the choice of the joint assembly of the State of Delaware. Who, then, may be governor? The constitution is perfectly plain upon that subject:

"'The supreme executive powers of the State shall be vested in a governor. The governor shall be chosen by the citizens of the State.'

"Is it possible, then, that a governor of Delaware should be any other person than one chosen by the citizens of the State? Certainly not; he can not be. No person can be governor of Delaware unless he be chosen by the citizens of the State. Can not the senate choose a governor? No, sir. Can the house of representatives choose a governor? No, sir. Can both houses choose the governor? No, sir. Both houses put together can only elect 'a person to exercise the office of governor.'

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"I was very much surprised then by the statement of the learned Senator from Oregon with reference to what he claims to be a well-known maxim of common law, that the acceptance of one office, an incompatible office, vacates an office formerly held by the same man. I am not now questioning that law, though I might question some construction put upon it by the honorable Senator; I will not do that in passing, but the question I ask is, when did he accept the second office of governor? How could he accept it? A man may accept a thing that is offered to him. He may even accept or decline a thing that is offered to him. A man is elected by the citizens of Delaware governor of the State. That person can accept, that person can decline. Was Mr. Watson ever elected by the citizens of the State to the office of governor? No. The maxim of common law has nothing to do with the question in the case. There was indeed no second office, and no acceptance of any second office.

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"There has been a good deal of discussion about two general propositions in the constitution—one, section 12 of Article II, and another, section 5 of Article III. One provides that no person holding an office under the State shall be a senator. No

person holding any office under the State shall be a senator. I admit that the governor is an officer of the State, but I say that Watson never was governor and never could be governor. He may be sometime, but when he becomes governor it will be after he is chosen by the citizens of the State to that office, in the language of the constitution. He will never become governor before that time. He can not be governor before that time. No other power can choose him. No other constituency can elect him. The governor of Delaware is chosen by the people. Watson was holding no other office under the State then—none whatever. He is a senator, and continues to be a senator.

"I admit that the governor is an officer, but for sufficient reasons, already given, it is plain that Watson never was governor, and could not be governor. The right devolved upon him only to exercise the office. That is the extent of his authority: but this right was not an office, it was simply a right; it was not an office, it was simply the exercise of an office; it was a right appurtenant, not to Watson, nor to any person; it was a right appurtenant to the speakership, to the senatorship. It was a right inherent in no person, appertaining not to Mr. Watson; but it was a right inhering in and pertaining to the speakership of the senate of Delaware, and to a member of the senate of Delaware, by consequence."

[Extracts from remarks of Mr. Pritchard in support of the resolution that Mr. Du Pont was entitled to a seat in the Senate as a Senator from the State of Delaware. Found in the proceedings of March 12, 1896, in the Congressional Record, vol. 28, pp. 2729, 2730.]

"Mr. President:

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"Before entering upon a discussion of this case I beg leave to say that I have read and carefully considered the very able arguments presented by both sides, and that I have arrived at the conclusion that Mr. Du Pont did, on the 9th day of May, as aforesaid, receive a majority of the votes cast by those who legally constituted the joint assembly of the State of Delaware at that time. In forming this opinion I have been guided by what I conceive to be a proper construction of the constitution of the State of Delaware. I find on an examination of the constitution of that State that the second article of the constitution contains the following section:

"'SEC. 12. No person concerned in any Army or Navy contract, no member of Congress, nor any person holding any office under this State or of the United States, except the attorney-general, officers usually appointed by the courts of justice, respectively, attorneys at law, and officers of the militia holding no disqualifying office, shall, during his continuance in Congress or in office, be a senator or representative.'

"Here we have a positive declaration that no person, during his continuance in the office of governor of Delaware, shall be a senator. If this section means anything, it is that the person holding or exercising the office of governor of that State is absolutely disqualified from exercising the functions of senator. I take it that it will hardly be contended by those who claim that Mr. Du Pont was not legally elected, that had Governor Watson been elected to the position of governor and senator both at the same time, that in the face of this provision in the constitution he would have been permitted to hold the office of governor and at the same time be a senator or representative. I presume no one will contend that he could have qualified and exercised the functions of both offices at the same time. That being so, we should remember the well-settled principle of law that no one can be permitted to indirectly do that which he can not directly do. Those who take the position that Governor Watson on that occasion had the authority to vote as senator and exercise the functions of the office of senator are asking us to decide that the governor by indirection could do that which he could not directly do. This is such a flagrant and utter disregard of all the rules of construction with which I am acquainted that I am fully persuaded that such an argument will not influence members of this body in deciding a grave question like the one under consideration.

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"According to the well-settled rules of the common law, the valid acceptance of one office by the person already holding another and an incompatible office vacates the former as effectually as an actual surrender of it. In fact, it has always been regarded as an abdication, and therefore as a quasi resignation. I find among the decisions of the supreme court of my State several cases which unquestionably recognize the principle of the common law which forbade the same person from holding incompatible offices.

"I call attention to the case in the matter of J. G. Martin, decided in 62 North

Carolina, page 153, which expressly decides that the acceptance of one office by a person already holding an incompatible office vacates the former.

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"This is a case which occurred during the late war, when my distinguished predecessor was governor of our State. The question arose as to whether or not General Martin, who was then holding the office of adjutant-general, could at the same time occupy the office of brigadier-general of the Confederate States.

"An agreed case was submitted to the supreme court of North Carolina, and the supreme court of that State, presided over by Chief Justice Pearson, one of the most eminent common-law lawyers in the country, decided that in that case the very moment he accepted the office of brigadier-general in the Confederate States the office of adjutant-general became vacant, and that Governor Vance had the right to appoint a successor.

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"Mechem's treatise on the Law of Public Offices and Officers, section 420, in discussing the effect of accepting incompatible offices, says:

"'It is a well-settled rule of the common law that he who while occupying one office accepts another incompatible with the first, ipso facto absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.' (Millard *v.* Thatcher, 2 T. R., 81; Rex *v.* Patteson, 4 B. and Ad., 9; Rex *v.* Hughes, 5 B. and C., 886.)

"I understand the Senators on the other side to take the position that it must affirmatively appear to this body that there was an adjudication of the fact by the senate of the State of Delaware that the office was vacant before we can find that it was vacant. In this decision it is expressly decided to the contrary, that no further proceeding is necessary in order to vacate the first office held by the party who takes the second. I proceed with the opinion:

"'That the second office is inferior to the first does not affect the rule (Millard *v.* Thatcher, 2 T. R., 81), and even though the title to the second office fail, as where the election was void, the rule is still the same, nor can the officer then regain possession of his former office to which another has been appointed or elected.' (Rex *v.* Hughes, 5 B. and C., 886.)

"In this connection I wish to call attention to the case of Bryan *v.* Cattell (15 Iowa, 550), in which the court said:

"'Our opinion is that we are not confined to the statutory clauses or events in determining whether a vacancy exists. If a party accepts another office which, within the meaning of the law and cases, is incompatible with that which he holds, we have no doubt that the first one would become vacant. Thus, as is well said by the appellant, if the judge of a district court should accept a seat upon this bench, a vacancy would be created in the first office, and yet the statute does not, in terms, cover such a case. So if the auditor of state should take the office of treasurer, and many other cases that might be named.'

"Mr. President, I wish to read from a case which is reported in 45 Missouri, The State, ex rel. James W. Owens, petitioner, *v.* Dan M. Draper, State auditor, respondent, page 356. I will state before I read this opinion that they had a provision in their constitution in the State of Missouri that no one exercising or holding a State office shall at the same time hold an office in the general assembly. I am not going to read the opinion which relates to the construction of that section, but I am going to read the opinion bearing on the construction of the common-law doctrine vacating an office where an incompatible office is accepted. Among other things the court said:

"'The case is submitted on the pleadings, and they show that while Owens was a judge of the circuit court he was elected a representative to the legislature, qualified and took his seat, and performed the duties and functions of that office. There does not appear to have been any resignation of the judgeship, and the question is whether he could legally hold the two offices and receive the pay appertaining to both at the same time. There has never been any doubt about the principle'—

"Says Judge Wagner, who rendered the opinion—

"'so far as I am advised, that at common law, if a party accepts another office which is incompatible with the one he holds, the first one would become vacant.'

"'Suppose Owens'—

"That is, the petitioner—

"'instead of being elected to the legislature had been elected to a seat on this bench, and had qualified and entered on the discharge of its duties. It is perfectly clear to my mind that his seat on the circuit bench would have been thereby vacated.

"'Or if the auditor should be elected treasurer, or the attorney-general secretary of state, their acceptance of the latter offices would necessarily vacate their former

ones. Besides the common-law rule, the State government is divided into separate and distinct branches or departments, the officers of each having separate and independent functions to perform.'

"Just as they had in this case. There was the executive of the State of Delaware with his separate, distinct, and independent functions to perform; there was the State senate of Delaware with its separate, distinct, and independent functions to perform.

"'It was designed that they should be distinguished and divided by a line of demarkation, and that one should not trench upon the other.'

"This is a principle which our lawmakers have ever kept in view in the past, and one which we as such are compelled, under our oaths, to preserve and enforce whenever and wherever we come in contact with it in the discharge of our official duties."

[Extracts from remarks of Mr. Burrows in support of the resolution that Mr. Du Pont was entitled to a seat in the Senate as a Senator from the State of Delaware. Found in the proceedings of April 13, 1896, in the Congressional Record, vol. 28, pp. 3898, 3899, 3900, 3901, 3902, and 3903.]

"Mr. President:

* * * * * * *

"It is conceded that at a general election held in the State of Delaware in November, 1894, there were elected a governor for the term of four years, and a full membership of the Delaware legislature, consisting of 9 senators and 21 representatives; that in January, 1895, the governor elect, Mr. Marvil, was duly inducted into office and entered upon the performance of its duties; that both branches of the legislature, composed of members duly qualified, were legally organized, and that Senator Watson was elected speaker of the senate; that among the duties devolving upon such legislature was the election of a United States Senator for the full term of six years beginning March 4, 1895, and ending March 4, 1901; that the legislature entered upon the performance of this duty in conformity to law and continued therein until the day of final adjournment, May 9, 1895; and that on the last-named day the recorded vote in the joint assembly for United States Senator was 15 for Henry A. Du Pont and 15 against him, which did not give Mr. Du Pont a majority of the total recorded vote of 30, and that thereupon the legislature adjourned without day.

"It is further conceded that on the 8th day of April, 1895, Governor Marvil died; and that by the constitution of the State of Delaware it is provided that—

" 'Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified;'

"That on the following day, April 9, and in compliance with this constitutional mandate, the chancellor, in the presence of the senate, administered to Mr. Watson, the speaker of the senate (and I quote the journal entry), 'the oaths of office as governor,' by which, among other things, Watson obligated himself to 'perform the duties of the office of governor of the State of Delaware with fidelity.' It is further admitted that thereupon he entered upon the discharge of the duties of such office and that he has ever since exercised and is now performing the duties of chief executive of the State of Delaware. It is further admitted that from the 9th day of April, 1895, the day Mr. Watson took the oath as governor and entered upon the exercise of that office, until the 9th day of May, 1895, the day of the final vote for United States Senator in the joint assembly, Mr. Watson took no part in the business of the senate, either as speaker or senator, or in the proceedings of the joint assembly; and that the highest vote recorded in the joint assembly for United States Senator between the 9th of April and the 9th of May was 29, and that the declared vote of 30 for United States Senator in the joint assembly of May 9 was made possible only by the appearance of Mr. Watson, then exercising the office of governor, who on that day entered the senate and the joint assembly and cast his vote for United States Senator.

"It is further conceded that on the final vote Mr. Du Pont received 15 votes, and that of the 15 votes cast against him one of the number was the vote of Mr. Watson, and that without his vote Henry A. Du Pont would have had a majority over all, and would have been elected a Senator of the United States from the State of Delaware for the full term of six years.

* * * * * * *

"The primary and vital question, therefore, to be determined, simply stated, is this: Had Watson, while exercising the office of governor of the State of Delaware, the right to vote in the joint assembly of the legislature for United States Senator? Upon this point the Committee on Privileges and Elections were unable to agree, and this is one and the main issue presented to the Senate for its consideration and final judgment.

"The majority of the committee insist that when, on the 9th day of April, Senator Watson took the oath and entered upon the exercise of the office of governor of the State of Delaware, from that moment, and so long as he continued to exercise its functions, he became and continues to be governor; and that as such he had no constitutional or legal right to discharge the functions of senator, and that his attempt to do so in the joint assembly of May 9 was a usurpation and his vote for United States Senator a nullity.

"On the other hand it is contended that although Watson entered upon the exercise of the office of governor, yet, nevertheless, he was then a senator, and continues to hold the office of senator and speaker, and that there was no constitutional or legal restraint which prevented him from discharging the functions of both offices at the same time, and that, in fact, his exact legal, constitutional, and official status was and is senator and speaker exercising the office of governor.

* * * * * * *

"It is interesting to note in this connection that the position now taken by opposing Senators—that Watson did not in fact become governor when he entered upon the exercise of that office—is a complete reversal and abandonment of the position taken by counsel in their argument before the Committee on Privileges and Elections, wherein it was admitted that Mr. Watson did become and was in fact governor when he entered upon the exercise of that office. I quote from the reply of opposing counsel to the argument made in support of Du Pont's claim. They say:

"'Counsel devote thirty pages of their brief to a demonstration of the fact that the speaker of the senate, in case of a vacancy in the office of governor, becomes governor of the State. The matter counsel present on this head attests their industry and may interest the curious, but it supports a proposition which we do not contest.'

"It was conceded then that Watson became, and was in fact, governor the moment he entered upon the exercise of the functions of that office; and had that admission been made on the floor of the Senate it would have simplified, if not ended, this controversy. But opposing Senators were too astute to make this concession, knowing that under the constitution of the State of Delaware the office of governor and senator can not be held by the same person at the same time, and that as it was absolutely essential to the validity of Watson's vote for United States Senator that he should have been a lawful member of the State senate and of the joint assembly when he voted, it became equally imperative to deny that he was at that time governor, or that he was 'holding any office under the State' except that of senator.

"It becomes necessary, therefore, to inquire, as a matter of fact, whether Watson, while exercising the office of governor, was by that act "holding an office under the State" within the meaning of the constitution, and whether Senators can successfully cut their way through this constitutional inhibition by contending that such holding was not an office.

* * * * * * *

"And this brings us to an examination of that provision of the constitution of the State of Delaware under and in obedience to which Watson entered upon the exercise of the executive office.

"Article III, section 14, provides as follows:

* * * * * * *

"Plain as this proposition of the constitution is, yet it is the storm center around which all the legal acumen of the opposition spends its force. The contention is this, that the expression 'shall exercise the office' does not mean that the speaker of the senate shall become or is governor in fact, but that he is simply 'exercising the office'—moving it around as though it were a thing of life, to keep its blood from stagnating; to keep the office alive until such time as a real governor can be elected by the people and be duly qualified. Is this the common-sense or legal meaning of the expression 'exercising an office?' Webster defines the verb 'to exercise' as follows: 'To put in practice; to carry out in action; to perform the duties of; as, to exercise an office.'

"It is difficult to comprehend how one can exercise an office, perform all its functions, discharge all its duties, and yet not be an incumbent of such office. As was said in a well-adjudicated case, to which I shall have occasion to refer later, 'How can a person fill the office of governor without being governor? Given a public office and one who, duly empowered, discharges its duties, and we have an incumbent of that office.' Mechem, in his work on Public Offices and Officers, a recognized authority in the profession, says:

"'A public office is the right, authority, and duty created and conferred by law, by which, for a given period, an individual is vested with some portion of the sovereign function of the government, to be exercised by him for the benefit of the public.'

"'An office'—

"Says Blackstone—

"'is a right to exercise a private or public employment and to take the fees and emoluments thereunto belonging.'

"Judge Cooley, whom the Senator from Indiana justly eulogized as a great jurist, in Troop *v.* Langdon (40 Michigan), said:

"'An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it the performance of which will be the consideration for its being conferred upon a particular individual who, for the time being, will be the officer.'

"Judge Danforth, in Rowland *v.* Major (83 New York), said:

"'Whether we look in the direction of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office.'

"'But it is needless to multiply authorities.

* * * * * * *

"But in examining the question whether Watson, in entering upon the exercise of the office of governor, actually became an incumbent of the office, it is wholly unnecessary, in my judgment, to look beyond the plain terms of the constitution itself. That such became and is his official status is clearly demonstrable, I think, from the very language employed. Indeed any other interpretation would render the words used wholly inexplicable. Let us examine carefully, then, for a moment, that provision of the Delaware constitution under and by virtue of which Watson entered upon and is now exercising the office of governor. It is as follows:

"'Upon any vacancy happening in the office of governor by his death, removal, resignation, or inability, the speaker of the senate shall exercise the office until a governor elected by the people shall be duly qualified. If there be no speaker of the senate, or'—

"These words have been passed over lightly by our friends on the other side—

"'upon a further vacancy happening in the office by his death, removal, resignation, or inability, the speaker of the house of representatives shall exercise the office until a governor elected by the people shall be duly qualified.'

"I want to call attention to the words 'further vacancy happening in the office;' that is, happening in the office of governor. Here we have, in case of a vacancy happening in the office of governor, the line of succession definitely fixed. First the speaker of the senate, and after him the speaker of the house shall exercise the office. When does the office of governor devolve upon the speaker of the senate? In the language of the provision just quoted, 'upon any vacancy happening in the office of governor by his death, removal, resignation, or inability.' And when does the exercise of the office devolve upon the speaker of the house? In the language of the constitution, when there is 'no speaker of the senate, or upon a further vacancy,' not a continuing vacancy, 'happening in the office by his death, removal, resignation, or inability.'

* * * * * * *

"Here we have, it will be observed, two vacancies referred to—one caused by the death, removal, resignation, or inability of the governor elected by the people; and the other by the death, removal, resignation, or inability of the speaker of the senate, who may have succeeded to the exercise of the executive office. It will be observed that this second vacancy is spoken of as a 'further vacancy in the office.'

* * * * * * *

"Mark the words 'further vacancy.' This presupposes a prior vacancy, and not only that, but that such prior vacancy had been filled by somebody, otherwise the expression 'further vacancy' would be meaningless and absolutely senseless. There could be no further vacancy until that former vacancy had been supplied. There might be a continuing vacancy, but not a further vacancy. If Watson, when he entered upon the exercise of the office of governor, did not fill the vacancy caused by the death of Governor Marvil, and become the governor of the State, then Watson's death, resignation, or removal could not create a further vacancy in that office. It would continue the original vacancy. It is absurd to talk about a further vacancy in an office already vacant and continuing vacant. That is an impossibility. The vacancy already existing must first be filled before it is possible to create another or further vacancy in the same office. One vacancy happening in an office there can not be another or a further vacancy in that office until the prior vacancy has been filled. A tenant may vacate his landlord's house, but there can not be another—a further—vacancy in that house until it has been again occupied. The expression 'further vacancy' is

wholly inexplicable upon any other theory than that the original vacancy had been filled and, in this instance, by Governor Watson. This seems to me conclusive.

* * * * * * *

"But it is needless to grope through the uncertain and bewildering paths of legal speculation when we may confidently walk with steady and unfaltering step in a course illumined with the light of judicial learning. I propose to call attention to only two or three cases out of the many which seem to bear most directly upon the issue involved in this controversy. And first I will cite a case to which the Senator from Oregon [Mr. Mitchell] alluded in opening the debate, decided by the supreme court of the State of Maine, and reported in 7 Greenleaf, page 483. The constitution of the State of Maine contains the following provision (Article IV, section 14):

"'Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise'—

"Precisely like the constitution of Delaware—

"'the president of the senate shall exercise the office of governor until another governor shall be duly qualified.'

* * * * * * *

"On the 14th of January, 1830, Joshua Hall, a member of the Maine senate, was chosen president of that body. Soon afterwards the governor died, and Hall entered upon the exercise of the office of governor. Sixteen senators, including Hall, had been admitted and sworn. On the 26th of January the senate decided that there were four vacancies. Under the constitution these vacancies were to be filled by a joint assembly of the legislature. On the 1st of February the house of representatives sent a message to the senate requesting that body to meet the house in joint assembly for the election of senators to fill the vacancies. On the 2d of February, the senate being in session, a senator moved an adjournment, in order that the members of the senate might meet the members of the house of representatives in joint assembly. Hall, who was then exercising the office of governor, appeared in the senate and claimed the right to act as president. The vote was taken by yeas and nays. Hall voted in the negative. His vote being counted, the result was—yeas 8 and nays 8; and the motion was lost. On the 13th of February Jonathan G. Hunton, having in the meantime been elected governor, submitted certain questions to the supreme court in pursuance of a provision of the Maine constitution. One of these questions was the following:

"'2. Has the president of the senate, when the office of governor is vacant, and when he ought to be acting as governor, a right to preside and vote at the senate board?'

"The answer to this question was given by the chief justice, with the concurrence of the other justices, in the following words:

"'As to the second question, my opinion is that while the president of the senate, in virtue of his office as such, is clothed with the power of exercising the office of governor, he has no right to preside over the senate or to vote as a member of that body?'

"There is a provision of the Maine constitution which, to some extent, impairs, but by no means destroys, the value of this decision as an authority in the case now under consideration. It is to the effect that while the president of the senate exercises the office of governor his duties as president of the senate shall be suspended and a president pro tempore elected. Clearly Hall had no right to preside over the senate, for the constitutton expressly suspended his functions as president of that body while exercising the office of governor, and the court was certainly right in so holding. But the court went further and declared Hall had no right to vote in the senate.

* * * * * * *

"I have one other case, and only one, to which I desire to call attention, which I think is very important in this connection, and it is the case reported, as I have stated to the Senate, in II Oregon Reports, page 389, of Chadwick *v.* Earhart.

"By the constitution of the State of Oregon it is provided:

"'In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability both of the governor and secretary of state the president of the senate shall act as governor until the disability be removed or a governor elected.'

"This case arose in this way: The governor of the State was elected to the United States Senate and resigned the governorship, and thereupon, under the provision of the constitution just quoted, the secretary of state entered upon the performance of the duties of governor. The contention was whether the secretary of state was entitled to the salary of governor.

"Chief Justice Waldo, delivering the opinion of the court—and the case is stated in the opinion very fully—said:

"'Two questions are submitted in this case. The first and principal one is whether, when, under section 8 of Article V of the constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office.

* * * * * * *

"'Counsel for the respondent claims that, in the contingency provided for in said section 8, the duties of the office of governor become annexed to the office of secretary of state and are discharged as duties incident to the latter office; in other words, that the duties of the office, but not the office itself, devolve upon the secretary of state.

"'This position seems to require, first, either that the office of governor should continue vacant during the time the secretary discharges its duties, and that such duties be in some way performed by the secretary of state, as such, consistently with a condition of vacancy; or, second, that the office be filled, and yet he who fills it be in nowise governor, but continue to be merely secretary of state.'

"I think the case is on all fours with the one we have here.

"'In the first place it is not shown how an office can be vacant and yet there be a person—not the deputy or locum tenens of another—empowered by law to discharge the duties of the office, and who does in fact discharge them. It is not explained how in such a case the duties can be separated from the office so that he who discharges them does not become an incumbent of the office; and, in the second place, how a person can fill the office of governor without being governor.

"'It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given a public office and one who, duly empowered, discharges its duties, and we have an incumbent of that office. Such is the case here. The secretary of state, by force of the function cast upon him, becomes governor, and consequently entitled to the salary appertaining to the office.'

* * * * * * *

"It seems to me, in conclusion, in the light of reason and authority, that when Governor Marvil died and Watson entered upon the exercise of the office of governor, he became the executive of the State, and, by reason thereof, was prohibited by the constitution from discharging the duties of senator, and that his participation in the proceedings of the joint assembly of May 9, 1895, and vote therein for United States Senator were without authority of law and wholly void."

[Extracts from remarks of Mr. Gray in opposition to the resolution declaring that Mr. Du Pont was entitled to a seat in the Senate as a Senator from the State of Delaware. Found in the proceedings of April 15, 1896, in the Congressional Record, vol. 28, pp. 3982, 3983, 3984.]

"Mr. President, at the outset, it is proper to remark, in view of what has been said by all the Senators who have spoken in support of this claim, that all fair prepossessions founded upon the merits, founded upon the situation in the State of Delaware, are in favor of the propositions that I now support and which have been supported by the minority of the Committee on Privileges and Elections in opposition to the claim of Mr. Du Pont. If Mr. Du Pont shall be seated, he will be seated because a community in the State of Delaware has been disfranchised; he will be seated because one of the regularly elected members of the legislature, upon which the duty of electing a United States Senator devolved, has been deprived of the right to exercise the function of an elector, and thereby made a result possible which, if he had not been thus deprived, could not have been brought about. In other words, Mr. President, those who support the claim of Mr. Du Pont to a seat in this body can only hope to be successful by the accident of a vacancy in representation, which they argue has been brought about under the provisions of the constitution of Delaware.

"No one doubts that if every person elected to the legislature of the State of Delaware by the people of that State was present and voting when the election for United States Senator was being held Mr. Du Pont would not be seated. No one doubts that if Kent County, in the State of Delaware, had its full representation, which it had elected under the constitution, in that electoral body that Mr. Du Pont would not have been chosen. So that, if he should be admitted here and it should be declared that he was elected and entitled to a seat in this body, it would be by reason of this casus in the situation in the State of Delaware, and not by reason of the will of the people as expressed when they elected the members of the legislature.

* * * * * * *

"The parts of the constitution of the State of Delaware with which we are principally concerned in this discussion are those which I send to the desk and ask the Secretary to read for me. They are from article 2 which treats of legislative power.

* * * * * * *

"It is submitted, sir, that a careful and intelligent reading of these provisions would not leave a doubt of the following propositions:

"First. That the scheme of the Delaware constitution provides for a governor, to be elected by the people, in whom the supreme executive powers of the State shall be vested, who shall hold his office for a term of four years, and shall have certain prescribed qualifications, and not be eligible for a second time to the office.

"Second. That no other than one so elected for the term and with the qualifications prescribed by the constitution is a governor in the full constitutional sense.

"Third. That the framers of that constitution, regarding the vicissitudes of human life, have provided in case of the death of a governor so elected that the duties of the office shall be discharged by a person holding a place of high dignity in the legislative department of the government, to wit, the speaker of the senate, who is necessarily a senator elected to represent one of the counties of the State.

"Fourth. That the speaker, upon whom the constitution in such a contingency devolves the exercise of the office, exercises a temporary and ad interim function until a governor in the full constitutional sense can be elected by the people. That he does not exercise the office for a full term of four years or for the remainder of the term of the deceased governor, but only until an election of governor can be had. It may be only for a few weeks.

"Fifth. That the constitution in devolving this temporary ad interim function upon the speaker of the senate has not provided that thereby such speaker shall vacate the place of a senator from the county to which he was elected; and the whole scheme of the constitution negatives any implication of the intent to create such a vacancy.

"The speaker of the senate in such cases is a guardian of the gubernatorial office, like the civil law term in loco parentis—in loco gubernatoris—custos, like the great seal, being "in commission" when there is no chancellor.

"Those are cases which seem to me analogous and most like the provision that is made by the Delaware constitution for the contingency of the death of a governor elected by the people. All of these exercises of authority are well understood and well known as not conferring either the rank or the power or the substance of the office, but are stop-gaps. They are made for a temporary emergency, which it was thought best should be provided for in order that the machinery of government might not break down. It does not require any refined exegesis to explain that to the plain people of the State for whom constitutions are made. They can understand that one officer may, upon a temporary emergency, exercise the duties of another office without stepping into the shoes of that officer, or being or becoming the officer whose duties he is performing. It is a thing which belongs to the common affairs of everyday life, and when the constitution makers of Delaware framed this provision to meet a temporary emergency they knew they were speaking to people who would understand the machinery that had been provided to meet the case that was described.

It is inconceivable that intelligent men, engaged in the serious business of framing the organic law of a State, should have neglected to expressly declare and provide for a vacancy in the representation in the senate from a county, if one was intended or contemplated, when the speaker of the senate should exercise the office of governor upon the happening of a contingency for which they were then providing.

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Imagine that having done that, these framers of the organic law of Delaware, having devolved that duty upon the speaker of the senate of Delaware as a stop-gap, should have been confronted with the suggestion, "You have probably made a vacancy in the office or position or place of representative in the senate from Kent County, or Newcastle, or Sussex," and they said, as the Senator from Oregon declares in effect they said, "Oh, well, let it go; we will leave it open for construction when the occasion arises." Or suppose they had been told that "there was an American system, an American common law," that was so binding, that was so well understood, so all-pervasive that of its own force it would work a vacancy, as was said by the Senator from New Hampshire yesterday. If there was such a law, as claimed by the Senator from New Hampshire, we must presume that those framers of the constitution of Delaware understood it as well as he—that John M. Clayton, George Read, James Rogers, Willard Hall, and Charles Polk and their colleagues knew as much about the American system as even the distinguished Senator from New Hampshire. Yet we are asked by the distinguished Senator to believe that these men were confronted with this American doctrine which is said created a vacancy in the representation from a county, depriving the constituency of one-third of its representation, they said, "We will not provide for it; let it go; let one-third of the people of that county go unrepresented." Vacancy in the representation of a county where there are only

three to represent it is about as important a matter as a vacancy in the executive office, and yet we are told that those men, confronted with that situation, were willing that the vacancy should go unprovided for, and never wrote one line to show that they recognized that vacancy, much less to provide for filling it.

"I am here to defend my State from the imputation of ever having had a constitutional convention composed of men so fatuous, so unfitted for the high duty they were called upon to perform, that when confronted with an exigency like that they did not have intelligence enough to deal with it. Oh, no, Mr. President; I said it was inconceivable. So it is. When they said that the duties of the office shall devolve upon the senator who happens to be speaker, it never entered their heads that they were vacating the office of senator from one of the counties, or else we know they would have provided for the filling of that vacancy.

* * * * * * *

"We are not to make pawns of the rights of the citizens of a State upon the political chessboard. We are not to gamble away the rights of great communities and to stultify our own common sense in order to accomplish a predetermined purpose or end. Constitutions, as I said a while ago, are made for the plain people of a State. They were meant to be interpreted by those plain rules which govern the meaning of the English language, in which they are written, and it will not do here in this high place by argumentation, by dialectics, by refined and subtle reasoning, to reason away the plain, obvious, common-sense meaning of these great charters, and leave the people dazed and amazed at the consequences of what they themselves have done."

WEDNESDAY, *May 13, 1896.*

Mr. TURPIE. I wish to offer an amendment on the part of the minority of the committee in conformity with the precedents upon the subject. I move to insert "not" before "entitled."

Mr. MITCHELL of Oregon. I ask that the amendment be printed and go over until to-morrow.

The VICE-PRESIDENT. It will be so ordered.

(Cong. Rec., Vol. 28, p. 5169).

FRIDAY, *May 15, 1896.*

The amendment proposed by Mr. Turpie to the resolution reported from the Committee on Privileges and Elections was read, as follows:

"*Resolved*, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware."

The question of agreeing to the amendment being submitted to the Senate, the same was agreed to by the following vote:

Yeas—Messrs. Allen, Bacon, Bate, Berry, Blackburn, Butler, Caffery, Chilton, Cockrell, Faulkner, George, Gibson, Gorman, Gray, Harris, Hill, Jones (Ark.), Kyle, Lindsay, Martin, Mills, Mitchell (Wis.), Morgan, Pasco, Peffer, Roach, Stewart, Turpie, Vilas, Walthall, White—31.

Nays—Messrs. Baker, Brown, Burrows, Cameron, Cannon, Carter, Chandler, Clark, Cullom, Davis, Dubois, Elkins, Fry, Gallinger, Hawley, McBride, Mantle, Mitchell (Oreg.), Perkins, Pettigrew, Platt, Proctor, Quay, Sewell, Sherman, Shoup, Teller, Warren, Wetmore, Wilson—30.

The question of agreeing to the resolution as amended was then submitted to the Senate and the same was agreed to by the same vote as that given on agreeing to the amendment, as hereinbefore stated.

(Cong. Rec., Vol. 28, pp. 5294, 5295, and 5296.)

TUESDAY, *January 12, 1897.*

Mr. Chandler presented a memorial from Henry A. Du Pont alleging that he is justly entitled to a seat in the Senate from the State of Delaware, and that under the circumstances the question of the validity of his election should again be investigated and acted upon, and that he hopes and expects to show on another consideration of the subject that he is entitled to such seat, and praying the Senate to reconsider the case and seat the petitioner.

The memorial was received and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 29, p. 706.)

WEDNESDAY, *January 27, 1897.*

Mr. Chandler presented the petition of certain citizens of Delaware, praying that the claim of Henry A. Du Pont be again investigated, and stating that he was duly

elected to the United States Senate by the legislature of Delaware the 9th day of May, 1895. On motion of Mr. Chandler, the petition was referred to the Committee on Privileges and Elections.

Mr. Chandler also presented a petition from Henry A. Du Pont relative to his claim to a seat in the Senate as a Senator from the State of Delaware. Which petition was ordered to be printed as a document and referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 29, pp. 1198, 1199.)

THURSDAY, *January 28, 1897.*

Mr. Chandler presented the petition of certain citizens of Delaware, praying that the petition of Henry A. Du Pont with his claim to a seat in the Senate from the State of Delaware be again investigated by the Senate, and that, on reconsideration of the case, Mr. Du Pont be seated as a Senator from said State. Which petition was referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 29, pp. 1239, 1240.)

MONDAY, *March 1, 1897.*

Mr. Hoar, from the Committee on Privileges and Elections, submitted the report of the committee in the case of Henry A. Du Pont, claiming a seat in the Senate from the State of Delaware. Which report was ordered printed in the Record and also to be printed as a document.

(Cong. Rec., vol. 29, p. 2524.)

REPORT OF THE COMMITTEE.

[The committee consisted of the same members mentioned in the statement preceding the report in the case of Henry A. Du Pont, *supra.*]

HENRY A. DU PONT.

MARCH 1, 1897.—Ordered to be printed.

Mr. Hoar, from the Committee on Privileges and Elections, submitted the following report:

The Committee on Privileges and Elections, to whom was referred the petition of Henry A. Du Pont, of the State of Delaware, claiming a seat in the Senate from that State by virtue of an election by the legislature thereof on May 9, 1895, have considered the same and report:

Mr. Du Pont presented to the Senate, December 4, 1895, a petition for admission as Senator from the State of Delaware for what then remained unexpired of the term beginning March 4, 1895.

It appeared that at a joint convention of the two houses of the legislature of the State of Delaware, duly held on the 9th day of May, 1895, 15 votes were cast for Mr. Du Pont and 15 votes for other candidates. One of the votes cast for other candidates was the vote of the acting governor of the State of Delaware, who had succeeded to the executive chair on the death of the governor. He was a senator and the speaker of the Delaware senate at the time of the alleged election, the term of office for which he had been elected for senator and speaker having not expired. If he were entitled to vote, Mr. Du Pont was not lawfully elected. If he were not so entitled, Mr. Du Pont had a majority of 1 vote. The question of his right to vote depended upon the question whether his accession to the executive chair by virtue of the constitution of the State should deprive him of his title to vote as a senator.

That question was the only one raised in the discussion of Mr. Du Pont's title to a seat in the Senate. The Committee on Privileges and Elections reported in his favor and there was a full discussion of the question.

On the 15th day of May, 1896, the Senate passed the following resolution by a majority of 1 vote:

"*Resolved*, That Henry A. Du Pont is not entitled to a seat in the Senate from the State of Delaware for the full term commencing March 4, 1895."

Mr. Du Pont now prays to have this question reopened. The grounds of his application, as stated in his petition and by his eminent counsel in an argument addressed to the committee, are:

First. That there was a mistake in the pairs as announced when the vote on this resolution was taken, so that a Senator who was in favor of Mr. Du Pont was paired against him. On investigation we find that no such mistake occurred, and that every Senator who desired to vote who was in favor of Mr. Du Pont either voted for him or was paired in his favor.

Second. That the petitioner expects to satisfy the Senate that it was wrong in its construction of the constitution of Delaware when it held that the vote of the acting governor for another candidate than Mr. Du Pont was lawful.

New Senators have entered the chamber since the resolution just cited was adopted. Nothing else has changed. The case then stated and acted upon is the case now stated. The simple question is: Whether the Senate, notwithstanding its decision of May 15, 1896, will now admit Mr. Du Pont to a seat?

The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution the judge of the

elections, qualifications, and returns of its members, and its judgment is just as binding in law, in all constitutional vigor and potency when it is rendered by one majority as when it is unanimous.

It is clear that the word "judge" in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals. We can conceive of no case which can arise in human affairs where it is more important that a judgment of any court should be respected and should stand unaffected by caprice or anything likely to excite passion or to tempt virtue. When the Senate decided the question it was sitting as a high constitutional court. In its action we think it ought to respect the principles, in giving effect to its own decision, which have been established in other judicial tribunals in like cases and which the experience of mankind has found safe and salutary.

We do not doubt that the Senate, like other courts, may review its own judgments where new evidence has been discovered, or where by reason of fraud or accident it appears that the judgment ought to be reviewed. The remedy which in other courts may be given by writs or review or error or bills of review may doubtless be given here by a simple vote reversing the first adjudication. We have no doubt that a legal doctrine involved in a former judgment of the Senate may be overruled in later cases. But there is no case known in other judicial tribunals in which a final judgment in the same case can be rescinded or reversed merely because the composition of the court has changed or because the members of the court who originally decided it have changed their mind as to the law or fact which is involved.

It seems to us very important to the preservation of constitutional government, very important to the dignity and authority of the Senate, very important to the peace of the country, that we should abide by this principle. There are few greater temptations which affect the conduct of men than the temptation to seize upon political power without regard to the obligation of law. To act upon the doctrine upon which this petition rests would expose the Senate to the temptation to reverse its own judgments and to vacate or to award seats in this Chamber according as the changing majorities should make possible. If such practice should be admitted it would, in our opinion, go far to weaken the respect due to this body and the respect due to constitutional authority.

GEO. F. HOAR.
WM. E. CHANDLER.
J. C. PRITCHARD.
J. C. BURROWS.
GEO. GRAY.
DAVID TURPIE.
JAMES L. PUGH.
JOHN M. PALMER.

(Cong. Rec., vol. 29, pp. 2524, 2525.)

[Second session of the Fifty-fifth Congress.]

THURSDAY, JANUARY 13, 1898.

Mr. Hoar submitted an amendment intended to be proposed by him to the urgent deficiency appropriation bill to pay Henry A. du Pont $1,855.45, the amount expended by him in prosecuting his claim to a seat in the United States Senate from the State of Delaware, which was referred to the Committee on Privileges and ordered to be printed.

(Cong. Rec., vol. 31, p. 582.)

FRIDAY, JANUARY 14, 1898.

Mr. Chandler, from the Committee on Privileges and Elections, reported favorably the amendment introduced by Mr. Hoar, intended to be proposed to the urgent deficiency appropriation bill, and asked that it be referred to the Committee on Appropriations, which was so ordered.

(Cong. Rec., vol. 31, p. 610.)

TUESDAY, JANUARY 18, 1898.

Mr. Hale, from the Committee on Appropriations, offered the following amendment to the urgent deficiency appropriation bill then under consideration by the Senate, which was read and became a part of the act of January 28, 1898 (Stats., 55th Cong., 2d sess., p. 239): "To pay Henry A. du Pont the amount expended by him in prosecuting his claim to a seat in the Senate from the State of Delaware, $1,855.45."

(Cong. Rec., vol. 31, p. 720.)

[Fifty-fourth Congress—second session, and Fifty-fifth Congress—first session.]

JOHN E. ADDICKS v. RICHARD R. KENNEY, *of Delaware.*

The term of Anthony Higgins as Senator from the State of Delaware expired March 3, 1895. After the decision by the Senate that Henry A. Du Pont was not elected to the office of United States Senator by the legislature of the State of Delaware, and on the 21st day of January, 1897, a paper was presented in the Senate certifying to the election of John Edward Addicks as Senator from the State of Delaware on the 20th day of January, 1897, for the term beginning March 4, 1895. These credentials purported to be signed by the speaker of the senate of the State of Delaware, the speaker of the house of representatives of the State of Delaware, and the clerk of the senate and the clerk of the house of representatives of the State of Delaware. February 5, 1897, the credentials of Richard R. Kenney were presented in the Senate duly signed by the governor of the State of Delaware and certifying to the election of said Richard R. Kenney on the 19th day of January, 1897, as a Senator from said State for the term ending March 3, 1901. These credentials being in due form, Mr. Kenney was admitted to a seat in the Senate.

March 19, 1897, the petition of John Edward Addicks was presented in the Senate, claiming that he, said John Edward Addicks, was elected to the Senate of the United States on the 20th day of January, 1897, by the legislature of the State of Delaware, and alleging certain facts in relation to the election of Richard R. Kenney from which the petitioner asserted that Mr. Kenney was not legally elected to that office. This petition was referred to the Committee on Privileges and Elections, but no report concerning the matter was made by the committee nor was any further action taken by the Senate in reference to such petition.

The history of the case here given consists of a statement of the proceedings in the Senate in said case as published in the Congressional Record, and the remarks of Mr. Hoar on the occasion of the presenting of the credentials of Mr. Kenney.

PROCEEDINGS IN THE SENATE.

THURSDAY, *January 21, 1897.*

Mr. Chandler presented the following paper, which was referred to the Committee on Privileges and Elections:

"DELAWARE, *ss:*

"Be it known that the legislature of the State of Delaware did, on the 20th day of January, in the year of our Lord 1897, at an election in due manner held according to the form of the act of the general assembly of said State in such case made and provided, choose John Edward Addicks to be a Senator from said State in the Senate of the United States for the constitutional term from the 3d day of March, in the year of our Lord 1895.

"Given under our hands in obedience to the said act of the general assembly the day and year aforesaid.

"ROBERT J. HANBY,
"*Speaker of the Senate.*

"THOMAS C. MOORE,
"*Speaker of the House of Representatives.*

"GEO. W. ROGERS,
"*Clerk of the Senate.*

"CHAS. R. HASTINGS,
"*Clerk of the House of Representatives.*

(Cong. Rec., vol. 29, p. 1004.)

FRIDAY, *February 5, 1897.*

Mr. Gray presented the credentials of Richard W. Kenney as a Senator from the State of Delaware. The credentials were read, as follows:

"STATE OF DELAWARE, EXECUTIVE DEPARTMENT.

"*To the President of the Senate of the United States:*

"This is to certify that on the 19th day of January, in the year of our Lord 1897, Richard R. Kenney was duly elected by the legislature of Delaware a Senator to represent said State in the Senate of the United States, to fill a vacancy existing in the representation of said State for the term ending the 3d day of March, A. D. 1901.

"Witness his excellency, our governor, Ebe W. Tunnell, and our seal hereunto affixed, at Dover, this 21st day of January, in the year of our Lord 1897, and of the independence of the United States of America the one hundred and twenty-first.

"EBE W. TUNNELL.

"By the governor:

"WM. H. BRYCE, *Secretary of State.*"

Mr. Kenney being present, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

(Cong. Rec., vol. 29, pp. 1559, 1560.)

[Remarks of Mr. Hoar on the occasion of the presenting of the credentials of Mr. Kenney as a Senator from the State of Delaware. Found in the proceedings of February 5, 1897, in the Congressional Record, vol. 29, pp. 1559, 1560.]

"Mr. President, I desire to make a brief statement also before the Senate admits this gentleman to a seat.

"At the last session of the Senate the Senate determined by a majority of 1, I think (I was not present when the final vote took place, being absent in consequence of illness), that Mr. Henry A. Du Pont was not entitled to a seat in the Senate. The result necessarily involved in that determination was the decision of the Senate that a vacancy existed from the State of Delaware.

"I suppose it is unnecessary to say that I dissented from the opinion on which that vote of the Senate was based. The question was whether the acting governor, formerly speaker of the senate and formerly a member of the senate, was disqualified from voting under the Delaware constitution by his accepting and entering upon the then vacant office of governor. I thought then and think now that it was just such an act of usurped authority when he undertook to vote as it would have been if President Johnson or President Arthur had come back to the Senate here and undertaken to preside as Vice-President and to give a casting vote on some important question. I never have changed that opinion and I have no great doubt about it; but the Senate adjudged otherwise.

"The Senate is made by the Constitution the judge of the election and qualification of its members, and its judgment is just as binding in law, in all constitutional vigor and potency, when it is rendered by 1 majority as when it is unanimous. I remember very well what I think was one of the most admirable public utterances of the late James G. Blaine. The year after his own party had nearly lost the State government by an attempted fraud and usurpation on the part of their antagonists there was a contested election, that party then being in power. It was very close, and Mr. Blaine declared that 1 majority for Plaisted was as good as a thousand in entitling Mr. Blaine's opponent, Governor Plaisted, to the seat.

"Now, what was the effect of that judgment of the Senate? It seems to me that it was the same as the judgment of a court would have been fixing the rights of parties. It may be undoubtedly reviewed for newly discovered evidence; it may undoubtedly be vacated for an error in the record, as if we should discover that one or two Senators who were recorded as voting one way in fact voted another way. I suppose it could be vacated if it should turn out, to use an illustration that some one else made in my hearing recently, that that governor, when it was supposed he voted in the Delaware legislature, was falsely impersonated by some one else and was not there at all. But, although parliamentary proceedings differ in form from those of courts, the great rule on which the safety of all human property and transactions depend, established in courts of justice, ought in substance to govern us here.

"There has been an application on the part of Mr. Du Pont—whom I respect personally, whom I eagerly desire should have a seat in this body, and who I think ought to have had one on the merits of his case—to reopen that case. No newly discovered evidence is suggested; no fraud or mistake is suggested. The reopening of the case would merely be a reconsideration of a question of constitutional law which this great constitutional court has decided once. That is all he asks and that is all he would obtain if his prayer for a reopening of the case were granted.

"That petition was referred to the Committee on Privileges and Elections, and after a very able and interesting argument in favor of Mr. Du Pont by Mr. Garland, late Attorney-General—and it is not necessary to say that any argument that gentleman makes will be able and interesting—the committee unanimously decided this morning that there had been an adjudication by the Senate and that nothing further remained to be done. It was unanimously decided with the exception of one member, who was not prepared to determine what was his duty at the particular time.

"Mr. President, I propose to act upon that doctrine. I think it is very important for constitutional government, very important to the dignity and authority of the Senate, very important for the peace of the country that we should stand by these principles.

"It is a very unpleasant thing to me that Mr. Du Pont is not to take his seat, and that some one else is to take it. But it would be a very bad thing for every citizen of this country unless the Senate of the United States could act and could be known to act upon great questions where right and righteousness are involved in pursuance of a law other and higher than its own desire.

"If it be true that Mr. Du Pont was not legally elected, or if it be true that that question has been settled by a judgment of the Senate, it follows that there is a vacancy, and that there was a vacancy at the time of the alleged election of Mr. Kenney, in the office of Senator from the State of Delaware; and there being a vacancy under the Constitution and statute of the United States, the credential in due form, signed by the executive of that State, gives the gentleman who now applies for the seat a prima facie title to the seat, subject, as has been suggested by my honorable friend from New Hampshire, to reexamination on the merits hereafter, if that reexamination shall be desired. I therefore assent to the request of the Senator from Delaware that the oath be administered."

FRIDAY, *March 19, 1897.*

Mr. BURROWS. I present the petition of John Edward Addicks, a citizen of the State of Delaware, setting forth that on the 20th day of January, 1897, by a majority of the duly elected and qualified members of the senate and house of representatives of the State of Delaware, he was duly elected a United States Senator to fill the vacancy in the United States Senate occasioned by the expiration of the term of Anthony Higgins, and that he was denied the usual and formal certificate of election to which he was entitled. He further sets forth that the Hon. R. R. Kenney, now holding a seat in the United States Senate, was not duly and legally elected to fill the vacancy and is not legally entitled to his seat; that a majority of the citizens who met and assumed to act as the legislature of said State and went through the form of electing Mr. Kenney were never elected, but usurped the office of members of the legislature. The petitioner further contests the right of said Kenney to occupy a seat in the United States Senate, and affirms that Mr. Kenney was not legally elected thereto.

The petition further states that the three counties in the State of Delaware, which comprise its entire territory, elected at the last election seven members of the legislature from each of the counties, and that a canvass of the ballots since the election shows that in two counties—the county of Kent and the county of Sussex—the Republican candidates, seven from each county, were elected, or fourteen members of the lower house, and that, in substance, the members elected, with those holding over, constituted a majority of the legislature in both houses. The petitioner prays that the matter may be investigated and his right to a seat in the Senate passed upon by the Senate. I move that the petitition be printed and that it be referred to the Committee on Privileges and Elections.

Mr. GRAY. * * * I wish to state that as a matter of fact there has been no canvass, in the legal or official sense of that term, of the voters of those two counties since the election.

The memorial was ordered to be printed as a document and to be referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 30, p. 66.)

THURSDAY, *February 21, 1901.*

Mr. Chandler submitted the following resolution, which was referred to the Committee on Privileges and Elections:

"*Resolved*, That there be paid out of the contingent fund of the Senate to Richard R. Kenney, a Senator from the State of Delaware, the sum of $500 in reimbursement of expenses necessarily incurred by him in defense of his title to a seat."

(Cong. Rec., vol. 34, p. 2726.)

FRIDAY, *February 22, 1901.*

Mr. Pettus, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That there should be paid out of the contingent fund of the Senate to Senator Richard R. Kenney, of Delaware, the sum of $488, the amount expended by him in defending his right to a seat in the Senate."

(Cong. Rec., vol. 34, p. 2802.)

THURSDAY, *February 28, 1901.*

Mr. Jones, of Nevada, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution reported by Mr. Pettus from the Committee on Privileges and Elections on the 22d instant, reported it without amendment, and it was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 34, p. 3189.)

[Fifty-fifth Congress, second and third sessions, and Fifty-sixth Congress, first session.]

MARCUS A. HANNA,

Senator from Ohio.

Marcus A. Hanna was chosen by the legislature of the State of Ohio a Senator from that State for the remaining portion of the term ending March 3, 1899, in place of John Sherman, who resigned to accept the office of Secretary of State of the United States. Mr. Hanna appeared January 17, 1898, and took his seat in the Senate without objection. Subsequently, and on the 28th day of May, 1898, a certified copy of the report of the committee appointed by the senate of the State of Ohio to investigate charges of bribery in the election of Mr. Hanna to the Senate of the United States was filed and referred to the Committee on Privileges and Elections. On the 28th day of February, 1899, the committee submitted a report asking to be discharged from further consideration of the report of the State senate of Ohio. A minority of the committee submitted a minority report recommending further inquiry and investigation. One member of the committee did not join in either the majority or the minority report, but submitted a separate report for himself. No further action was taken by the Senate in the case, but on the 5th day of June, 1900, the matter was referred to by Mr. Pettigrew in debate, and by request of Mr. Foraker the entire report of the Committee on Privileges and Elections in the case was inserted in the Record.

The history of the case here given consists of a statement of the proceedings in the Senate in the case, as published in the Congressional Record, the report of the Committee on Privileges and Elections, the report of the minority of the committee, and the separate report of Mr. Allen, a member of the committee, and also a reference to the proceedings in the Senate during which the entire report of the committee was ordered to be printed in the Record.

PROCEEDINGS IN THE SENATE.

MONDAY, *January 17, 1898.*

Mr. Foraker presented the credentials of Marcus Alonzo Hanna, chosen by the legislature of the State of Ohio a Senator from that State for the remaining portion of the term ending March 3, 1899. The credentials were read and ordered to be filed. The oath prescribed by law having been administered to Mr. Hanna, he took his seat in the Senate.

(Cong. Rec., vol. 31, pp. 665, 666.)

SATURDAY, *May 28, 1898.*

The VICE-PRESIDENT. The Chair lays before the Senate for reference a communication from the general assembly of Ohio, which will be read.

The Secretary read as follows:

"GENERAL ASSEMBLY OF OHIO,
"OFFICE CLERK OF THE SENATE,
"*Columbus, May 26, 1898.*

"MY DEAR SIR: I have this day forwarded to you by the United States Express Company a certified copy of the report of the committee appointed by the senate of Ohio, pursuant to senate resolution No. 21, to investigate the charges of bribery in the election of Hon. Marcus A. Hanna to the Senate of the United States, together with the testimony taken therein, which was ordered to be sent to you by the Ohio senate. Kindly acknowledge receipt of the same.

"I have the honor to be, very truly yours,

"D. O. CASTLE,
"*Chief Clerk of the Senate.*

"HON. GARRET A. HOBART,
"*United States Senate, Washington, D. C.*"

The communication, with the accompanying papers, was referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 31, p. 5317.)

TUESDAY, *February 28, 1899.*

Mr. Chandler, from the Committee on Privileges and Elections, to whom was referred a certified copy of the report of the committee appointed by the senate of the

State of Ohio, pursuant to senate resolution No. 21, to investigate the charges of bribery in the election of Hon. Marcus A. Hanna to the Senate of the United States, submitted a written report, which was ordered to be printed and to lie on the table.

Mr. Turley submitted a minority report, which was also ordered to be printed and to lie on the table.

Mr. Allen submitted a report for himself in relation to which the same order was made.

(Cong. Rec., vol. 32, p. 2558.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Chandler (chairman), Hoar, Burrows, Pritchard, Spooner, Faulkner, Caffery, Allen, and Pettus.]

ELECTION OF HON. M. A. HANNA.

FEBRUARY 28, 1899.—Ordered to lie on the table and be printed.

Mr. Chandler, from the Committee on Privileges and Elections, submitted the following report on the charges of bribery in the election of Hon. M. A. Hanna to the Senate of the United States:

The Committee on Privileges and Elections, to which was referred the certified copy of the report of the committee appointed by the senate of Ohio to investigate the charges of bribery in the election of Hon. Marcus A. Hanna to the Senate of the United States, having considered the same, report back to the Senate said certified copy, and further report as follows:

This certified copy of the report of the senate of Ohio, being a typewritten document, was presented to the United States Senate by the Vice-President on May 28, 1898, having been received by him through the mails, and was referred to the Committee on Privileges and Elections on motion of the Senator from Colorado (Mr. Teller), but no order for printing was made. It has, however, been put in type for the use of the committee. The contents of the certified copy are the "Report of the committee appointed by the senate of Ohio," including the testimony, of which 500 copies were printed by the Ohio senate, and the report further ordered to be printed in the appendix of the State senate journal. The closing paragraph of the report, signed by the chairman and three members, recommends its adoption by the State senate and that a copy thereof, with the testimony, "be transmitted to the President of the Senate of the United States, of which Senator Hanna is a member, for such action as it may deem advisable." The clerk of the State senate, in certifying on May 26, 1898, that the papers transmitted were a true and correct copy of the report of the committee, adds as to the report the words "and adopted by the Ohio senate."

From the above statement it will be seen that no direct remonstrance, memorial, or protest setting out that Mr. Hanna was not elected Senator or that he ought to be expelled, coming from parties asserting readiness to prosecute their charges, has been presented to the Senate. Nor has the reception on May 28, 1898, of the certified copy of the State senate report been followed up by any appearance before this committee of any prosecuting parties or by the submission to the committee of any additional papers from any source. Nevertheless, the committee have given an examination to the report of the Ohio State senate committee, the points of the same, concisely stated, being as follows:

The specific charge is what the committee call "four main facts" stated in language as follows:

"The evidence taken by your committee, in its judgment, proves four main facts:

"1. That on or about January 9, 1898, an attempt was made to bribe John C. Otis, a member of the house of representatives of the present general assembly of the State of Ohio, to vote for Marcus A. Hanna for United States Senator.

"2. That Henry H. Boyce was the principal offender in the commission of that crime.

"3. That Maj. E. G. Rathbone and Maj. Charles F. Dick were agents of Marcus A. Hanna, and procured, aided, and abetted Henry H. Boyce to commit that crimes

"4. That H. H. Hollenbeck aided said Henry H. Boyce in committing that crime."

Although there is no evidence that Mr. Hanna had knowledge of the alleged attempt to bribe Mr. Otis, the State senate committee argue that the proven relations of the above parties to Mr. Hanna are persuasive to the conclusion that he knew and sanctioned what they did.

The only other point made by the State senate committee is that Hollenbeck and Boyce evaded the jurisdiction of the committee and that Messrs. Rathbone and

Dick, and Mr. Hanna himself, omitted to appear in response to subpœnas and invitations sent them by registered mail.

The above report of the State senate committee appears to have been adopted by the Ohio State senate on April 23, 1898, by a vote of 19 yeas to 17 nays. Senator James R. Garfield made a minority report dated April 23, 1898, a copy of which is herewith submitted, in which he reviews the evidence and declares his belief that the conclusions of the majority report are "contrary to the acts presented." He further argues that the Otis case was the outcome of "a scheme carefully prepared and executed by the opponents of Mr. Hanna to secure his defeat by making this charge of bribery during the last days of the Senatorial contest."

The report of the State senate committee does not show the proceedings of the Ohio legislature when Mr. Hanna was elected Senator, but the record of the ballotings is as follows:

The votes of Tuesday, January 11, 1898, were, in the house: Mr. Hanna 56, all others 53; in the senate: Mr. Hanna 17, all others 19; being 73 for Mr. Hanna and 72 for all others.

On Wednesday, January 12, the joint balloting resulted as follows: Mr. Hanna 73, all others 71; and Mr. Hanna was declared elected.

Mr. John C. Otis did not vote for Mr. Hanna, but on both days voted for Robert E. McKisson, and his vote is included in the 72 and 71 opposition votes above given.

There is no proof submitted either (1) that Mr. Hanna was elected Senator through bribery, or (2) that he had any agents engaged in carrying on his canvass for the Senate who were directly or impliedly authorized by him to resort to corrupt methods or any form of wrongdoing, or (3) that he had any personal knowledge of the facts of the Otis case. It may be said that there is no evidence which fairly tends to prove either of the foregoing three propositions.

Upon the view of the case thus briefly stated, the Committee on Privileges and Elections has reached the conclusion that the United States Senate is not called upon to take any action in the premises. The utmost fact which the committee of the State senate claim to have proved is that an attempt was made to bribe Mr. Otis, which failed. Without further facts than this the validity of Mr. Hanna's election will stand unimpeached, and the Senate is not called upon to search for further facts in the absence of any specification of such facts or of any distinct suggestion where they may be found, the whole demand of the State senate report that Mr. Hanna be expelled from the United States Senate being rested upon the Otis case.

Whether, even if this unsuccessful attempt at bribery in the case of Representative Otis were fastened upon the representatives of Senator Hanna by undoubted proof, the Senate would be called upon to take any action is not by any means clear. Certainly without strong evidence that Senator Hanna himself had knowledge of the transaction the Senate would hardly be justified in doing more than expose the facts for condemnation by public opinion; and the exposure of such facts as the State senate say were proved has already been accomplished by the State senate report, while there is no direct evidence, and substantially no presumptive evidence, that Senator Hanna had any knowledge of what was going on.

Moreover, it seems clear to this committee that it would not be justified in recommending any action whatever to be taken by the Senate without further testimony to be taken by the committee. The question whether additional evidence should be taken has been the only difficult question which the committee has considered. It is clear that Mr. Otis never had any intention of yielding to bribery. He encouraged Mr. Boyce, by the advice of others, only in order to entrap him. Then he carefully withdrew and substituted his attorney, Mr. Campbell, to continue the negotiations. Mr. Campbell labored to induce Mr. Boyce to offer money, and finally, as he says, obtained $1,750 from him as part payment on $3,500 to be paid for Mr. Otis's vote for Mr. Hanna, leaving $6,500 to be paid if Mr. Hanna was elected. At this point public exposure through Mr. Otis, Mr. Campbell, and their associates took place. Mr. Boyce disappeared and the incident was closed.

That Mr. Boyce, operating at Cincinnati, where Mr. Otis lived, had relations with Mr. Hanna's representatives at Columbus, the State capital, the State senate committee undertook to prove by the evidence of various detectives, professional and amateur, who listened at telephone wires and shadowed Mr. Boyce, Mr. Hollenbeck, and others. The effort of the committee was carefully and skillfully made. It was not wholly devoid of results. It raises suspicions that Mr. Hanna's representatives at Columbus knew what Mr. Boyce was doing. But this whole line of inquiry would require verification by testimony to be taken by the Committee on Privileges and Elections before that committee would be willing to found conclusions thereon.

In reaching the opinion that the Senate is not called upon to take further testimony the committee are not unmindful of the fact that many witnesses refused to testify when they appeared before the State senate committee, and that Mr. Hanna

and his representatives had subpœnas sent to them by mail and did not respond. Mr. Garfield in his minority report states the alleged reasons why Mr. Hanna did not appear, namely, that a fair and impartial hearing was impossible because of the known hostility of the chairman of the committee, and because the committee at its first meeting decided to refuse to allow any person whose name was connected with the investigation "to appear in person and be represented by counsel."

The reasons why the Committee on Privileges and Elections do not decide to ask for power to take testimony may be restated as follows:

I.

The belief, heretofore suggested, that even if the unsuccessful attempt at bribery into which Messrs. Otis and Campbell led Mr. Boyce were to be proved as alleged by the State senate committee, the United States Senate would not feel called upon to do more than has already been done by the State senate, namely, expose the transaction to public view. To go over again the whole ground covered by the State senate merely for the purpose of such additional exposure would be tedious, expensive, and unnecessary.

II.

The fact that no case of bribery beyond the Otis case and no further specific corrupt acts are alleged or suggested. The beginning and the end of the State senate report is the Otis case.

III.

The fact that there has been no demand for the prosecution of the inquiry coming from the State of Ohio, except by the transmission by the chief clerk of the Ohio State senate of the senate report, as hereinbefore stated, to the United States Senate for "such action as it may deem advisable." This was received by the Senate on May 28, 1898, and referred to this committee, and from that time to this, as hereinbefore stated, no further interest has apparently been taken in the subject by any resident of the State of Ohio.

The committee do not doubt that if facts appeared from the report of the committee of the State senate requiring the United States Senate, out of a proper regard for its own reputation, to take further testimony concerning Mr. Hanna's election it would be the duty of the Senate to proceed without waiting for further prosecution of the case coming from residents of the State of Ohio. But, taking the case as it stands and noting the absence of such prosecution, the conclusion of the committee is not to ask the Senate for authority and direction to take further testimony, but to ask to be discharged from the further consideration of the report of the State senate of Ohio.

VIEWS OF THE MINORITY.

Mr. Turley, from the minority of the Committee on Privileges and Elections, submitted the following views in the matter of the report of the committee appointed by the senate of the State of Ohio to investigate the charges of bribery in the election of Hon. M. A. Hanna to the Senate of the United States.

We can not concur in the report of the majority of the Committee on Privileges and Elections in the matter of the report of the committee appointed by the senate of the State of Ohio to investigate the charges of bribery in the election of Hon. M. A. Hanna to the Senate of the United States.

The charge is that early in January, 1898, an attempt was made by H. H. Boyce and others to bribe John C. Otis, a member of the house of representatives of the general assembly of the State of Ohio, to vote for Marcus A. Hanna for the Senate of the United States.

Among other things, the majority of the committee say:

"Moreover, it seems clear to this committee that it would not be justified in recommending any action to be taken by the Senate without further testimony to be taken by the committee. The question whether additional evidence should be taken has been the only difficult question which the committee has considered. It is clear that Mr. Otis never had any intention of yielding to bribery. He encouraged Mr. Boyce by the advice of others only in order to entrap him. Then he carefully withdrew and substituted his attorney, Mr. Campbell, to continue the negotiations. Mr. Campbell labored to induce Mr. Boyce to offer money, and finally, as he says, obtained $1,750 from him as part payment on $3,500 to be paid for Mr. Otis's vote for Mr. Hanna, leaving $6,500 to be paid if Mr. Hanna was elected. At this point public exposure, through Mr. Otis, Mr. Campbell, and their associates, took place. Mr. Boyce disappeared, and the incident was closed.

"That Mr. Boyce, operating in Cincinnati, where Mr. Otis lives, had relations with

Mr. Hanna's representatives at Columbus, the State capital, the State senate committee undertook to prove by the evidence of various detectives, professional and amateur, who listened at telephone wires and shadowed Mr. Boyce, Mr. Hollenbeck, and others. The effort of the committee was carefully and skillfully made. It was not wholly devoid of results; it raises pregnant suspicions that Mr. Hanna's representatives at Columbus knew what Mr. Boyce was doing. But this whole line of inquiry would require verification by testimony to be taken by the Committee on Privileges and Elections before that committee would be willing to found conclusions thereon."

The attempt on the part of Boyce to buy Otis's vote for Mr. Hanna is clearly proven by Campbell, who, from his testimony, seems to have been a lawyer of large practice. One thousand seven hundred and fifty dollars was paid in cash by Boyce to Campbell as attorney for Otis. Boyce agreed to pay $1,750 more when Otis reached Columbus and a balance of $6,500 if Mr. Hanna was elected.

We will now refer to portions of the evidence before the committee of the State senate of Ohio bearing upon the relations existing between Mr. Boyce while at Cincinnati and Mr. Hanna's representatives at Columbus. It is shown that Mr. Hanna and Majors Dick and Rathbone (Dick and Rathbone being managers for Mr. Hanna) were at the Neil House, in Columbus, Ohio, where Mr. Hanna had his headquarters, for a part of three weeks preceding January 12, 1898. The private telephone used in Mr. Hanna's headquarters was No. 1092.

Otis testifies that on Friday, January 7, 1898, about 11 o'clock, he was called up over the telephone from the Great Southern Hotel at Columbus by a General Boyce. He had never heard of Boyce before. Boyce stated that he "had come on from New York to see Otis on important business and had reached Columbus on Wednesday about two hours after Otis had left." The result of the conversation was that Boyce and Otis agreed to meet at the Gibson House that evening. Later in the day Boyce telegraphed Otis that he would reach Cincinnati at 5.30 o'clock. Otis says he met Boyce at the Gibson House between 5.30 and 6 o'clock that evening and had a conversation with him in which the senatorial question was discussed and they agreed to meet again the next evening. Myers, a clerk at the Gibson House, testified that at about 6.40 p. m. on the 7th of January a call came over the telephone from Columbus for General Boyce, but he could not be found at the time. It was repeated a little later on, at which time General Boyce was standing in the lobby. He was at once called to the telephone in the hotel office. Myers said he heard Boyce say, "Hello, Major Dick!" and speak of Hanna being sore.

This conversation, as far as he heard it, Myers says he repeated to the manager of the hotel, who told him if Boyce wished to use the telephone again to arrange for him to use the one in the manager's private office, which was numbered 548. It seems the two telephones were so connected that a person listening at the telephone in the hotel office could overhear everything which passed through the telephone in the manager's private office. Now, the books of the telephone company in Columbus show that on January 7 there was but one call from telephone 1092 at the Hanna headquarters to telephone 548, Gibson House, and that was at about 8 p. m. Myers testifies further that Boyce went to the theater after supper on the night of the 7th, returning to the hotel somewhere at about 10.45 p. m. In the meantime another call had come for him from Columbus. He was so notified and went to the telephone in the manager's private office and called up telephone 1092 at Columbus.

Myers said he listened at the telephone in the hotel office and heard all that was said, taking notes of same at the time. He says Boyce addressed the person in Columbus as "Major," told him he had seen "O," had arranged matters, and it would take $20,000 down; that the Major replied: "They did not know about that; they would see 'H,'" and that then there was an intermission of about five minutes, when the person at Columbus said they would give $10,000 down and $10,000 when it was over; and that the conversation continued concerning Mr. "O," and what they would pay him for his vote. The books of the telephone company in Cincinnati show that on the 7th of January, 1898, at about 11.20 p. m., Boyce, from telephone 548, called up Columbus and talked with Rathbone eleven minutes, and the telephone books in Columbus show that telephone 548 in Cincinnati called telephone 1092 in Columbus at about 11.15 p. m. on that day.

Myers and two other employees of the Gibson House testify that at about 12 o'clock the same night another call came from telephone 1092 at Columbus for Boyce. Myers claims to have overheard this conversation also, and to have taken notes of it, copies of which were produced in full, and which are as follows:

"COLUMBUS. Mr. Boyce in?

"CINCINNATI. Yes.

"COLUMBUS. Call him to long-distance telephone.

"CINCINNATI. Who wants him?
"COLUMBUS. Columbus does.
"CINCINNATI. All right; wait five minutes.
"BOYCE. Hello, Columbus! This you, Major?
"MAJOR. (Major) Yes.
"BOYCE. What do you want?
"MAJOR. Have been talking to H. and he says: 'Suppose he won't put signature on paper—what will we do?'
"BOYCE. I will fix that all right; but if I was in his place I would not sign paper, as it is a foolish play. His price is $20,000. (Dick is speaking to Hanna.)
"MAJOR. If he wants protection, exchange notes and accommodation papers with him, as that will protect both of you. He don't want him alarmed.
"BOYCE. How will you arrange matters?
"MAJOR. I will speak to Hanna. I will send Hollenbeck down in the morning. He will be there about 10; may be a little late. We are afraid that if Mr. O. falls out the rest will go to pieces. We will make it in a package and give it to Hollenbeck, so he can transfer it and not know what he is doing.
"BOYCE. What shall I pledge him to do?
"MAJOR. To vote for Hanna and the Hanna wing of the Republican party. I want you to make him feel as though he were among friends. Give him to understand that he will be treated as one of us, and we will not overlook him when the fight is over. The terms are $10,000 and the rest as soon as it is over. You want to meet Hollenbeck to-morrow and stay with him until he is ready to come back to Columbus, and then, if possible, come up with him.
"BOYCE. I will do as you say. I think everything is all right and in good shape. I am a very good judge of human nature, and I don't think that Mr. O. will betray us. If he should, I would have him killed.
"MAJOR (laughingly). Dead men tell no tales. Myers is up to some tricks again to-night.
"BOYCE. What is he doing?
"MAJOR. I only heard it mentioned.
"BOYCE. Major, you will hear good news from Washington Sunday morning over the long-distance phone.
"MAJOR. What is it about, and who is it from?
"BOYCE. I can't tell you, but it is away up and is of the best.
"MAJOR. As soon as your meeting is over to-morrow call me up and let me know what you did.
"BOYCE. Justing, of Fairfax County, is all right.
"MAJOR. I think Governor Bushnell is tired of the whole thing, and if he gets a chance he will give it up and drop out. Good night."

Hollenbeck, according to the evidence, did arrive at the Gibson House next morning, January 8, and had one or more interviews with Boyce. Miss Jacobs, a stenographer at the Gibson House, testifies that on January 8, at 1.30 p. m., she took notes of a conversation between Hollenbeck and some one at telephone 1092, Columbus. Her notes were produced and show the conversation to have been as follows:

"SATURDAY, *January 8, 1898—1.30 p. m.*

"HELLO. Will you tell 1092, at Columbus, that Hollenbeck is now at the Gibson House—that is, Mr. Hollenbeck? I will wait for him.
"Q. Hello. Is this long distance?—A. Yes.
"Q. Did you hear anything from Columbus?—A. The line in Columbus is busy now, but I will call you as soon as I can get them.
"Q. I will wait right here.

A little later.

"Mr. HOLLENBECK. Hello! This is Hollenbeck.
"COLUMBUS. Is this Hollenbeck?
"Mr. H. Yes.
"COLUMBUS. Say, hold that line and just wait a minute there. [After a few minutes' pause.] Hello!
"Mr. H. I did not succeed in finding Mr. Schmidlapp, but found another man who got the matter.
"COLUMBUS. Who got the other matter?
"Mr. H. The other man.
"COLUMBUS. Who was the other man?
"Mr. H. He is all right.
"COLUMBUS. But who is he?

"Mr. H. One of your friends—all right. He was up at Columbus the other day with you.

"COLUMBUS. To whom did you deliver the message?

"Mr. H. General Boyce.

"COLUMBUS. What became of the letter to Schmidlapp?

"Mr. H. The Schmidlapp letter was left with Mr. Schmidlapp.

"COLUMBUS. Did he see the letter?

"Mr. H. He was not in, but it was left with his private man.

"COLUMBUS. What was done with the draft?

"Mr. H. That was returned.

"COLUMBUS. What was done with the letter?

"Mr. H. The letter was left. You can reach Schmidlapp by telephone to St. Louis if you want him.

"COLUMBUS. I do not care for that.

"Mr. H. The General feels very well over the outlook.

"COLUMBUS. Did you find the other man?

"Mr. H. The other man has not come in yet.

"COLUMBUS. There is a telegram here dated at Springfield.

"Mr. H. I have not telegraphed. Have not said a word to anybody.

"COLUMBUS. That is strange.

"Mr. H. Shall I show the letter introducing me?

"COLUMBUS. Do as you think best. Here is the telegram I got. It reads: 'Springfield Depot, January 8, 1898. Party left train at Springfield.' That is the telegram received.

"Mr. H. I did not send any telegram to anybody. That is very funny. I was very careful not to be seen; went down dark alleys and byways.

"COLUMBUS. How about the General?

"Mr. H. I am not supposed to know anything about him, but he is very well and very happy over it.

"COLUMBUS. You have to be watchful.

"Mr. H. I will be that. Good-bye.

"(And telephone rang off.)"

The books of the telephone company in Columbus show that on January 8, at 1.30 p. m., telephone 1092 called telephone 548 in Cincinnati.

Otis says he had his second interview with Boyce at the Gibson House Saturday evening, January 8, 1898, at about 3 p. m.

Miss Jacobs says that about 6.45 p. m. on January 8 she took down a conversation between Boyce and Rathbone. Her notes are produced and show the conversation to have been as follows:

"SATURDAY, *January 8, 1898—about 6.45.*

"Major RATHBONE. Hello! Is this Gibson House?

"General BOYCE. Yes; we are still alive. My party has just gone. He has been here ever since 3. We have gone over the ground pretty thoroughly. A signed letter or telegram, which I am authorized to give the President out of deference to him—do you understand? He is all right; is very much interested. He is thoroughly convinced that if he did not come in that others would do it without him, but he says that neither Lane nor Droste will vote for Hanna. I want to tell you that. He can not do much with Droste. He says that Droste is jealous of him because he thought he got the inside of the speakership, but both of these men have asked him to help them about the committee. He thinks he could get Lane if he had somebody to go to Lane. He wanted to know if we counted the majority without that?

"COLUMBUS. We do.

"BOYCE. But of course we want them both.

"COLUMBUS. Yes.

"BOYCE. Can you make any suggestion at all? Well, I think the line for him to work on is that one to help out the committee, and he will do as they want him to do. I think that is the line to work on. We shall go up together on the train to-morrow, leaving here about 4 o'clock. Don't think that there will be anybody else on the train so far as we are interested. He thinks Droste is up there, and Lane, too.

"COLUMBUS. I don't know.

"BOYCE. He is eager now to do something more—authorizing the telegram. He is coming again to-night, and we will spend most of to-morrow together—dine together.

"COLUMBUS. How about telegrams?

"BOYCE. If he signed the statement and said he was going to vote for Hanna, that will answer. Don't you think it will?

'COLUMBUS. Yes; if he signs it.

"BOYCE. Well, I will tell you. One of the inducements you know as thoroughly—but that was not enough. He wants to be protected, etc. I told him he should be. I did not write any papers, because I did not want him to have any paper. He has not told anybody up to this time that he has been talking with me. He is afraid of Mason. Mason is going to give him some choice committee position, and, of course, he is shy of Mason. I suppose there is no hope for him.

"COLUMBUS. I do not know.

"BOYCE. When Otis comes up there and goes to Mason and says, 'The thing is all up, I am going with the others,' won't that help? Of course, if Mason knew that they were all going to break away, he would not be left in the lurch, would he?

"COLUMBUS. No; I do not think so.

"BOYCE. The whole atmosphere is in our favor.

"COLUMBUS. About this telegram; will you let me know when it is sent, just as soon as you can?

"BOYCE. I want to get your judgment. Both of us want to be judicious. We do not want to expose him to fight. You will see that he is taken care of in Washington.

"COLUMBUS. I can arrange at that end so there is no leak there. About that dispatch; if you send it, send it through the Postal and let me know as quickly as it goes.

"BOYCE. He is coming back here about 9 o'clock or so, and we will have another talk about these matters. Droste is a silver man and would have voted for Gray, but Otis would not have voted for Gray anyhow. In his mind was Kurtz and Bushnell when I opened the campaign.

"COLUMBUS. As soon as you come I would like to see you and have a conference with you. Supposing we meet at 10 o'clock, unless I notify you to the contrary, at 263 East Broad street at 10 o'clock.

"BOYCE. Will be at the Great Southern. We expect to leave here on the Pennsylvania line about 4 o'clock, but we are going to settle definitely to-night or to-morrow. Good-bye.

"(And the telephone rang off.)"

The telephone books in Cincinnati show that at 6.52 p. m. on January 8 Boyce, from telephone 548, talked to Rathbone about thirteen minutes; and the telephone books at Columbus show that at 6.50 p. m. on January 8 telephone 548, at Cincinnati, called telephone 1092 in Columbus. According to Campbell and Otis, Boyce's first interview with Campbell was on Saturday night, January 8. Other interviews followed on Sunday, and it was in these interviews that the terms for the purchase of Otis's vote were finally agreed upon between Boyce and Campbell. Campbell says in these conversations Boyce wanted to know if they could not arrange for the votes of Droste and Lane, and other members of the legislature, mentioning the sums that he could get for these votes, and stating that there would be a large amount to divide between them.

Now, Miss Jacobs testifies further that on January 9, at about 11.35 o'clock a. m., she took down another conversation between Boyce and Columbus, which was in the following words:

"SUNDAY MORNING, *January 9, 1898—about 11.35.*

"BOYCE. Hello! Is this the Major?

"MAJOR. Yes; wait a minute. [After a moment's pause.] Hello!

"BOYCE. How are you, Major?

"MAJOR. I recognize you.

"BOYCE. Well, I wanted to ask if you have any direct connection with either Droste or Lane? These men were all elected here on a pledge, and our little friend, who is interested, would like to have the others come, and he brought to me a lawyer, who wants to make a deal. They would not do it unless they received a consideration for it. He says that under no circumstances does he think Droste will vote for the Senator unless for these reasons. Do you think I can put any emphasis upon Lane coming our way?

"MAJOR. I do not know; we are catching them as fast as we can bring them.

"BOYCE. Do you put much faith in Jones?

"MAJOR. He can not get away.

"BOYCE. I said in the first place we did not need either Droste or Lane, only for their strength. Now, you know there is going to be a conference to-night with the other fellows. Isn't it wise for us to keep away and not come?

"MAJOR. I don't know, General.

"BOYCE. You know when a man is safe he is safe; that is all there is about it.

"MAJOR. They telegraphed them all to come down.

"BOYCE. If anything should occur between now and 2 o'clock, will you ring me up, please?

"MAJOR. Yes; I will.

"BOYCE. The young lawyer is coming to see me again. You understand these men were elected on a pledge saying that they would not vote for Senator Hanna?

"MAJOR. I know that.

"BOYCE. It was a peculiar thing to get this man off Jones or Manuel. This man had pledged himself. This man had pledged himself to become elected. He has been afraid all the time, and is now afraid, of the Enquirer.

"MAJOR. I do not think they will have much to say. During the heat of the discussion the whole thing would be wiped out. I think we are in good shape. We have got the men with us.

"BOYCE. We want a clear majority for our side without any question. There is no doubt but what we will have 17 of the senators.

"MAJOR. There ought to be 18. I don't see why Burke should not come in.

"BOYCE. My man would like to have Mason for Hanna very much. You see Mason votes before he does. He couldn't raise a question then about it. If I will not come up there I will notify you. I shall see in an hour or two whether Lane or Droste are both here or one of them. No one seemed to know last night and I couldn't find out. I shall know in an hour or two. The latest information is that Droste would nominate Gerrard.

"MAJOR. I am to have a conference a little later and then we will see what is to be done. I will let you know. Good-bye."

(Telephone rings off.)

The telephone books in Cincinnati show that on January 9, at 11.18 a. m., Boyce, from telephone 548, talked to Rathbone in Columbus for ten minutes, at a cost of $2.50, while the books in Columbus show that on said day telephone 1092 at 11.15 a. m. called telephone 548 at Cincinnati, at a cost of $2.50.

There was other evidence before the State senate committee tending to show the intimate relations between Boyce and Mr. Hanna's managers, but it would carry this report to unnecessary length to quote it.

We think that the evidence to which we have already referred, standing as it does uncontradicted and unexplained, shows that certain of Mr. Hanna's managers at Columbus not only knew the purposes which Boyce had in view in Cincinnati, but also that they aided, abetted, and advised him in carrying out these purposes, and that this state of affairs existed while Mr. Hanna was present at his headquarters.

This view is strengthened by two facts disclosed in the report of the State senate committee:

First. That many of the witnesses, whose testimony apparently would have thrown much light upon the subject under inquiry, denied the jurisdiction of the committee and refused to testify under the advice of counsel, who stated that they represented the interests of Majors Rathbone and Dick and Senator Hanna; and,

Second. That Mr. Hanna and his representatives had subpœnas sent them by mail, which seem to have reached them, calling upon them to appear before the State senate committee, to which they made no response.

The report of the majority says they "do not doubt that if facts appeared from the report of the committee of the State senate requiring the United States Senate, out of a proper regard for its own reputation, to take further testimony concerning Mr. Hanna's election, it would be the duty of the Senate to proceed without waiting for further prosecution of the case coming from residents of the State of Ohio."

We think such facts do appear from the report of the committee of the State senate, and that this body should direct further inquiry and investigation to be made.

THOS. B. TURLEY,
E. W. PETTUS.
D. CAFFERY.

Mr. ALLEN, from the minority of the Committee on Privileges and Elections, submitted the following views on the charges of bribery in the election of Hon. M. A. Hanna to the Senate of the United States:

In view of the fact that this Congress will expire within the next three days and that the term of service of Mr. Hanna will expire with it, it is apparent that there is not time within which to consider the case, and it will perforce of circumstances fall with the close of the session. My term of office expires with this Congress, and

I do not, under such circumstances, deem it wise to express an opinion as to what a future Congress should do, to which Mr. Hanna has been elected.

Respectfully submitted.

WILLIAM V. ALLEN.

[The certified copy of the report of the committee appointed by the senate of Ohio to investigate the charges of bribery in the election of Hon. Marcus A. Hanna to the Senate of the United States, and the minority report of that committee are omitted. These documents may be found in Senate Report No. 1859, Fifty-fifth Congress, third session, and also in the Congressional Record, vol. 33, pp. 6585–6635.]

TUESDAY, *June 5, 1900.*

Mr. Pettigrew, during the progress of debate on antitrust legislation, read from the foregoing report of the minority of the committee and commented thereon. After further discussion the entire report of the committee was ordered to be printed in the Record.

(Cong. Rec., vol. 33, pp. 6585 to 6635.)

[Fifty-sixth Congress, first session.]

NATHAN B. SCOTT,

Senator from West Virginia.

Nathan B. Scott was elected a Senator from the State of West Virginia for the term beginning March 4, 1899, in place of Charles J. Faulkner, whose term expired March 3, 1899. Before Mr. Scott appeared to claim his seat certain memorials were presented to the Senate remonstrating against the seating of Mr. Scott. At the beginning of the first session of the Fifty-sixth Congress Mr. Scott was duly seated as a Senator from the State of West Virginia, without objection at the time. Afterwards a resolution was introduced in the Senate declaring that Mr. Scott was not entitled to a seat in the Senate; which was referred to the Committee on Privileges and Elections, with the memorials referred to.

March 20, 1900, the committee submitted a report with an accompanying resolution that Mr. Scott was entitled to a seat in the Senate as a Senator from the State of West Virginia. A minority of the committee submitted a report which was adverse to the right of Mr. Scott to the seat held by him in the Senate. The objections to the title of Mr. Scott to a seat in the Senate, the conclusions of the committee thereon, and the views of the minority of the committee in relation thereto are fully stated in the report of the committee, with the views of the minority, submitted and printed in the case and hereinafter appearing.

The matter was debated in the Senate April 25 and 26, 1900, and the resolution reported by the Committee on Privileges and Elections was adopted April 27, 1900, by a vote of 52 yeas to 3 nays.

The history of the case here given consists of a statement of the proceedings in the Senate relating thereto, as published in the Congressional Record, the report of the Committee on Privileges and Elections, the dissenting report of the minority of the committee, a statement of the days on which these reports were debated in the Senate with a reference to the record of the same, extracts from the remarks of Mr. McComas and Mr. Pettus in such debate, and the vote on the resolution submitted by the committee.

PROCEEDINGS IN THE SENATE.

THURSDAY, *February 23, 1899.*

Mr. Faulkner presented the memorial of John T. McGraw, of Grafton, W. Va., remonstrating against the seating of Hon Nathan B. Scott as a Senator of the United States from the State of West Virginia for the term beginning March 4, 1899. The memorial was ordered to be printed as a document.

(Cong. Rec., vol. 32, pp. 2205, 2206.)

THURSDAY, *March 2, 1899.*

Mr. Faulkner presented a memorial signed by 45 members of the legislature of West Virginia, remonstrating against the seating of Hon. Nathan B. Scott, a Senator of the United States from that State for the term of six years beginning March 4, 1899.

The memorial was ordered to be printed as a document.

(Cong. Rec., vol. 32, pp. 2691, 2692.)

WEDNESDAY, *December 6, 1899.*

The President pro tempore presented the depositions of R. W. Morrow and sundry other citizens of West Virginia, witnesses in behalf of John T. McGraw against the title of Hon. Nathan B. Scott to a seat in the United States Senate; which were referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 33, p. 79.)

Mr. Jones of Arkansas submitted the following resolution; which was referred to the Committee on Privileges and Elections:

"*Resolved*, That Nathan B. Scott, now occupying a seat as a Senator from West Virginia, is not entitled to a seat in the Senate."

The memorial of John T. McGraw, which was presented to the Senate during the last Congress by Senator Faulkner, was ordered taken from the files and referred to the Committee on Privileges and Elections in connection with the foregoing resolution.

(Cong. Rec., vol. 33, p. 98.)

THURSDAY, *December 7, 1899.*

Mr. Chandler, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Nathan B. Scott to a seat as Senator from the State of West Virginia, and said committee is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths, and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

(Cong. Rec., vol. 33, p. 132.)

TUESDAY, *December 12, 1899.*

Mr. Gallinger, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution reported by Mr. Chandler from the Committee on Privileges and Elections, on the 7th instant, in reference to the investigation of the title of Nathan B. Scott to a seat in the Senate as a Senator from the State of West Virginia, reported it without amendment; and it was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 33, p. 231.)

TUESDAY, *March 20, 1900.*

Mr. McComas, from the Committee on Privileges and Elections, submitted a report in relation to certain memorials protesting against the seating of Mr. Scott as a Senator from the State of West Virginia. The report was accompanied by the following resolution:

"*Resolved*, That Nathan B. Scott has been duly elected a Senator from the State of West Virginia for the term of six years commencing on the 4th day of March, 1899, and that he is entitled to a seat in the Senate as such Senator."

Mr. Pettus submitted the views of a minority of the committee; which were ordered printed with the report of the committee.

(Cong. Rec., vol. 33, p. 3072.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Chandler (chairman), Hoar, Burrows, Pritchard, McComas, Caffery, Pettus, Turley, and Harris.]

PROTEST AGAINST THE SEATING OF HON. NATHAN B. SCOTT.

MARCH 20, 1900.—Ordered to be printed.

Mr. McComas, from the Committee on Privileges and Elections, submitted the following report and views of the minority (to accompany Senate Res. No. 213):

The Committee on Privileges and Elections, to whom was referred a certain memorial of John T. McGraw, a citizen of West Virginia, and a certain memorial of John J. Cornwell and others, members of the senate and house of delegates of West Virginia, each memorial protesting against the seating of Hon. Nathan B. Scott as a Senator from that State, have considered the same and respectfully report:

The certificate of the governor of West Virginia, in due form, of the election of Mr. Scott by the legislature constituted a prima facie title in Mr. Scott to a seat in the Senate, and thereupon he was admitted to take the oath of office. The remonstrants insist that he is not entitled to a seat in this body.

The matter was submitted to the committee upon the memorials, the journals of each house, an agreed statement of facts, and certain oral arguments and admissions of counsel at the hearing. The remonstrants offered to prove certain declarations of several State officials, of members of the general assembly, and of attorneys in argument before legislative committees; also certain acts of persons, detailed in certain alleged depositions, submitted in printed form, but the committee was of opinion that there was no proffer of sufficient evidence of fraud or intimidation affecting the election to warrant such investigation by the committee.

On January 24, 1899, the two houses of the legislature of West Virginia each balloted, but failed to concur in the appointment of a Senator, and on the next day both houses met in a joint assembly, and upon the first ballot the whole number of votes cast was 95, of which Mr. Scott received 48, Mr. McGraw 46, and Mr. Goff 1.

Thereupon the presiding officer of the joint assembly declared that Nathan B. Scott having received a majority of the votes cast by both branches of the legislature voting in joint assembly he is duly elected a Senator in the Congress of the United States. The joint assembly thereupon adjourned.

A quorum of the joint assembly and a quorum of each house was present and voted. The proceedings were regular and resulted in the election of Mr. Scott, unless certain admitted facts constitute a valid objection to his election.

The memorial of John J. Cornwell and other members states briefly, and the memorial of John T. McGraw states fully, the objections of the remonstrants to Mr. Scott's title to a seat in this body.

The objections stated by Mr. McGraw are five in number.

The first objection assigned is that Mr. Scott did not receive a majority of the votes constituting such joint assembly; that there were in said body 97 votes, a majority of which is 49, and that Mr. Scott received but 48 votes.

The journal of the joint assembly on January 25, 1899 (House Journal, p. 189), shows 25 senators and 70 members of the house of delegates present and voting; shows 95 to be the whole number of votes cast, and of these Mr. Scott received 48 votes—a majority of all votes cast.

Under the apportionment the senate contained one more member and the house one more member. The journal of the joint assembly discloses nothing concerning these two. It does not appear therefrom whether they were present. It does not show that they were entitled to vote or that they in any manner claimed or waived the right to vote. Prima facie, from the journal of the joint assembly, either they were not entitled and were not present, or if present did not claim or waive their right to vote. Therefore this journal shows that Mr. Scott received a valid majority of the joint assembly, consisting of 95 members.

As was said in Lapham and Miller (Senate Election Cases, p. 697):

"The ground alleged is that there was not a majority of the whole legislature actually voting for the members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the members chosen. In our opinion that was a valid election."

See also Clark and Maginnis *v.* Sanders and Power (Senate Election Cases, 727); Davidson *v.* Call (Senate Election Cases, 806).

The journals of the senate and house explain the nonparticipation of the senator from the fourth senatorial district and the member of the house of delegates from Taylor County.

On January 20, 1899 (Senate Journal, p. 66), a resolution was introduced in the senate declaring that Kidd, the sitting member, was not elected and that Morris was duly elected, directing that Kidd vacate his seat and Morris be sworn in.

On January 23, 1899 (Senate Journal, 91–94), this resolution was considered and a substitute was adopted reciting the contest between Kidd and Morris, the reference to and pendency of the contest before the committee on privileges and elections, and the opinion of the senate that Morris was entitled to the seat pending the contest, wherefore the senate resolved that Kidd was not entitled and that Morris was entitled to a seat in the senate from the fourth senatorial district pending the contest, and that Morris be sworn in. Morris took the oath and was seated.

On January 25, 1899 (Senate Journal, p. 1081), the senate adopted a resolution that the contested-election case of Morris *v.* Kidd be the special order for consideration and determination on its merits on February 7, 1899, with leave to either party to take testimony, "and that pending the determination of such contest neither Morris nor Kidd shall be entitled to vote or sit as a member of this body."

The journal of the house shows the following proceedings in the contest over the seat of delegate from Taylor County:

The secretary of state, under chapter 3, section 70, of the Code of West Virginia, returned to the house when it assembled the list of delegates entitled to participate in its organization, and among them Brohard, of Taylor County, who was sworn in. (House Journal, p. 5.)

On January 12, 1899, the house referred to the committee on privileges and elections the question of the right of Brohard to be sworn in, with instructions to report the person prima facie entitled to be sworn in as member from Taylor County. On January 16, 1899, the house adopted a resolution reported from said committee that, pending determination of the title to the seat, neither Brohard nor Dent (the contestee) "be permitted to participate in the proceedings of this house."

On January 24, 1899, the majority of said committee reported a resolution that Dent was elected a delegate from Taylor County, and that he at once be qualified and take his seat.

On January 25, 1899, the house unanimously resolved that the consideration of the

majority and minority reports concerning the contest in relation to the delegate from Taylor County be postponed until February 7, with leave to either party to take testimony.

The judgment of the senate was a finality in respect of Morris and Kidd. The judgment of the house was a finality in respect of Dent and Brohard. Each of them was adjudicated not qualified to participate or vote in the house wherein he claimed a seat, pending the final decision of the body which by the constitution of West Virginia (art. 6, sec. 24) is made "the judge of the election returns and qualifications of its own members."

Therefore, on January 25, 1899, only 95 members had the right to participate and vote in the two houses; only 95 members had the right to participate and vote in the joint assembly. Of these Mr. Scott received 48 votes—a majority. Therefore the first objection, that there were 97 votes in the joint assembly, and that a majority was 49, is unfounded.

The second objection assigned is, that "of 48 votes received by Mr. Scott were the votes of Senators Getzendanner and Pearson, cast and received against a protest spread upon the journal of the joint assembly, and showing that these senators had, under article 6, section 13, of the State constitution, forfeited their seats as senators in the legislature by the acceptance of lucrative offices under the Federal Government, and likewise their right to vote in said joint convention."

These protests show that Senators Getzendanner and Pearson accepted commissions in the Second Regiment of West Virginia Volunteers and discharged the duties and received the pay of captain and lieutenant, respectively, while in the service of the United States during the Spanish war. These facts are admitted, and it is further admitted that these senators were "hold-over senators," who, between the session of the last legislature and the assembling of the new legislature in 1899, had accepted, had served, and had resigned their commissions prior to the twenty-fourth regular session of the State legislature. The protest further recites that these two senators had vacated their seats and forfeited their right to vote in the joint convention, as stated in the second objection.

It appears by the journal of the joint assembly that Senator Getzendanner and Pearson were present therein and voted for Mr. Scott.

The constitutional provision is that—

"No person holding a lucrative office under this State, the United States, or any foreign office * * * shall be eligible to a seat in the legislature."

On January 20, 1899, resolutions of like tenor and effect with these protests were offered in the senate, declaring that by virtue of this constitutional provision and the acceptance of said commissions each of these senators "thereby became ineligible and forfeited his right to a seat in this body." These resolutions were referred to the committee on privileges and elections, and on January 23 1899, that committee reported in lieu of said resolutions a substitute declaring that Getzendanner and Pearson are legally qualified and entitled to hold their membership in the senate, and have not vacated their seats therein under the provisions of section 13 of article 3. The senate adopted the substitute on January 24, 1899.

This judgment of the senate of West Virginia upon the title of Senators Getzendanner and Pearson to their seats therein is a finality. The Senate of the United States can not reverse it. As before said, the State senate is, under the State constitution, "the judge of the elections, returns, and qualifications of its own members." Such constitutional powers have effect, not only to make the members of each house the judge in each case, but also to forbid that the members of any other tribunal shall be judges thereof to review or reverse such original judgment. The jurisdiction of each of the houses of the State legislature is original and exclusive. (Case of H. A. Du Pont, Fifty-fourth Congress, first session, Report No. 289, p. 104.)

The senate of West Virginia is the only tribunal which could either hear or determine lawfully these objections to the qualifications of Senators Getzendanner and Pearson. Its judgment in their favor is final. The Senate of the United States has not authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State. Where the title of an individual member of the legislature who has once been seated has been determined by a subsequent adjudication of the house to which he belongs, such judgment will not be here disturbed or inquired into. (Potter *v.* Robbins, Senate Election Cases, 179; Clark and Maginnis *v.* Sanders and Power, Senate Election Cases, 727; the case of David Turpie, Senate Election Cases, 719; the petition of H. A. Du Pont (minority report), Fifty-fourth Congress, first session, Report No. 289, pp. 98–104; Sykes *v.* Spencer, Senate Election Cases, 611.)

It should be noted that the Senate of the United States, in Stanton *v.* Lane (Senate Election Cases, 276), upon a similar case came to a like conclusion with the senate of West Virginia. James H. Lane was elected a Senator from Kansas in April,

1861, and took his seat July 4, 1861. It appears that on June 20, 1861, President Lincoln appointed him brigadier-general of volunteers; that he accepted the appointment and qualified to perform its duties, but had resigned the office. The governor of Kansas appointed Frederic P. Stanton to fill the vacancy, but on January 16, 1862, the Senate voted that Lane was entitled to his seat in that body. Of the majority, some held that the office of brigadier-general did not exist on June 20, 1861; others that, although Lane held the office after he had been elected Senator, yet, having resigned the same before taking his seat in the Senate, he did not come within the constitutional provision (art. 1, sec. 6). It profits little here to discuss the reasons or motives of State senators or of the Senate.

It is well said in David Turpie's case (Senate Election Cases, 719), that—

"This body is made by the Constitution the judge of the election, qualifications, and returns of its members. The senate of Indiana is likewise the judge of the election, qualifications, and returns of its own members. We must determine all questions arising out of the proceedings of the electors. But who sustain the character of electors is to be determined by the legislative body of the State. We can not inquire into the motive which controlled its judgment."

The third and fourth objections of John T. McGraw, remonstrant, may be considered as two parts of the same ground of objection. It is charged that Republican senators in the State senate threatened to unseat unlegally certain Democratic senators unless the house acceded to demands (not stated), and did unseat R. F. Kidd, a Democratic senator, in partial execution of these threats; that thereby the Democratic members went into joint convention under duress; that this joint convention was not held under the law, but under a private agreement between the members of the two houses, ratified by both houses; that this agreement was void as against public policy and vitiated the election of Senator Scott; that the effect of this agreement was to disfranchise one Democratic senator and one Democratic member of the house of delegates, who, had they been permitted to cast their votes in the joint convention, would have voted against Mr. Scott.

It does not appear from the journal of the joint convention that the alleged Democratic senator, Kidd, and the alleged Democratic delegate, Dent, were present or offered to vote in the joint convention. Their names were not called. If present, as stated in brief and argument, they appear to have acquiesced, to have waived their alleged right as representatives.

It does appear that the State senate had a Republican majority and the house of delegates had a Democratic majority, and that when the joint convention met that body was comprised of 49 Republicans and 46 Democrats. All of the latter voted for Mr. McGraw; all save one of the Republicans, who voted for Judge Goff, voted for Mr. Scott, giving him 1 majority, as stated.

It was conceded in briefs of counsel and in their oral arguments that there was excitement and much activity, as is not unusual in legislative bodies in like situations, and that there were contests against sitting members from political motives. One Democrat in the senate, Kidd, had been unseated and a Republican, Morris, seated in his place. One sitting Republican in the house, Via, had been unseated and a Democrat, Logan, had been seated in his place. Another sitting Republican, Brohard, of Taylor County, had been excluded from participation in the proceedings of the house on January 16, and on January 26 the committee had reported that Dent was entitled to the seat. Neither Kidd, Dent, nor Brohard had voted that day for Senator in either house, balloting separately, nor had either offered to vote. In the senate Morris was present and voted for Scott.

As the joint convention was to assemble at noon on the following day, it would appear difficult to unseat Brohard and seat Dent earlier the next morning.

At this juncture the Republicans would have had in joint convention 50 votes and the Democrats would have had 46 had the joint convention met without further action in either house.

As a result of conferences among adherents of the two parties, 5 Democratic members of the house, including Mr. McKinney, the speaker, and Mr. Davis, the leader of his party, signed the following proposal, which was thereafter presented to and signed by 5 Republican senators, including Mr. Marshall, the president of the senate. This proposal, which purports to have been made by Democrats and accepted by Republicans, is as follows:

"*To the Republican Senators:*

"GENTLEMEN: In order to bring about a peaceful and orderly settlement of the differences now existing between the two houses of the West Virginia legislature, we submit to you the following propositions, viz:

"(1) The election and qualification of the member of the house of delegates from Taylor County to be heard and tried upon its merits.

"(2) The election and qualification of a senator from the Fourth senatorial district to be heard and tried upon its merits.

"(3) These two cases to be finally voted upon in each house on the 7th day of February, 1899, after 2 p. m. of that day, with privilege to any party to take any evidence pertinent up and until noon of February 6, 1899, when the taking of evidence shall be closed.

"(4) All contests and controversies as to the membership of each house other than the two above named to be dismissed, and no further contests or controversies respecting the membership therein to be brought or entertained by either house.

"(5) Pending the investigation hereinabove referred to, neither Dent, Brohard, Kidd, or Morris shall vote, in joint assembly or otherwise.

"(6) All resolutions now pending in either house, looking to unseating any member thereof, or questioning the seat of any sitting member, shall be dismissed.

"(7) Each of the signers of this proposition pledges himself to vote and use all honorable means to have the stipulations herein contained faithfully carried out and observed.

"O. S. McKINNEY.
"ISAIAH BEE.
"W. L. MANSFIELD.
"JNO. W. DAVIS.
"R. W. MORROW.

"We, the undersigned Republican senators, concur in the foregoing proposition.

"R. E. FAST.
"O. S. MARSHALL.
"ALONZO GARRETT.
"S. L. BAKER.
"S. W. MATTHEWS."

Its first sentence declares its purpose to bring about a peaceful and orderly settlement of the differences now existing between the two houses. It is to be noted that those who are alleged to have acted under duress first signed and submitted the proposal, then those who it is alleged threatened them consented to accept the proposal.

This proposal stipulated that the case of Brohard, Republican, in the house, and the case of Kidd, Democrat, in the senate, shall be heard and tried upon their merits, and finally voted on February 7, 1899; that, pending the decision of these cases, neither Dent, Democrat, nor Brohard, Republican, in the house, nor Kidd, Democrat, nor Morris, Republican, in the senate, shall vote, in joint assembly or otherwise, and that all contests and resolutions looking to unseating of members shall cease in each house.

The signers pledge themselves individually to so vote and to use all honorable means to have those stipulations carried out. Five Democrats in the house and 5 Republicans in the senate were numerically sufficient to change the partisan majority in either house. As these men included the presiding officers of each house and the floor leaders of the majority in each house, their statement of the spirit and purpose of the proposal of these Democrats, accepted by these Republicans in the paper they signed, should be accepted as true.

In the senate, as a result of this conference, Senator Garrett the next morning offered the resolution postponing the Kidd *v.* Morris contest, as before stated, and forbidding further participation of Morris in the voting for Senator of the United States. It was adopted unanimously.

In the house Mr. Davis offered a like resolution, postponing the discussion of the Dent *v.* Brohard contest, as before stated. It was adopted unanimously.

Mr. John W. Davis, conceded by both sides to be a man of ability and high character, the leader of the Democratic majority in the house, who introduced the resolution, in a printed deposition (used by both sides in argument before the committee and so used here) gives his own reasons for signing this paper, and declares that the statement he makes for himself was in accord with conversations he had with other Democratic signers at or before the time the agreement was presented to him for signature. Mr. Davis's statement may therefore be taken as the statement of all the Democrats who signed this proposal:

"Question. What was your understanding of the purpose of that agreement upon the part of the Democrats?

"Answer. That agreement, as I understood it, was entered into for the purpose of avoiding further trouble between the two houses and in each house in regard to contests then pending, the situation having become very acute, rumors being current upon all hands of an intention upon the part of the Republican minority in the

house to withdraw and organize a separate house and upon the part of the Republican majority in the senate to unseat various Democratic senators, and it being believed that the best interests of the people of West Virginia and the proper conduct of the business of the legislature demanded an early and final settlement of these questions."

In the senate Kidd had been unseated by the Republican majority. In the house Via had been unseated and Brohard was about to be unseated by the Democrats. Other contests were pressed from partisan motives. The pacific understanding of these 10 men ended this strife and enabled the legislature to proceed with its business.

It may be that wrong and injustice to members and contestants was done and intended to be done upon one side or the other or on both sides. There is no evidence of force or fraud in these transactions in the documents and facts before us. The unanimous vote in both houses upon resolutions postponing pending contests for seats disproves duress if the word duress has meaning in this remonstrance.

We can not say that such an agreement as this between 10 men, and favored afterwards by all members, is "void as against public policy." We can not declare void the unanimous act of the senate or the unanimous act of the house of like pacific purpose. Nor can we perceive how it "vitiated said election." Its immediate result was not "to disfranchise one Democratic senator and one Democratic member." Its immediate result, if any, was pacific, and the subsequent action of both houses had as its immediate result the disfranchisement of Morris, the sitting Republican senator.

The sitting Republican delegate from Taylor County had eight days before been excluded from participation in the proceedings. The Federal statute required this legislature to proceed to elect the Senator of the United States on the second Tuesday after organization of the legislature and to meet next day at noon in joint assembly, and pending this joint meeting both houses thus disposed of contested cases. As it was unanimous in both houses, the members appear to have considered it a fair and reasonable plan, as it facilitated the meeting in joint assembly—to have considered it to be in the public interest.

It is true that speedily thereafter Morris was unseated and Kidd seated again, and that Brohard was unseated and Dent seated in his place. The merits of these contests were to be decided by the two legislative bodies having original and exclusive jurisdiction. As we have said, their public and solemn adjudications of the election of these members can not be reviewed, or reversed, or affirmed here. Therefore the third and fourth objections of the remonstrants are insufficient.

A majority of the committee do not mean to decide that the Senate could not refuse a seat to a claimant who is elected by a legislature which is itself directly and plainly the result of force or fraud. If, on the eve of a joint assembly, a majority in either house should cease to be judges of the elections and qualifications of members of the minority and become revolutionary conspirators; if, for instance, a majority should imprison enough minority members on the day of the joint convention to reverse the majority therein, we do not assert that the Senate should not inquire into such violence, force, and intimidation, or that it could not declare that there was a joint convention in form only, but not in fact, and that there was no election therefore. In the past the Senate has investigated fraud and corruption in elections where the proceedings were regular and the form was lawful, and then declared there had been no election.

The case presented by the remonstrants in no wise resembles such extreme case.

Upon careful consideration of the case before us the majority of the committee agree that Mr. Scott was peacefully and fairly elected, and that the first four objections of the remonstrants are not valid objections.

The fifth objection assigned by John T. McGraw, memorialist, is that at the time of the election of Mr. Scott he was a citizen but not an inhabitant of the State of West Virginia, but was an inhabitant of the District of Columbia.

It is admitted that Mr. Scott was born in Ohio; that when a young man he removed to Wheeling, in West Virginia, engaged in business, had resided there until January 1, 1898, when he was appointed by the President Commissioner of Internal Revenue, and upon his confirmation thereafter he came to Washington to discharge the duties of this Federal office, but with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va., his home; that in accord with this intent he exercised unchallenged the right to vote and did vote on November 8, 1898, in the precinct in Wheeling where his residence was and had remained unchanged; that he came here with no intent to change his domicile to Washington from Wheeling, and that he claims to be an inhabitant of Wheeling, W. Va., and that he remained in Washington in the discharge of his official functions with intent to return to his home in Wheeling when his duties of office here ended.

The mere statement of facts should suffice to show that this objection is unfounded. The Federal Constitution requires that the Senator shall be an "inhabitant" of the

State. This term is a legal equivalent of the term "resident," and residence is what is required by the law of West Virginia to entitle the male citizens of that State to vote.

The committee, without extended discussion, were unanimously of the opinion that Mr. Scott was an inhabitant of West Virginia at the time of his election to the Senate of the United States and is entitled to retain his seat.

The committee ask to be discharged from the further consideration of the several memorials, and recommend the passage of the following resolution:

"*Resolved*, That Nathan B. Scott has been duly elected a Senator from the State of West Virginia for the term of six years commencing on the fourth day of March, eighteen hundred and ninety-nine, and that he is entitled to a seat in the Senate as such Senator."

VIEWS OF THE MINORITY.

The remonstrants in this case took a large number of depositions, on notice to Mr. Scott of the time and place, and these depositions were offered to the committee as evidence. But these depositions were not taken under authority of the committee, but were taken as though there was a case pending in a court of the United States between parties. The committee rejected the depositions.

Then the remonstrants asked to have the witnesses whose depositions had been taken summoned as witnesses, but the committee refused this request, and the case was tried on the journals of the two houses of the legislature of West Virginia, and some arguments of counsel as to certain facts. Later your attention will be called to parts of the said depositions.

The facts, on the evidence received by the committee, are as follows:

On the 11th day of January, 1899, the legislature of West Virginia assembled and each house was organized.

In the senate the Republicans had about two-thirds, but two Republicans would not vote for Mr. Scott. The house of delegates was Democratic by a small majority.

In the Senate objection was made to H. C. Getzendanner and E. G. Pierson being admitted to seats as senators, on the ground that each of them, after election in November, 1896, and after serving as senators in 1897, had accepted a commission as an officer in the Volunteer Army of the United States—an office of profit— and served as such officers—one as captain and the other as lieutenant. At first these objections were laid on the table, and the two persons objected to took their seats.

Afterwards the matter was referred to a committee, and the committee, in substance, found the facts as stated in the objections to be true; but the committee further found that each one of these army officers had been discharged before the legislature met in January, 1899. Therefore the committee reported that said Getzendanner and Pierson were still senators; and this report was adopted, by a party vote, on the 24th day of January, 1899. This ruling was made on a demand for the previous question and without any debate.

And on the same day (January 24, 1899) two petitions for contests of seats in the senate were presented to the senate as follows:

J. H. Collins, Republican, against J. H. Marcum, Democrat, and D. M. Shirkey, Republican, against Walter L. Ashby, Democrat.

On January 20, 1899, the following resolution was offered by Mr. White:

"As there is a contest pending in this senate against Walter L. Ashby, a member of said senate from the ninth senatorial district: Therefore, be it

"*Resolved*, that said Walter L. Ashby be suspended from voting or discussing any matter that may come up before this body until said contest is settled."

This resolution, under the rules, went over. And at the same time, January 20, 1899, Mr. White offered another resolution in these words:

"*Resolved*, That R. F. Kidd, from the fourth senatorial district, now holding a seat in the senate of the State of West Virginia, was not duly elected on the 8th day of January, 1898, but B. M. Morris was duly elected: Therefore, be it

"*Resolved*, That said R. F. Kidd vacate his seat in the senate of West Virginia, and M. B. Morris, of Gilmer County, be required to be sworn in as a member of said body." (66.)

This is the first mention of the name of M. B. Morris in the journal of the senate. This resolution also went over, under the rules, for one day.

As above shown, the petition of contest of J. H. Collins against James H. Marcum was presented to the senate on the 24th day of January, but it was marked by the clerk "Filed January 21, 1899, at 8.15 p. m."

On January 21, Mr. Latham offered the following:

"Whereas a contest has been instituted by J. H. Collins against James H. Marcum for a seat in the senate as senator from the sixth senatorial district, and believing

that, pending the further investigation of the case, justice and right dictate that said seat be declared vacant:

"*Resolved*, That the seat in the senate now occupied by James H. Marcum as a senator from the sixth senatorial district be declared vacant; that the committee on privileges and elections be instructed to make a thorough investigation of the case and have power to send for persons and papers and any ballots in dispute, and to take such pertinent evidence as may be offered by either party, and that said Collins and Marcum be granted leave to appear before said committee in person and by counsel, and that pending such investigation neither James H. Marcum nor J. H. Collins be permitted to participate in the proceedings of the senate nor to occupy a seat therein." (78, 79.)

This resolution was laid over for a day under the rules.

On January 23, 1899, the resolution offered by Mr. White unseating Kidd and seating Morris was called up and a substitute was offered by Mr. Smith, a Republican, and was adopted by a party vote—16 to 8. That resolution is as follows:

"Whereas there is now pending in the senate a contest between R. F. Kidd and B. M. Morris for a seat as senator from the fourth senatorial district of this State; and

"Whereas said contest has been referred to the committee on privileges and elections, where the same is pending, and can not be determined for a considerable length of time; and

"Whereas it is the opinion of the senate that pending said contest B. M. Morris should be entitled to said seat: Therefore, be it

"*Resolved*, That R. F. Kidd is not entitled to a seat in the senate as a senator from the fourth senatorial district, and that B. M. Morris is entitled to a seat in the senate as a senator from the fourth senatorial district pending the final disposition of said contest proceedings, and that said B. M. Morris be forthwith sworn in as such senator." (91, 92.)

And B. M. Morris was sworn as a senator pro tempore et pro hâc vice. (94.)

On the 24th of January, 1899, the senate voted for United States Senator, and N. B. Scott received 17 votes, counting Getzendanner and Pierson, the two who were army officers, and B. M. Morris, the man sworn in temporarily on the preceding day.

And J. T. McGraw received 8 votes, Whitaker, Republican, not voting.

Protests were filed against counting the votes of Getzendanner, Pierson, and Morris.

In the house of delegates a vote was had for United States Senator on January 24, 1999; and

John T. McGraw received 38 votes and Nathan B. Scott received 29 votes, Nathan Goff received 1 vote, Reese Blizzard received 1 vote, and Mr. Asbury was absent and did not vote.

Scott had 46 votes, McGraw had 46 votes, and 2 votes scattered.

On the 24th of January, 1899, when the vote for United States Senator was taken in each house separately, there were pending for seats in the Senate the following contest cases: M. B. Morris *v.* R. F. Kidd, D. M. Shirkey *v.* W. L. Ashby, and J. H. Collins *v.* J. H. Marcum. And in the house of delegates there were then pending references as to the title to seats of the following persons: H. F. Brohard *v.* W. R. B. Dent, of Taylor County; Wilbur Spencer, W. S. Talbott, J. D. Logan, W. B. Cutright, Julius Scherr, B. J. Redmond, and Frank Legge, respectively.

The case of Brohard and Dent was in this shape: Neither had a certificate of election. The returns showed a majority for Brohard, but on a recount by the returning board, authorized by law, it appeared that Dent was elected. This board consisted then of two members only, and the two did not agree. However, the officer who made the list of members, a Republican, put the name of Brohard, a Republican, on the list, though he had no certificate.

Then, after the first vote for United States Senator, five Democrats of the house and five Republicans of the senate made a written agreement on January 24, 1899, which is copied into the report of the majority of this committee, and by this agreement the contests between Morris and Kidd in the senate, and between Brohard and Dent in the house, were to be laid over until the 7th day of February, 1899, and neither one of the four was to be allowed to vote until the contests were decided; and all other contests were to be dismissed.

And on the morning of the 25th of January, 1899, resolutions were passed in each house to carry that agreement into effect.

And afterwards, on the last-named day, the two houses met together and voted for United States Senator, and N. B. Scott received 48 votes, J. T. McGraw received 46 votes, and Nathan Goff received 1 vote—total, 95. (S. J., 112.)

So Mr. Scott received a majority of 1 vote and was declared elected.

After Mr Scott was declared elected, the senate, on February 7, 1899, had no trouble in giving Mr. Kidd the seat from which he had been suspended, pro hac vice.

No one then disputed his right, for the purpose of his exclusion had been accomplished. (S. J., 312.)

And on the same day Dent was given his seat as a member of the house.

From the facts above stated, which are proved by the journals of the two houses, it appears that the election of Mr. Scott was procured by fraud. The senate elected two members for that body (Getzendanner and Pierson), and suspended a Democrat (Kidd) until after the Senatorial election so that he could not vote against Mr. Scott. It must be remembered that Mr. Scott was declared to be elected by a majority of 1 vote only, and that on the vote in the houses separately on the day before Scott received 46 and McGraw 46 votes. So without some curiously fraudulent proceedings Scott could not be elected.

Now, look at the facts proved by the depositions above mentioned.

Together these depositions prove a regular conspiracy to elect Mr. Scott by fraudulent practices.

George W. Atkinson was governor, William M. O. Dawson was secretary of state and chairman of the Republican State executive committee, A. B. White was collector of internal revenue and secretary of the Republican State executive committee, Edgar P. Rucker was attorney-general of the State, and all of them Republicans, and all of them engaged in the conspiracy to elect Mr. Scott.

The governor, it appears, commenced the fraudulent proceedings. At the November election, 1898, R. B. Ash, of Marion County, a Democrat, was elected a member of the house of delegates over A. N. Pritchard, a Republican. On the 29th day of November the governor of the State sent a telegram in these words:

"CHARLESTON, KANAWHA COUNTY, W. VA.,
"*November 29, 1898.*

"Capt. A. L. PRITCHARD, *Mannington:*

"Party interests demand contest in your case. We will pay all expenses. Please wire Kendall to proceed immediately.

"G. W. ATKINSON."

And on the same day the secretary of state and the collector of internal revenue sent a telegram in these words:

"CHARLESTON, KANAWHA COUNTY, W. VA.,
"*November 29, 1898.*

"Capt. A. L. PRITCHARD, *Mannington:*

"Republican State executive committee request you to allow the use of your name in contest proceeding to protect interests of Republican party. All costs and expenses will be paid by us.

"WM. M. O. DAWSON, *Chairman.*
"A. B. WHITE, *Secretary.*"

These telegrams were addressed to Capt. A. L. Pritchard at the place of his residence, and were received by him, but were intended for Mr. A. N. Pritchard, who was defeated by Mr. Ash for a seat in the house of delegates (pp. 86, 87, brief of remonstrants).

In the house of delegates Logan had the regular certificate of election, and the committee on privileges and elections reported that he was prima facie entitled to be seated, though Via, who had no certificate, was improperly placed on the roll of the house by the secretary of state, W. M. O. Dawson, who sent the telegram to Pritchard.

Attorney-General Edgar P. Rucker and United States District Attorney Joseph H. Gaines and others represented Via in his contest with Logan before the house committee, and in his speech before that committee the attorney-general, in an ill-tempered way, charged that the committee had already agreed to decide against Via and in favor of Logan, and if they were to carry out this prearranged plan the committee need not be surprised "to see blood flow in the capitol on the next day, because plans had been formulated looking to the preventing of the seating of Logan, even at the cost of shedding of blood" (p. 81 of brief of remonstrants).

Threats were made by Republican members of the senate to turn out all of the Democratic senators elected in November, 1898, if a compromise was not made.

And many threats were made by Republicans in authority to organize a new house of delegates out of the Republicans then sitting and the Republicans defeated at the election in 1898, if a compromise was not made.

For the purpose of carrying out these threats, the defeated candidates for seats in the house of delegates of the Republican party were summoned and came to the capital.

And for the same purpose, Republicans defeated in November, 1898, for seats in

the senate were summoned to the capital to occupy seats to which Democrats were duly elected, and the contests mentioned were instituted in the senate.

These fraudulent and revolutionary proceedings had the active support of the senate, the governor, the secretary of state, and the attorney-general, and all for the purpose of electing Mr. Scott to a seat in this body.

And threats were made to turn out of the senate all Democratic senators elected in November, 1898, if the compromise were not made.

Threats of violence were made by Republicans against Republican members who refused to vote for Mr. Scott.

It is inferred from the form of the paper called "The compromise agreement," in the report of the majority of the committee, that the Democrats in the legislature made the proposition for the compromise to the Republicans. The inference, though natural from the form of writing, is not true as matter of fact. The Republicans in the senate made the proposition to the Democrats in this way, as shown by the deposition of Hon. William A. Ohley. He testifies:

"Very soon after the unseating of Kidd I was met by Hon. Z. I. Vinson, of Huntington, chairman of the Gold Democratic State committee, at the Hotel Ruffner, who invited me to a conference with himself and John T. McGraw in John T. McGraw's room. He said that Senators Fast, Marshall, and others, though they acted with their party in unseating Kidd, did not approve of such revolutionary tactics, and wished to make a compromise fair and just to all concerned under which they could break away from their party associations and act in accordance with good conscience.

"He stated that if a sufficient number of Democrats in the house to carry the resolution through the house, in conjunction with the Republicans, would agree to the proposition he had to make, that enough Republicans in the senate would agree to such a resolution to carry the proposition in the upper branch of the State legislature. His proposition had the essential features of the agreement as it was finally signed.

"He said at the time that should Senator Elkins and Chairman Dawson learn what was going on before it was done they would put a stop to it, and urged that if the Democrats wished to retain their newly elected senators and to reseat Kidd, who had already been unseated, that they act with all speed, while those Republicans who had cooperated with their party in unseating Kidd were repentant and willing to act the part of honest officials and conscientious citizens. He was requested, either by myself or Mr. McGraw, to put his proposition in writing.

"He did so then and there, and the proposition filed herewith is the original proposition then and there drafted, except as to the striking out of the word 'conservative' and the change of dates in section 3. Figuring what the result would be under the compromise agreement it was seen at once that the Democrats could not elect a United States Senator by a party vote, but the advantage of retaining the legislature in its integrity and of preventing any further revolutionary tactics upon the part of the Republicans, and the undoing of the great wrong that had already been done Senator Kidd, was regarded by us as of too great advantage to be lightly thrown aside, particularly in the face of the evident purpose of the Republicans to further increase their majority by throwing out additional hold-over senators.

"I therefore, after discussing the length of time allowed for maturing the contests and objecting to any greater delay than February 4, which was inserted in the paper, took the paper to the capitol and in fifteen minutes had the necessary number of signatures of the Democratic members of the house of delegates. The paper was then handed to Mr. Vinson, and he stated that he would immediately obtain the signatures of the Republican senators. The next time I saw the paper was that evening, when it was handed to me by George W. McClintic, who had been acting as counsel for the Republican committee in the Republican contest cases. The dates of hearing the contest cases had been changed in the paper from the 4th day of February to the 10th day of February, Mr. McClintic stating that this much time was necessary in order to mature the contest cases.

"The Democrats objected to this delay, as needed legislation had already been delayed too long. We were in the hall of the house of delegates, and there was a considerable dispute before the opening of the night session as to this change in date. Very much to the surprise of the Democrats, who supposed that the leaders of the Republican party were neither aware of the agreement nor approved of it, many of the latter appeared to participate in the discussion. W. M. O. Davidson, chairman of the Republican State committee, and the secretary of the committee, A. B. White, of Parkersburg, and others appeared as though interested in the proceedings.

"The speaker of the house called the house to order and, on motion, it was adjourned in a very few minutes; and by arrangement the signers of the agreement and those proposing the same agreed to meet at the Ruffner Hotel, and did later

gather at the room of Speaker McKinney. Here were present Senator Stephen B. Elkins, Congressman B. B. Dovener, Chairman Dawson, and other leaders of the Republican party. All seemed to be fully cognizant of the terms of the agreement and fully advised as to the difference between the parties having it under consideration. After some discussion the change in time to the 7th of February was agreed upon, and resolutions carrying out the terms of the agreement were spread on the records of the two houses the following morning, which was the day of the joint convention."

In short, those depositions prove the following:

1. That in November, 1898, soon after the election, the governor of the State, the secretary of state, who was also chairman of the Republican State committee, and the secretary of the said committee and others entered into a fraudulent conspiracy, the purpose of which was to elect Mr. Scott United States Senator.

2. And that the said conspirators, aided by the attorney-general and State senators and others in authority, accomplished their fraudulent purpose by fraudulent means.

The questions of law arising on the facts of this case will be briefly noticed.

It is urged by the majority of the committee that as each house of the legislative body was the judge of the election of its own members its decision can not be reviewed. This proposition, though often asserted, is not sound law, in the broad way it is asserted, because there are many cases to which it does not apply.

It is a universal rule of the courts that a judgment obtained by fraud will be set aside on timely application of the party injured if he is not in fault. One of the old judges put the law down in this form:

"The jurisdiction of courts of equity to set aside a decree obtained by fraud in an original bill filed for that purpose has long been unquestioned."

See Freeman on Judgments, sections 486 and 489, where the learning on this subject is collected.

The report of the majority of the committee states an exception to their general rule, which, if fairly applied to the facts, would be decisive against Mr. Scott. The paragraph of that report referred to is on page 8, and concludes in these words:

"In the past the Senate has investigated fraud and corruption in elections where the proceedings were regular and the form was lawful, and then declared there had been no election."

Senators sometimes forget that this Senate is the judge of the "elections, returns, and qualifications" of its own members.

There is no need to cite cases to prove that, under common law, and under the constitution of West Virginia, quoted in the majority report, Getzendanner and Pierson, after they were elected senators in 1886, and after serving as senators in January, 1887, resigned their seats by accepting offices of profit under the United States, and the State senate again elected them to seats in the senate. These senators were elected by the people and had their seats and resigned their seats and never were reelected by the people, but were reelected by the senate and voted for Scott.

But if it were admitted that the State senate were absolutely the judge of the elections and qualifications of its members, and that their decision could not be investigated elsewhere, still the record shows that in the case of Kidd the State senate did fraudulently and illegally suspend Kidd, who was duly elected a senator and received a certificate of election, and was duly sworn and admitted to his seat, and afterwards, on January 23, 1899, the senate passed a resolution, not as to his election or qualifications, not that he was not elected, not that his opponent, Morris, was elected, but the senate resolved in substance, without authority, that Morris should occupy Kidd's seat pending the contest—a fraudulent device, entirely outside of any pretense of authority, for the purpose of securing the election of Mr. Scott to a seat in this senate.

Remember that all of the members of both houses were 97, and on the vote as counted, Scott received 48, McGraw 46, and Goff 1. Getzendanner and Pierson, senators only by the fraudulent action of the senate, voted for Mr. Scott, and Kidd was prevented from voting against Scott by the revolutionary and fraudulent contrivances of the senate in suspending Kidd without any cause stated and without any authority to do so; for no man will dare to contend that any legislative body in any one of the United States has the authority to suspend a member without cause or evidence.

If you once establish such a doctrine, the inevitable result will be anarchy. For, unfortunately for this country, men like Governor Atkinson, Secretary of State Dawson, and Collector White are to be found to invent plans of fraud; and bold men like Attorney-General Rucker may be found to threaten bloodshed on "plans formulated," even when addressing a legislative committee as lawyers. And he the State's chief law officer!

The senate of the State, for cause, and by a two-thirds vote, could expel a mem-

ber, or by a majority vote could decide a contest after hearing, but who so bold as to assert that the senate had authority, without any cause, to suspend a member pending a contest for his seat? And that contest in this case was merely a fraudulent pretense, invented by the governor and his associates, in champertous and fraudulent conspiracies, to institute contests and pay "all costs and expenses,"—"against the peace and dignity of the State."

Kidd's case, when he was suspended, was before a committee of the senate, and that committee had sent for and obtained certain ballots, but never afterwards asked for or received any other evidence. And the senate, after Mr. Scott was declared elected, unanimously declared that Kidd was elected. And peace was again a blessing in Charleston.

But it is insisted that Kidd and Dent were suspended by agreement. That agreement was, in itself, an illegal and void contract, and against public policy. And the purpose of the senate to elect Mr. Scott by fraud is clearly shown by giving Morris Kidd's seat pending the contest, and allowing Morris to vote for Scott on the 24th of January when the houses voted separately.

The following authorities cited by counsel demonstrate that the action of the senate in suspending Kidd from his seat, and the agreement made by five Republicans of the senate and five Democrats of the house of delegates, consenting to the suspension of Kidd and suspending Dent of the house, was illegal and void, and vitiated the pretended election of Mr. Scott, which was the result of such fraudulent practices.

McCreary on Elections, 149, 151, 185, 186.
State *v.* Purdy, 36 Wis., 43.
Tucker *v.* Allen, 7 N. H., 140.
Lanssing *v.* Carpenter, 20 N. Y., 447.
People *v.* Maynard, 15 Mich., 171.
Alvord *v.* Collier, 20 Pick., 128.
Cooley's Con. Lim., 616.

In 1873, in the special session, there was a great debate of this question here raised, in the Caldwell case. It appeared that Caldwell had bought off his competitors and spent other money improperly, and afterwards Caldwell was regularly elected.

In that debate Senator Saulsbury said:

"What is meant by the authority conferred upon each House of Congress to judge of the election of its members? It is something distinct from judging of their qualifications and the returns of elections. It must mean that you may look into the election and judge not only whether it took place at the proper time and at the proper place, and by the proper legislative body (for these facts must appear on the face of the returns), but also to see if the election was conducted in the proper manner; that is, whether it was the free expression of the legislative will, uncontrolled and undeterred by force or fraud." (90.)

And Senator Morton, in the same case, said:

"If the Senate can not inquire into the circumstances attending the election of its members, whether such election was procured by bribery, corruption, or other matter impairing the freedom of elections, such inquiry can not be made anywhere. * * * The Constitution provides that each House shall be the judge of the elections, returns, and qualifications of its members.

"It may inquire into his qualifications, whether the member is 30 years old, had been nine years a citizen of the United States, and was an inhabitant of the State; whether the returns of the election are in due form and show an election by the lawful legislature of the State, certified as required by law, and whether the election was conducted according to law, and was free or attended by circumstances that would make it invalid, such as bribery, fraud, or intimidation. * * * Whatever impairs the freedom of elections is illegal and against public policy, and makes the election void." (Mar. 11.)

And Senator Pratt, speaking against Caldwell's claim to a seat, said:

"Called upon to pronounce whether that election was valid, can I say that such means were honest and proper, and not calculated to interfere with that freedom of elections which is the very soul of our political system?" (95.)

This case was referred to the committee on the protest of 49 members of the legislature of West Virginia against the seating of Mr. Scott. The entire legislature, by law, could not have been over 97. So a majority of the whole body protests.

And good government and fair dealing protest.

E. W. Pettus.

The foregoing resolution, reported by the Committee on Privileges and Elections, was the subject of debate in the Senate April 25, 1900 (Cong. Rec., vol. 33, pp. 4651–4653); April 26, 1900 (ibid., pp. 4696–4710), and April 27, 1900 (ibid., p. 4742 and pp. 4750–4759).

[Extracts from remarks of Mr. McComas in support of the resolution declaring that Mr. Scott was duly elected a Senator from the State of West Virginia. Found in the proceedings of April 25, 1900, in the Congressional Record, vol. 33, pp. 4651 and 4652.]

"Mr. President, the certificate of the junior Senator from West Virginia was in due form, and he was seated.

"Certain remonstrants protested that he is not entitled to retain his seat.

"These memorials came in for decision by the committee on the proceedings in the journals, agreed facts, and admissions of counsel.

"It is true the remonstrants offered to prove the declarations of a couple of State officials, of several members of the assembly, and of attorneys before committees, and certain acts of little significance detailed in certain ex parte depositions, or, rather, printed copies of them.

"The committee was almost unanimous in the opinion that there was no proffer of evidence of frauds or intimidation to warrant any investigation of these vague and unimportant matters. I will briefly state the case made before the committee, confining myself to undisputed facts:

"On January 24, 1899, both houses voted separately for Senator.

"On January 25, 1899, both houses met in joint assembly. Ninety-five votes were cast. Mr. Scott received 48 votes, Mr. McGraw 46 votes, and Mr. Goff 1 vote. Mr. Scott received a clear majority of the votes cast and was declared duly elected Senator, and the convention adjourned.

"A quorum of the joint assembly, or quorum of each house, was present and voted. The proceedings were regular, and Mr. Scott was elected, unless some or all of the objections I now recite invalidate his election:

"1. The first objection assigned by the remonstrants is that there were 97 votes constituting the joint assembly; that 49 votes was a majority, but Mr. Scott received only 48 votes.

"But the journal shows 25 senators and 70 members present and voting. The total was 95 and Mr. Scott received 48 votes, a majority of the votes cast. It is true that by the apportionment of West Virginia the senate contained 1 more and the house 1 more member.

"Prima facie, from the journal, these seats were vacant or these members were not present. They did not, if present, vote or claim the right to vote. Mr. Scott's majority was a valid majority.

"As was said in Lapham and Miller (Senate Election Cases, p. 697):

"'The ground alleged is that there was not a majority of the whole legislature actually voting for the members chosen. In our opinion that is not necessary. There was a quorum of each house present in the joint assembly; there was a majority of that quorum actually voting for the members chosen. In our opinion that was a valid election.'

"See also Clark and Maginnis *v.* Sanders and Power (Senate Election Cases, 727); Davidson *v.* Call (Senate Election Cases, 806).

"The journals of the senate and house explain the nonparticipation of the senator from the fourth senatorial district and the member of the house of delegates from Taylor County.

"On January 20, 1899 (senate journal, p. 66), a resolution was introduced in the senate declaring that Kidd, the sitting member, was not elected and that Morris was duly elected, directing that Kidd vacate his seat and that Morris be sworn in.

"On January 23, 1899 (senate journal, 91–94), this resolution was considered and a substitute was adopted reciting the contest between Kidd and Morris, the reference to and pendency of the contest before the committee on privileges and elections, and the opinion of the senate that Morris was entitled to the seat pending the contest, wherefore the senate resolved that Kidd was not entitled and that Morris was entitled to a seat in the senate from the fourth senatorial district pending the contest, and that Morris be sworn in. Mr. Morris took the oath and was seated.

"On January 25, 1899 (senate journal, p. 1081), the senate adopted a resolution that the contested election case of Morris *v.* Kidd be the special order for February 7, 1899, with leave to either party to take testimony, and 'that pending the determination of such contest neither Morris nor Kidd should be entitled to vote or sit as a member of this body.'

"The journal of the house shows that in the contest of Dent for the seat of Brohard a like course was pursued, and a resolution was passed that pending the decision neither Dent nor Brohard 'be permitted to participate in the proceedings of this house.' The judgment of the senate was a finality in respect of Morris *v.* Kidd. The judgment of the house was a finality in respect of Dent *v.* Brohard. Each house, by the constitution of West Virginia, is made 'the judge of the election, returns, and qualification of its members.' Therefore, on January 25 only 95 mem-

bers had the right to participate and vote in the joint assembly. Of these Mr. Scott received 48, a majority. Therefore the first objection is unfounded.

"2. The second objection is that Senators Getzendanner and Pearson, who voted for Mr. Scott, had forfeited their seats by accepting commissions in the regiment of State volunteers in the service of the United States during the Spanish-American war.

"These two members were 'hold-over' senators who, between the session of the last legislature and the assembling of the new legislature in 1899, had accepted, had served under, and had resigned their commissions prior to the meeting of the legislature.

"It appears by the journal of the joint assembly that Senators Getzendanner and Pearson were present therein and voted for Mr. Scott.

"The constitutional provision is that—

"'No person holding a lucrative office under the State, the United States, or any foreign office * * * shall be eligible to a seat in the legislature.'

"On January 20, 1899, resolutions were offered in the senate declaring that by virtue of this constitutional provision and the acceptance of said commissions each of these senators 'thereby became ineligible and forfeited his right to a seat in this body.' These resolutions were referred to the committee on privileges and elections, and on January 23, 1889, the committee reported in lieu of said resolutions a substitute declaring that Getzendanner and Pearson were legally qualified and entitled to hold their membership in the senate and had not vacated their seats therein under the provisions of section 13 of article 3. The senate adopted the substitute on January 24, 1899.

"The judgment of the senate of West Virginia upon the title of Senators Getzendanner and Pearson to their seats therein is a finality. The Senate of the United States can not reverse it. As before said, the State senate is, under the State constitution, 'the judge of the elections, returns, and qualifications of its own members.' Such constitutional powers have effect, not only to make the members of each house the judge in each case, but also to forbid that the members of any other tribunal shall be the judges thereof to review or reverse such original judgment. The jurisdiction of each of the houses of the State legislature is original and exclusive. (Case of H. A. Du Pont, Fifty-fourth Congress, first session, Report No. 289, p. 104.)

"The senate of West Virginia is the only tribunal which could either hear or determine lawfully these objections to the qualifications of Senators Getzendanner and Pearson. Its judgment in their favor is final. The Senate of the United States has not authority to originate, hear, or determine any objections to the qualifications of those who acted and voted as members of the senate of the State. Where the title of an individual member of the legislature who has once been seated has been determined by a subsequent adjudication of the house to which he belongs, such judgment will not be here disturbed or inquired into. (Potter *v.* Robbins, Senate Election Cases, 179; Clark and Maginnis *v.* Sanders and Power, Senate Election Cases, 727; the case of David Turpie, Senate Election Cases, 719; the petition of H. A. Du Pont (minority report), Fifty-fourth Congress, first session, Report No. 289, pp. 98–104; Sykes *v.* Spencer, Senate Election Cases, 611.)

"It should be noted that the Senate of the United States in Stanton *v.* Lane (Senate Election Cases, 276), upon a similar case, came to a like conclusion with the senate of West Virginia. James H. Lane was elected a Senator from Kansas in April, 1861, and took his seat July 4, 1861. It appears that June 20, 1861, President Lincoln appointed him brigadier-general of volunteers; that he accepted the appointment and qualified to perform its duties, but had resigned the office. The governor of Kansas appointed Frederic P. Stanton to fill the vacancy, but on January 16, 1862, the Senate voted that Lane was entitled to his seat in that body. Of the majority some held that the office of brigadier-general did not exist on June 20, 1861; others that, although Lane held the office after he had been elected Senator, yet, having resigned the same before taking his seat in the Senate, he did not come within the constitutional provision (Art. I, sec. 6). It profits little here to discuss the reasons or motives of State senators or of the Senate."

[Extracts from remarks of Mr. Pettus in opposition to the resolution declaring that Mr. Scott was duly elected a Senator from the State of West Virginia. Found in the proceedings of April 26, 1900, in the Congressional Record, vol. 33, pp. 4696, 4697, 4698.]

"Mr. President, I claim that it has been my habit in discussing law questions to deal fairly with my own mind and to assert no proposition of law which I do not believe to be true. I do this as a matter of policy, if for no better reason; for the man who is in the habit of advocating false propositions of law will so debauch his own mind, no matter what may be his learning or brain power, that he can not see the truth, though he meet it at noon in the public road. He makes 'such a sinner' of his intellect 'as to credit his own lie.'

"The question now submitted for your judgment is whether, according to the law of the land, the Hon. N. B. Scott is entitled to a seat as a Senator from West Virginia. The Committee on Privileges and Elections have given their report to the effect that he was so entitled; but that report is now to undergo the scrutiny of the Senate.

"The learned and accurate lawyer who made the report and has ably presented the argument to sustain it has discussed two questions not now in issue, because they were unanimously decided by the committee in his favor and were abandoned by the parties contesting. The first was the objection that Senator Scott was not an inhabitant of West Virginia, and the second was that 48 votes were not a majority of the entire legislature. Neither of these objections was well founded in law, and nothing will be said by me as to either of them.

* * * * * * *

"The facts, from the evidence as received by the committee, are as follows:

"On the 11th of January, 1899, the legislature of West Virginia assembled. Each house was organized. In the Senate the Republicans had about two-thirds of the members. * * *

* * * * * * *

"The house of delegates was Democratic by a small majority. I beg Senators' attention to this part of the statement. In the senate objection was made to H. C. Getzendanner and E. G. Pierson being admitted to seats as senators, on the ground that each of them after election, in November, 1896, and after serving as senators in 1897, had accepted commissions as officers in the U. S. Army, an office of profit, and served as such officers, one as captain and the other as lieutenant.

"At first these objections were laid on the table, and the two persons objected to took their seats. Afterwards the matter was referred to the committee on privileges and elections, and the committee in substance found the facts as stated in the objection. But the committee found that each one of these army officers had been discharged before the legislature met in January. Therefore the committee reported that Getzendanner and Pierson were still members, and this report was adopted by a party vote on the 24th day of January, 1899. This decision was made on a demand for the previous question and without debate.

"It is proper to state here that the 24th day of January, the day on which this vote was taken, was the day on which each of the houses was to vote separately for Senator.

"Now, it is insisted that this was no disqualification, or, if it is, that the senate of the State of West Virginia was a proper judge of the election and qualification of its own members.

"Now that, as a general rule, is a correct proposition. Furthermore, it is a general rule that when the senate of a State decides on the election or qualification of its own members this body does not ordinarily inquire into it—not at all in ordinary cases. There comes up a contest, facts are heard, the matter is decided, and this body has time and again said that they will let it remain where it was decided.

"But that is not this case. Here two senators, regularly elected, appeared and offered to take their seats. It was objected that those two senators had resigned their seats by accepting office under the United States and that they could not be properly received in that body.

"Now, Mr. President, I do not dispute the proposition of law as asserted by the Senator from Maryland, that that is the general rule where you decide on the election and qualification of members, but in all cases in the law courts fraud vitiates every business transaction, if it is sufficiently brought to the attention of the court and in proper form. So fraud in this very matter we are considering vitiates every such proceeding. This body has so declared, and the courts have so declared, and the Senator from Maryland has so declared in this very report itself. To be sure, he did not seem to see exactly how it fits. I desire to read a paragraph from the report of the Senator from Maryland. I call it his report. It is the report of the committee, but it was prepared by him.

* * * * * * *

"Now, Mr. President, in that connection I beg to read another paragraph from another report of this same committee. I believe it is good law. The committee says it is and cites many authorities. This is the writing of the distinguished Senator from New Hampshire:

"'It is clear that if, by bribery or corrupt practices on the part of the friends of a candidate who are conducting his canvass, votes are obtained for him without which he would not have had a majority, his election should be annulled, although proof is lacking that he knew of the bribery or corrupt practices.' (Pomeroy's case, Senate Election Cases, 426)

"A number of authorities are cited to prove the proposition, and it is proved. Well, are you going to put a bridle on this Senate so as to prevent them from looking into all sorts of fraud and corruption in the election of one of your body? If you are going to do that, you had as well abandon business and give it over to fraudulent men, and men who can buy what they want.

"Mr. President, on this subject that I am at present considering—that is to say, whether those two senators had a right to seats in that body—it does not depend upon any statute law; it does not depend upon any constitutional law. It has been the law of England from the very foundation of the common law to the present day. It is now and always has been the law in the United States and of every one of the States where the common law prevails.

* * * * * * *

"Mr. President, we were talking about two military senators, I will call them. The Senator from Maryland comes up like the brave and fair lawyer that he is, and says that the decision in the Lane case was not the law. It has always been the law in England that where a man holds one office and accepts another inconsistent with the discharge of the duties of the first he thereby resigns his first office. This has been the law from time immemorial.

"I recollect an old case, away back yonder in the black-letter books, where a justice of the peace in England concluded that it would suit his purposes if he had the office of constable also, and thereupon he applied for the office of constable and was appointed constable of his bailiwick. The case came up for judgment, to ascertain whether he was a justice of the peace any longer, and the judges said he was not; that by accepting the office of constable, which was utterly inconsistent with the office of justice of the peace, he had resigned his first office; it was vacant, and he could not discharge any of its functions. That is a simple case. It is away back in the black-letter books, and there is nothing to the contrary of it since.

"You talk about the constitutions of the various States. There have been some people—not the Senator from Maryland—but there have been some people who have actually tried to fritter away the constitution of West Virginia in reference to this subject, which says that a man who holds an office of profit under the United States, or any other power, is ineligible to the office of member of the legislature of West Virginia. If he is ineligible he can not hold the office lawfully. A man can not go into an office and go out of an office and come back into the office at his will and pleasure. An office is a continued thing. One term of an office can not be broken in two and renewed at the will of the man who holds it. If a man be ineligible to hold an office after he is elected to it, he goes out."

FRIDAY, *April 27, 1900.*

The Secretary read the resolution reported by Mr. McComas from the Committee on Privileges and Elections March 12, 1900, as follows:

"*Resolved*, That Nathan B. Scott has been duly elected a Senator from the State of West Virginia for the term of six years commencing on the 4th day of March, 1899, and that he is entitled to a seat in the Senate as such Senator."

A vote being taken on the above resolution, the same was agreed to, as follows:

Ayes—Messrs. Allen, Allison, Bacon, Baker, Bard, Bate, Berry, Burrows, Butler, Carter, Chandler, Clark (Wyo.), Clay, Cullom, Davis, Deboe, Depew, Elkins, Foster, Frye, Gear, Hansbrough, Harris, Hawley, Jones (Ark.), Jones (Nev.), Kean, Lindsay, Lodge, McComas, McCumber, McEnery, McLaurin, McMillan, Martin, Nelson, Perkins, Platt, Pritchard, Proctor, Quarles, Rawlins, Ross, Shoup, Simon, Spooner, Stewart, Sullivan, Taliaferro, Teller, Vest, and Warren—52.

Nays—Messrs. Morgan, Pettus, and Turner—3.

(Cong. Rec., vol. 33, pp. 4759, 4760.)

SATURDAY, *May 19, 1900.*

Mr. McComas, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That there be paid out of the contingent fund of the Senate the sum of $2,850 to Nathan B. Scott, a Senator from the State of West Virginia, in reimbursement of expenses necessarily incurred by him in defense of his title to his seat; and also that there be paid out of the same fund $2,850 to John T. McGraw for expenses incurred by him and other remonstrants contesting the seating of Senator Nathan B. Scott. These payments are appropriated as full and final compensation for all expenses, cash, and counsel fees incurred by the parties."

(Cong. Rec., vol. 33, p. 5734.)

FRIDAY, *May 25, 1900.*

Mr. Gallinger, from the Committee to Audit and Control the Contingent Expenses of the Senate, reported the resolution submitted by Mr. McComas on the 19th instant, with amendments, as follows:

In line 1 strike out the words "out of the contingent fund of the Senate;" and in line 6 strike out the words "out of the same fund."

The amendments were agreed to, and the resolution as amended was referred to the Committee on Appropriations.

(Cong. Rec., vol. 33, pp. 6015, 6016.)

[Fifty-sixth Congress, first session.]

WILLIAM A. CLARK, *Senator from Montana.*

At the beginning of the first session of the Fifty-sixth Congress William A. Clark was duly admitted to a seat in the Senate as a Senator from the State of Montana for the term of six years, commencing March 4, 1899. On the same day a memorial signed by certain citizens of Montana was presented in the Senate protesting against the validity of the election of Mr. Clark, and a petition signed by other citizens of Montana to the same effect was also presented. These were referred to the Committee on Privileges and Elections.

The committee submitted a report in the case April 23, 1900, in which report the committee found that Mr. Clark was not legally elected to the office of United States Senator from the State of Montana, for the reason that while he received 54 votes in the legislature by which he was chosen, and there were only 39 against him, leaving him an apparent majority of 15, he had obtained more than 8 votes of this majority through illegal and corrupt practices. The committee also submitted with their report a resolution that Mr. Clark was not duly and legally elected to a seat in the Senate by the legislature of the State of Montana.

Two of the members of the committee, while agreeing to the resolution reported by the committee, dissented from many parts of the report and did not agree with the majority of the committee in the general conduct of the investigation of the case, nor in regard to the admission of much of the evidence which was received by the committee in the case.

The resolution submitted by the committee was the subject of debate in the Senate, and on the 11th day of May, 1900, Mr. Clark resigned his office as Senator.

The history of the case here given consists of a statement of the proceedings of the Senate in the case as published in the Congressional Record, the report of the Committee on Privileges and Elections, with the views of the minority of the committee, a statement of the days on which the case was discussed in the Senate, with a reference to the record of the same, and also a reference to the letter of Mr. Clark containing his resignation.

PROCEEDINGS IN THE SENATE.

MONDAY, *December 4, 1899.*

Mr. Carter presented a memorial protesting against the validity of the election of William A. Clark as a Senator from the State of Montana. He also presented a petition asking the Senate at the earliest practicable moment to set a time and place for the hearing before the Committee on Privileges and Elections of the protest therein set forth. The memorial and petition were referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 33, p. 2.)

WEDNESDAY, *December 6, 1899.*

Mr. Chandler presented certain exhibits in connection with the contest against the right of Senator W. A. Clark to a seat in the Senate. The papers were received, ordered to be printed, and were referred to the Committee on Privileges and Elections.

(Cong. Rec., vol. 33, p. 85.)

THURSDAY, *December 7, 1899.*

Mr. Chandler, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of William A. Clark to a seat as Senator from the State of Montana; and said committee is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

(Cong. Rec., vol. 33, p. 132.)

TUESDAY, *December 12, 1899.*

Mr. Gallinger, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution reported by Mr. Chandler, from the Committee on Privileges and Elections, on the 7th instant, relative to the investigation of the title of William A. Clark to a seat in the Senate as a Senator from the State of Montana, reported it without amendment, and it was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 33, p. 231.)

MONDAY, *April 23, 1900.*

Mr. Chandler, from the Committee on Privileges and Elections, reported the following resolution:

"*Resolved*, That William A. Clark was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Montana."

He also submitted a written report of the committee and the testimony taken by the committee.

(Cong. Rec., vol. 33, p. 4537.)

REPORT OF THE COMMITTEE.

[The committee consisted of the same Senators named in the statement preceding the report of the committee in the case of Nathan B. Scott, supra.]

Mr. Chandler, from the Committee on Privileges and Elections, submitted the following report, to accompany Senate Res. No. 284:

THE RIGHT OF SENATOR WILLIAM A. CLARK, OF MONTANA, TO A SEAT IN THE SENATE.

This case was referred to the committee on December 4, 1899, upon a memorial dated February 25, 1899, signed by 27 members of the legislative assembly of Montana, and upon a later memorial signed by Robert B. Smith, governor of Montana; T. E. Collins, State treasurer; Henry C. Stiff, speaker of the house of representatives of the sixth legislative assembly of Montana; A. J. Campbell, member of Congress from Montana, and Charles S. Hartman, ex-Representative in Congress from Montana.

On December 7, 1899, the Senate directed the committee to investigate the right of W. A. Clark to a seat as Senator from Montana and authorized the sending for persons and papers. The committee began consideration of the case January 5, 1900, and hearings were held on January 5, 6, 8, 9, 10, 11, 12, 13, 17, 19, 20, 22, 23, 29, 30, and 31; February 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, and 28; March 1 and 2; April 3, 5, and 6; and the finding of the committee was made April 10, 1900.

FINDING OF THE COMMITTEE.

The finding of the committee is that the election to the Senate of William A. Clark, of Montana, is null and void on account of briberies, attempted briberies, and corrupt practices by his agents, and of violations of the laws of Montana defining and punishing crimes against the elective franchise.

THE ADMITTED OR UNDISPUTED FACTS.

This finding is made in view of certain admitted or undisputed facts, with their attendant circumstances, appearing in the testimony taken by the committee, as follows:

I.

Prior to 1895 the elections in Montana were accompanied by enormous expenditures of money, unquestionably involving widespread belief that extensive corruption was resorted to in all elections. Ex-Governor Hauser, a witness called by Senator Clark in his defense, testified that at the first State election the Big Four, so called, consisting of Senator W. A. Clark, Mr. Broadwater, Mr. Marcus Daly, and himself, as first contributions gave $40,000 each; and he also estimated that the expenditures made in connection with the contest to determine whether Anaconda or Helena should be the capital of the State were upward of $1,000,000. Senator Clark said he spent over $100,000 in that contest.

II.

On February 25, 1895, Montana undertook to protect herself against corruption in elections and passed a law relative to crimes against the elective franchise, which

limited in purpose and amount the political expenditures which could be made in any election, either by a political committee or a candidate, especially naming a candidate for United States Senator, who could not give more than $1,000 to any one committee in one county and could not pay more than $1,000 for his personal expenses in lawful ways specified, and provided that every political committee should make a public return of its expenditures, stating from whom every dollar was received and to whom every dollar was paid, and that every person acting otherwise than under a political committee should make a similar public return; and further provided a fine and imprisonment against persons omitting to make the return required by law.

III.

Senator Clark has been constantly a candidate for office. He was a candidate for Congress in 1888 and defeated. In 1890 there were two legislatures in Montana. He was elected United States Senator by the Democratic legislature, but was not seated. He was again a candidate for the Senate in 1893, but there was no election. In 1895 he was voted for as the Democratic candidate, but Senator Carter was elected.

In the summer of 1898, after he had consulted with Governor Hauser and other supporters, including at that time Mr. A. J. Campbell, a committee of his friends was created outside the State committee of the Democratic party, which was in the hands of persons not favorable to him; this, his committee, being organized for the purpose of controlling the politics of the State and securing the legislature to meet in January, 1899. This committee consisted of his son, Charles W. Clark, William McDermott, and A. J. Davidson, agent. Charles W. Clark was made treasurer, and the assistants of the committee were John B. Wellcome, Walter M. Bickford, A. J. Steele, John S. M. Neill, Frank E. Corbett, E. L. Whitmore, and Walter Cooper. To this committee Senator Clark gave unlimited authority to expend money which he agreed to furnish; an estimate, however, being made that at least $35,000 would be necessary to secure the State convention, and that $75,000 might be needed to secure the State legislature.

IV.

In the canvass which ensued the approximate expenditures admitted by the various members of his committee and their assistants were as follows: By Charles W. Clark, $25,000; by McDermott, $22,000; by Davidson, agent, $22,300; by Wellcome, $25,000; by Steele, $11,000; by Corbett, $5,000; by Whitmore, $4,600; by Cooper, $2,900, mainly furnished by Charles W. Clark; and the amount of these expenditures Senator Clark himself paid to his son. The advances and payments made by Senator Clark to his committee and agents, as admitted by him, amounted to about $139,000, of which sum Charles W. Clark received from him on August 12, 1898, $35,000; October 17, $20,000; November 23, $40,000, and February 13, 1900, $20,592; and in addition to this $139,000 Senator Clark paid $5,000 to McDermott, one of his agents; $5,000 to Wellcome, his attorney, and $5,000 to E. C. Day, a member of the legislature.

V.

None of the members of his committee or their assistants made the sworn returns required by law, nor did Senator Clark himself make any return.

VI.

In December, 1898, Senator Clark began negotiations with one H. W. McLaughlin, a member of the legislature, for the purchase of his wood lots and sawmills, and on the 9th day of December bought all Mr. McLaughlin's property for the sum of $24,684, paying $10,000 down, and on the 12th of March paid him $6,000 cash and $8,684 in stock of a new lumber company to which the property was transferred, which lumber company employed Mr. McLaughlin as its agent, with a salary of $200 per month.

VII.

On December 31, 1898, Mr. Walter M. Bickford received from Mr. Charles W. Clark five one-thousand-dollar bills and four five-hundred-dollar bills, and went to Missoula for the purpose of purchasing a supposed indebtedness on account of his ranch of one E. P. Woods, a member of the legislature, but, not succeeding in meeting Mr. Woods, he returned the money to Mr. Charles W. Clark. In February, 1899, Mr. Massena Bullard paid to Mr. Kemper the amount due upon the ranch and

a deed was made running to Mrs. Woods, which was not recorded, but in January, 1900, the property having been sold to other persons for $9,750, the deed to Mrs. Woods was destroyed and new deeds made to the new purchasers.

Senator Clark knew of Mr. Bickford's attempts to purchase the indebtedness which Woods owed, and the correspondence shows that the object was to secure Mr. Wood's vote for Senator Clark. Mr. Bickford testified: "In pursuance of that letter (the letter of November 21 from one Ector) and of the invitation I at that time received, I made arrangements to obtain, for the purpose of using it to prevent the indebtedness of Mr. Woods going into the hands of Mr. Daly's friends, the sum of $7,000 with which to take up that indebtedness." On November 12, 1898, Mrs. Woods mortgaged their sheep and cattle for $1,000, payable in one year, and on April 22, 1899, paid the mortgage debt. Mr. Woods has left Montana and gone to New Mexico.

VIII.

Mr. W. E. Tierney was senator and W. C. Eversole and Michael Shovlin were representatives from Broadwater County. Mr. Tierney voted for Mr. Clark on the first ballot, and Eversole and Shovlin came over on the sixth. Mr. Tierney was a dealer in general merchandise in three small firms—Miss A. M. Darcy & Co., Tierney & Co., and Eversole & Co.—which had moderate capital and were in debt. After the legislature adjourned, on March 3, Mr. Shovlin deposited $8,500 in the Montana National Bank. Eversole, who had in fact been only a clerk, bought out Mr. Tierney; paying him $1,600 in cash and a credit with his new firm of $3,000.

On June 1 Mr. Tierney organized the State Bank of Townsend with a capital stock of $25,000, of which he took $5,800. Mr. Shovlin took $1,000 and Mr. Eversole $1,000, nearly all the $25,000 passing through Mr. Tierney's hands in currency. His $5,800 he says he took from the money drawer in a safe in the office of Miss Darcy & Co., but whence this $5,800 came he did not show by any writing whatever.

IX.

Mr. E. L. Whitmore, the confidental agent and employee of Mr. Charles W. Clark, purchased of D. G. Warner, a member of the legislature, certain lots in the town of Boulder, Jefferson County, and a small ranch near by and took the deed in his own name, paying the amount of $7,500 in bank bills in Helena in the first week of January, 1899, the deed being recorded February 1, 1899. Mr. Warner has left Montana and gone to California.

X.

Mr. H. H. Garr, member of the legislature, lodged a package during the session with Mr. Peeler, of the bank of Kalispell. After the legislature adjourned he obtained the package, went to his home, and in the name of Miss Wickham, his wife's aunt, a milliner, who had lived with him for seven years, purchased a ranch for $3,500, for which he paid in currency, including a thousand-dollar bill, which money he said he obtained from his wife's aunt, believing she had accumulated and kept it in a box in her room in his house.

Mr. Garr had been a poor man, with little or no property, earning sometimes $50 or $75 a month as a notary public, sometimes nothing. He had in cash $75 or $80 when elected and borrowed $25 to go to Helena with. His wife's aunt paid board in the family at the rate of $2.50 a week. He had no previous knowledge of how she had accumulated this money. Mr. Steele had obtained interviews with him before the legislature met with a view to securing his vote, and after his arrival he figured in the Whiteside exposure.

XI.

Mr. John H. Geiger was a Republican who, after Mr. Whiteside's exposure, was seated in the legislature as a senator, in place of Mr. Whiteside, on the 26th day of January, by the votes of the Republicans and the Democratic supporters of Senator Clark, on the ground that his name on a few of his ballots had been marked at the wrong end, and on the 28th Mr. Geiger voted for Senator Clark. He was a man with no regular occupation, was entirely without means, and a borrower of small sums. During the session of the legislature he received and carried home with him $3,600. After accounting for one or two petty sums he claims that he obtained this money by faro gambling and through $1,100 in bills which he found in his room and believed came in connection with some bills pending in the legislature which Mr. John B. Wellcome was carrying through as attorney.

XII.

Mr. B. F. Fine, a member of the legislature and a mining operator with no property, in May after it had adjourned, in pursuance of an agreement made during the session by Senator Clark after his election as Senator, received $2,000 from Senator Clark's bankers, and since that date has received other moneys, making the sum of $5,000 in all, which has been all his earnings since his nomination, his only business being the hunting up of testimony to disbar or impeach Mr. W. A. Clark, of Madison County, one of the principal witnesses against Senator Clark, to do which no steps have yet been taken.

XIII.

Mr. Stephen Bywater, a Republican, 30 years of age, and a railroad conductor, voted for Mr. Clark for the first time on the eighteenth ballot, when he was elected. On the 3d day of March, immediately after the legislature adjourned, he deposited in the Montana National Bank $15,000. He accounts for it by saying that he brought from Kalispell, his home, $6,000 in currency, which he kept with him during the whole session of the legislature, and by saying that he received on March 3 $9,000 from his brother for the purchase of stock in a mining company in British Columbia, but he produced no writing in confirmation of his statement as to either the $6,000 or the $9,000. He did produce a prospectus and letter showing that there was such a mining company and that he was its president, and a Mr. Peeler, a broker, with whom Mr. Bywater kept an account, testified that Mr. Bywater also kept a package of money not included in the bank account.

XIV.

Mr. E. C. Day was Senator Clark's candidate for speaker, and was defeated in the Democratic caucus, receiving 25 votes against 30 votes for Mr. Stiff. Mr. Day was the leader of Mr. Clark's forces in the legislature during all the ballotings after the second. On February 13 Senator Clark personally wrote a letter directing that $5,000 should be given to Mr. Day for his services in the legislature and as a retainer as counsel in the future. This amount was received by Mr. Day, through Mr. Wellcome and Mr. Davidson, on the 3d day of March, the day after the legislature adjourned.

Mr. Day testified that the services for which he received the $5,000 were as follows: "I had acted as the manager, you might say, or leader of his forces upon the floor of the house. I attended to keeping a quorum present and seeing that friends of his were sent for that were not present at roll call, and made motions and attended to the ordinary parliamentary—perhaps you would call it—procedure of his friends in that body." Later Mr. Day received from Charles W. Clark $2,000 as fees in the Wellcome proceedings and $1,000 in two suits brought by Mr. Whiteside against the Butte Miner and the Helena Independent.

XV.

Mr. W. W. Beasley, a Republican representative, first voted for Senator Clark on the eighteenth ballot, when he was chosen, and that night or the next night he left Helena for St. Paul, having in his possession about $5,000 in currency, at least $1,000 of which was a thousand-dollar bill. He claimed that he had taken this money with him to Helena and carried it in his vest pocket during the whole session. By no writing did he show whence he received it or what he did with it. He claimed that he kept the money with him because he was in embarrassed circumstances in the sheep business and was afraid of law suits. When he was elected he owed a board bill of nearly $400, and while in Helena took out a life-insurance policy and gave a note for the premium. All the time he had a bank account in the Thomas Cruse Savings Bank at Helena.

ADDITIONAL STRENGTHENING FACTS.

While the findings of the committee are justified by the foregoing admitted and undisputed facts, with their attendant circumstances standing alone, those facts are strengthened by additional facts, including various unsuccessful attempts to secure votes by offers of money, which, although denied, are found by the majority of the committee to be sustained by the preponderance of the testimony. It would unnecessarily encumber and extend this report to attempt to give these additional facts in detail.

THE WHITESIDE $30,000 INCIDENT.

In addition to these unsuccessful attempts at bribery certain other alleged attempts will be narrated, because there is difference of opinion in the committee concerning them. They are as follows:

The case of W. A. Clark, State senator from Madison County, is one of those embraced in the Whiteside exposure. Mr. Clark and Mr. Whiteside testified that Mr. Wellcome placed $10,000 in an envelope and handed it to Mr. Whiteside, Mr. Clark's initials being written by the latter on the back of the envelope, the amount to be delivered to Mr. Clark in case he voted for Senator Clark. This money was part of the $30,000 produced by Mr. Whiteside before the legislative committee. Mr. Wellcome denied these statements.

State Senator H. L. Myers testified that in like manner $10,000 was placed in an envelope, upon the back of which he wrote his initials, and the package was retained by Mr. Whiteside to be delivered to him in case he voted for Mr. Clark. Mr. Whiteside testified that the $10,000 was furnished by Mr. Wellcome. Mr. M. L. Hewett testified that Mr. Charles W. Clark authorized the payment of $10,000 to Myers. Prior to the session of the legislature Mr. Charles W. Clark had, as shown by a letter signed by him, sent $500 to Mr. Myers as a retainer as counsel for the Bridger Coal Company, which Mr. Myers did not accept. But Mr. Clark denied the statement made by Mr. Hewett, and Mr. Wellcome denied the statement of Mr. Whiteside.

As to Representative H. H. Garr, Mr. Whiteside testified that in like manner $5,000 was furnished him by Mr. Wellcome for Mr. Garr and placed in an envelope, on the back of which Mr. Garr wrote his initials, Mr. Whiteside retaining the package as in the other two cases. Mr. Garr admits seeing the money and writing his name upon the back of the envelope, but says it was for purposes of identification, and that he did not know what the transaction meant. Mr. Wellcome denied these statements.

Mr. Whiteside, who was a State senator, testified that in like manner $5,000 was given to him by Mr. Wellcome as part of $10,000 which he was to receive for his vote for Senator Clark, which he placed in an envelope and later produced before the legislative committee. Mr. Wellcome denied these statements.

It is in connection with these last four cases of attempted bribery—those of Messrs. Clark of Madison, Myers, Garr, and Whiteside—that the controversy concerning Senator Clark's election has been largely maintained from the beginning.

The reasons why a majority of the committee find that, on the whole, the statements of Messrs. Clark of Madison, Myers, and Whiteside are true, notwithstanding the denials of Mr. Wellcome and others, may be briefly stated. The three accusers undoubtedly occupied the position of detectives, who willfully deceived the parties with whom they were dealing and against whom they made charges. On the other hand, the parties against whom they testified and who make the denials are charged with crimes to which, if guilty, they would be quite certain to add the offense of false swearing.

The majority of the committee, under all the circumstances appearing, are not willing to consider the situation as one of equilibrium between the detectives on the one hand and the alleged lawbreakers on the other. If Messrs. Clark of Madison, Myers, and Whiteside testified falsely, they must have contemplated in the beginning a conspiracy of the basest character, to be followed up by perjury of the worst sort, and they must have intended to pass through ordeals in the course of the investigations which would be made to which it can not be inferred they were willing to subject themselves merely to prevent Senator Clark from becoming a United States Senator.

THE ALLEGED DALY CONSPIRACY.

In the opinion of the majority there was no affirmative disproof produced by Senator Clark at any time showing that the facts in connection with the $30,000 exposure were not true. The charge that the accusations and the exposure resulted from a conspiracy formed and carried forward by Mr. Marcus Daly was a necessity of Mr. Clark's canvass and defense. But Mr. Daly and Mr. Conrad and others who were suspected of conspiracy denied all knowledge of the $30,000, of which $27,000 was in one-thousand-dollar bills, which had been produced by Mr. Whiteside as the money furnished by Mr. Wellcome in the attempted briberies. No one-thousand-dollar bills were shown to have been in the hands of any of the alleged Daly conspirators. On the other hand, the five one-thousand-dollar bills and four five-hundred-dollar bills which Mr. Bickford took from C. W. Clark and carried to Missoula on December 31, in connection with the E. P. Wood's transaction, were returned to Mr. Clark on January 1, and during the ensuing week, when the alleged briberies were attempted, large sums in currency were in the hands of Mr. C. W. Clark and Mr. Wellcome, including various one-thousand-dollar bills.

Mr. Clark, on January 3, had brought to him by a Mr. Hirshfield $9,000 in currency, in which were three one-thousand-dollar bills, and from this $9,000, or the money returned by Mr. Bickford, he gave Mr. Wellcome three or four one-thousand-dollar bills. On December 28 Mr. Wellcome drew from the bank $10,000, of which he says one, two, three, four, or five were one-thousand-dollar bills, and he carried them in the inside pocket of his vest until he used them. There were on the 3d or 4th of January three one-thousand-dollar bills and eight five-hundred-dollar bills in the possession of Mr. Whitmore, Mr. Charles W. Clark's confidential agent in the purchase of D. G. Warner's property. Charles W. Clark testified that his income was $250,000 per year.

In connection with the consideration of these last four cases of attempted bribery—of Clark of Madison, Myers, Garr, and Whiteside—it is important to state, in view of the difference of opinion in the committee concerning the credibility of Messrs. Clark of Madison, Myers, and Whiteside, that the whole committee find that if all the testimony concerning the $30,000 and all the testimony of Mr. Whiteside and Mr. Clark, of Madison, were laid aside there would still remain sufficient evidence in the case to lead the committee to find, as they do, that Mr. Clark's election is void. From the briberies which have been established the majority of the committee feel justified in finding that there were other successes in procuring, by corrupt practices, the votes of members of the legislature, where the facts naturally can not be directly proved.

THE CONDUCT OF THE REPUBLICAN LEGISLATORS.

The conduct of the Republican members of the legislature who, on the 28th day of January, left their Republican candidate and voted for Senator Clark and gave him his election, in the opinion of the majority of the committee, calls for special criticism. Senator Clark, beginning with 7 votes on January 10, had carried his votes up to 41 on the 27th of January. Mr. Conrad, beginning with 36 votes, had, on the 27th, 29 votes, and until that day his natural strength of over 30 votes had not been impaired from the beginning. There was an absolute deadlock and no possibility of the election of a Democrat without the aid of the Republicans.

On January 28, on the second ballot, Mr. Clark's vote was carried from 41 up to 54. Mr. Conrad's went down from 30 to 27, but only one of his supporters, Mr. Moran, voted for Senator Clark. Four Republicans, McKay, Worden, Hedges, and Lindsay, voted for the Republican candidate, Mr. Marshall, for whom they had first voted on January 10.

Eleven Republicans—Messrs. Geiger, Hobson, Mitchell, Phillips, Beasley, Bywater, Ingersoll, Jaqueth, Long, Magee, and Marcyes—went over to Senator Clark and gave him the election.

It is difficult to account for these Republican votes for Senator Clark. Senator Clark's candidacy had been tainted on the 10th of January by the Whiteside exposure. The facts exposed had not been disproved on January 28. It is true that a grand jury composed of six persons had reported that while there was evidence tending to show that money had been used it would not, in their judgment, warrant a conviction by a trial jury, but no other fact impugning the testimony of Messrs. Whiteside, Clark, of Madison, and Myers had then appeared.

The reasons given for the Republican votes for Mr. Clark seem to be pretenses and covers. Mr. Clark, who had been negotiating with Mr. Hobson, the leader of the Republicans, wrote a letter on the 16th of January, in which he declared himself to be in favor of a tariff on Montana products. Some of the Republicans said there ought not to be a deadlock, and that it would be better to have a Democratic Senator than a vacancy.

No one pretends that any effort was made to bring about the election of any other Democrat that Mr. Clark, against whose agents the charges of bribery had been made. The committee do not say that the votes of all the 11 Republicans were improperly secured, but that those of Mr. Geiger, Mr. Beasley, and Mr. Bywater were has already been found. The circumstances of suspicion against the others are numerous.

Senator S. S. Hobson is mainly responsible for the action of the Republican members. He was the chairman of their caucus and the leader in the Clark movement. He early began negotiations with Mr. Clark, and the latter's written promise that he would be an independent tariff Democrat was addressed to Mr. Hobson under the date of January 16.

Mr. Hobson was a man of moderate means. When he was elected he owed $22,000 or $23,000 to the Fergus County Bank, of which he was president. This he paid in May, 1899, and went East and to Europe about the time Senator Clark went; and when in connection with the Fergus County Bank he feared some manifestation of indignation at his course from ex-Senator T. C. Power, Senator Clark, in accordance

with a promise he had made soon after his election, promptly purchased the $46,000 of the bank stock which Mr. Power owned and took a transfer thereof, which has not been recorded on the books of the bank.

In the face of all the facts tending to impeach the conduct of so many of the Republican members, and of the evident political reasons why they should not have contributed their votes to the election of Senator Clark, a Democrat, under charges of corruption, the finding that Senator Clark's election was obtained by corrupt practices, in the opinion of the majority, is much strengthened by the action of the 11 Republicans who, on the 28th day of January, abandoned their own party and thus strangely elected a Democratic Senator.

THE DISOBEDIENCE OF THE MONTANA LAW CONCERNING CRIMES AGAINST THE ELECTIVE FRANCHISE.

The direct violations by Senator Clark and his committee and agents of the provisions of the Montana laws, before stated, are of the first importance in connection with the conclusions reached by the committee. The citizens and legislature of Montana in 1895, conscious of the discredit into which the State had fallen by the enormous expenditure of money in previous elections, made an earnest and legitimate effort to prevent corruption in politics in the future, and the act of February 25, 1895, was passed and incorporated into the penal code of that year.

RECITAL OF THE SUBSTANCE OF THE LAW.

A concise but correct and complete analysis of this law of 1895 is as follows:

The Montana Penal Code, in Title IV, headed "Crimes against the elective franchise," in section 85 of the act of February 25, 1895, provides that no person, to aid in his election to a public office, shall, directly or indirectly, by himself or through another person, expend or promise to expend any money or other valuable thing, except, as later provided, "for personal expenses and to a political committee."

Section 86 provides that a candidate may pay—

"(1) His own personal expenses for traveling and purposes properly incidental to traveling.

"(2) For sending out special publications giving his position and views.

"(3) For stationery and postage, telegraph and telephone and other public messenger service, and other petty personal expenses. 'And in no other case whatever' shall the total sum for his own personal expenses as authorized exceed the sum of $1,000 by any candidate for United States Senator."

Section 87 provides that a candidate may pay money to a political committee, not exceeding $1,000 by a candidate for United States Senator, nor to more than one committee in any county.

Section 88 applies the term "political committee" to "any combination of persons" who shall aid a party, principle, or candidate, and every such committee or combination must have a treasurer who shall keep its accounts.

Section 90 requires every treasurer to file his account within thirty days after an election, stating in detail his receipts and expenditures.

Section 91 requires every person who, acting otherwise than under the authority of a committee, expends money, to file such a statement as is required of a treasurer "in the county in which he is a legal voter."

Section 98 requires every statement to be made on oath.

Section 104 punishes violations of sections 90 and 91 by fine not exceeding $1,000 and imprisonment for not more than three months.

After the passage, in 1895, of this law punishing crimes against the elective franchise there was no serious occasion to test its provisions until 1898. In 1896 the coalition of the Silver Republicans with the Democrats made the State overwhelmingly Democratic, the plurality for Mr, Bryan being 32,043, and for Mr. Hartman, the Bryan Congressman, 24,503. In 1898, when Senator Clark renewed his canvass for the United States Senate, and his friends determined to directly disregard the law, he had no right to expend more than $1,000 through his one committee, nor more than $1,000 for his own personal expenses.

He expended a sum vastly in excess of the limit provided by law, and failed to render any return, and no such return was made by the aforesaid persons acting in his behalf. This failure to make return was with full knowledge of the fact that it was widely charged and widely believed that the election had been accomplished by bribery and the corrupt expenditure of money on a very large scale. He also, in June, 1899, with full knowledge of this belief and these charges, but in accordance with what he testified was his custom, destroyed all his checks, including those for his

expenditures in his canvass, and was unable to give any full and satisfactory vouchers for the money so expended by him and his agents.

The committee find the case proved without relying upon such destruction of checks, failure to render accounts, and disregard of the legal limit of expenditure. But they furnish to the committee strong additional reasons for believing the other evidence, which seems to them to establish the corruption charged.

On the other hand, returns were made, as appears in the book of testimony, by the Republican State committee of expenditures of $4,291.31, by the Democratic State committee of $9,161.49, by the Silver Republican State Committee of $1,708.25, by the People's Party State committee of $1,193.50, by the Silverbow County Democratic committee of $10,005.06, by the Silverbow County Silver Republican committee of $1,453.05.

Mr. Marcus Daly testified that he contributed to the State committee $4,500, to the Silverbow County committee $2,500, to the Deer Lodge County committee $500, to the Missoula County committee $250; making his total contributions $7,750. Mr. Daly was not a candidate and has never been a candidate for any office. Mr. W. G. Conrad, who was the principal opposing Democratic candidate for United States Senator against Mr. Clark, swore that he contributed to the State and various county committees between $5,000 and $10,000, not over $1,000 to any one committee, and after the election he spent between $200 and $300 outside of hotel bills, but paid no money in aid of his candidacy for Senator.

QUESTIONS OF LAW INVOLVED IN THE CASE.

In justifying the finding of the committee it is not necessary to discuss any doubtful questions of law.

(1) It is clear that if by bribery or corrupt practices on the part of the friends of a candidate who are conducting his canvass votes are obtained for him without which he would not have had a majority his election should be annulled, although proof is lacking that he knew of the bribery or corrupt practices. (Pomeroy's case, Senate Election Cases, 426; Caldwell's case, 430; Clayton's case, 444; Ingall's case, 692; Payne's case, 700, 705, 706; Minority report, 712.)

(2) It seems to have been admitted that if the person elected clearly participated in any one act of bribery or attempted bribery he should be deprived of his office, although the result of the election was not thereby changed. (Pomeroy's case, Senate Election Cases, 426; where Mr. Pomeroy had 84 votes against 25.)

According to the law, as understood by the committee, Senator Clark can not be permitted to retain his seat. He received 54 votes and there were 39 against him, leaving him an apparent majority of 15. If he obtained through illegal and corrupt practises 8 votes which would otherwise have been cast against him, he was not legally elected. More than this number of votes, the committee find from all the evidence, was thus obtained.

It is also a reasonable conclusion upon the whole case that Senator Clark is fairly to be charged with knowledge of the acts done in his behalf by his committee and his agents conducting his canvass. He arrived in Helena from Butte on January 4 and remained there until after his election on January 28, and was in constant conference with his committee and agents.

REJECTED TESTIMONY—CRITICISM OF THE PROSECUTORS.

There has been much testimony received by the committee which has not proved of substantial value. Many of the witnesses were unreliable, having made contradictory statements and having apparently sought to obtain from both sides of the controversy money for testifying.

Much criticism has been made of the contestants, especially of Mr. A. J. Campbell, a member of the House of Representatives, and an active prosecutor of the charges against Senator Clark. Some members of the committee can not refrain from expressing their disapproval of many of the methods pursued by Mr. Campbell and Mr. Whiteside in the prosecution of the charges against Senator Clark, and they do not approve of the actions of Mr. Daly in agreeing to furnish an unlimited amount of money to carry on the prosecution.

It appears from the evidence that Mr. Campbell, among other things, made a suggestion in a letter to a detective employed by him indicating that he wished the detective to obtain information from some member of the grand jury of one of the counties in Montana; and, further, that his stenographer or secretary gave several hundred dollars to two persons who made affidavits bearing on matters involved in this prosecution, the drafts for which sum Mr. Campbell paid. It also appears that

Mr. Campbell, in the course of the prosecution, participated in opening a letter written by Mr. Bickford to one Jesse B. Root.

It further appears that Mr. Campbell was one of the committee of friends consulted by Senator Clark in the summer of 1898 at the opening of the canvass, and that he was nominated for Congress at the Democratic convention held that year by the supporters of Senator Clark, as well as other members of the convention. In June, 1899, Mr. Campbell became the attorney for a corporation in which Marcus Daly was largely interested.

While it is true that bribery can never be proved by the testimony of the briber nor of the person bribed, and that it is almost always necessary to obtain the required information from go-betweens or persons who have explored the field and made reports backward and forward as to the probability of obtaining results by bribery, yet some members of the committee believe that this does not justify the character of acts which are proved and established against Mr. Campbell. Some members of the committee, however, do not join in any criticisms of Mr. Campbell and Mr. Daly.

These go-betweens who were employed by Mr. Campbell testified before the committee, most of them in the last instance, in behalf of Senator Clark. Some of their statements were true and some false.

The testimony of these persons, where they had made conflicting statements, has not been regarded by the committee unless corroborated, as the testimony of accomplices and detectives ought always to be corroborated. These witnesses, whose conduct has occasioned comment, had all been originally employed by Senator Clark or his committee or his friends. They are as follows:

One Z. T. Cason was retained by Senator Clark personally to endeavor to secure the vote of Representative Marcyes, and after the election was over, in a letter dated February 3, 1899, Senator Clark sent him $500. Cason testified before the supreme court and before this committee that he was authorized by Senator Clark to offer $10,000 to Mr. Marcyes. Later, getting into communication with Mr. Jesse B. Root, who was Mr. John B. Wellcome's law partner, he received $1,500 from him, and in consideration thereof signed a letter drafted by Root, dated December 8, 1899, saying that his previous statement was untrue, and then went to Baker City, Oreg., where he remained under an assumed name until he was caught by the subpœna of this committee.

One Benjamin Hill, during the senatorial contest, was a supporter of Senator Clark, and was paid by Senator Clark's clerk $350. He later met Whiteside and agreed to get evidence against Senator Clark, and told him what he now says was a "pack of damn lies," and he also entered into communication with Mr. Campbell. On June 30, 1899, he made a long affidavit against Senator Clark, which he now testifies was wholly false. He subsequently revealed to Senator Clark's counsel what he claimed to be the whole story. He was paid $610 by Mr. Wellcome, and appears to have received from the prosecutors about $1,500.

One L. L. Wright went to Helena to work for Senator Clark, and received from Mr. A. J. Steele $240. Later he engaged, through Benjamin Hill, to get evidence for the prosecution against Senator Clark, and on the 3d of November, 1899, he made an affidavit for the contestants, which he testified before the committee was false. He received $250 from Benjamin Hill, which appears to have come from the prosecutors.

One Thomas T. Lyon went to Helena, at the request of Mr. Wellcome, to serve Mr. Clark. Mr. Wellcome gave him $250. Later, in company with Benjamin Hill, he engaged with Campbell to furnish evidence against Mr. Clark, and said that Campbell agreed to give him $5,000, which Mr. Campbell denies. Later he told his story to Charles W. Clark, and on November 29, 1899, made an affidavit for the Clark side. He received from that side $250 and received from Mr. Campbell $300. He told Mr. Henry G. Rickerts that he had received from the Clark side $2,000, which he had deposited in his wife's name.

William F. Rector's testimony was considered by the committee entirely unreliable. So was that of E. L. P. Ector, except where he was corroborated, as he was upon the important parts of his evidence by Senator Clark and Mr. Bickford and by his correspondence with those two gentlemen.

THE APPROACH TO THE SUPREME COURT.

The majority of the committee think that the transactions connected with the judges of the supreme court of Montana need special consideration. The undisputed facts are as follows:

I.

Proceedings having been instituted against John B. Wellcome for the purpose of securing his disbarment for attempted bribery in connection with Senator Clark's election, it appears that on August 5, 1899, after a preliminary decision by the

supreme court that the court had jurisdiction, one Dr. William Treacy, a Republican advocate of Senator Clark, at Helena, approached Mr. Justice William H. Hunt, one of the three members of the supreme court, being his family physician, bearing a proposition which he said was from a party in town that Judge Hunt could have $100,000 if the court would dismiss the proceedings against Mr. Wellcome, and he advised Judge Hunt to accept the amount.

This proposition was first mentioned to Judge Hunt about noon. At half past 10 in the forenoon a special train had arrived from Butte bringing Charles W. Clark, Frank E. Corbett, and E. L. Whitmore, who went to the Helena Club, where, during the day, they saw Mr. John S. M. Neill, Mr. Davidson, Mr. Steele, Mr. Steve Carpenter, and Mr. Thomas Miller. They said they came to see Mr. B. Platt Carpenter. to induee him to put in an answer for Wellcome in the proceedings pending, and they returned in their special train to Butte in the afternoon, after Mr. Corbett had also had an interview with Mr. Justice Pigott, narratives of which were given to the committee by both parties thereto.

[Mr. Justice Pigott testified that Mr. Corbett told him that he had come over on the special train because Mr. Neill on the previous night telephoned to Butte that it had been ascertained that a deal could be had with the supreme court; that he, Mr. Corbett, condemned such a movement, had a mortgage of $24,000 on Mr. Neill's newspaper, and would foreclose it if Mr. Neill made any such attempt. All this Mr. Corbett denied.]

II.

On three occasions Dr. Treacy approached Attorney-General C. B. Nolan, who was in charge of the proceedings against Mr. Wellcome, and proposed to him to accept $100,000 and dismiss the proceedings.

III.

During the pendency of the proceedings against Mr. Wellcome Rev. A. B. Martin, president of a school at Great Falls, Mont., in which Senator Clark and Chief Justice Brantley were trustees, visited the chief justice with a letter in his hand dated October 7, 1899, from Senator Clark, wherein the latter urged him to see the chief justice and endeavor to prevent the disbarment of "that splendid man," John B. Wellcome.

Upon the foregoing undisputed facts and other facts which are controverted, a majority of the committee believe that Senator Clark's agents, in their desperation on account of the decision of the court to take jurisdiction in the Wellcome case, attempted an improper approach to the judges of the court and to Attorney-General Nolan, which fact can not but have a certain influence in the consideration of the other acts of those agents in connection with the Senatorial election. A minority of the committee, however, believe that the transactions were res inter alios acta, and that the evidence does not sufficiently bring home to Senator Clark or his agents any improper attempt to influence the court or the attorney-general.

PROMPT ACTION SUGGESTED.

This briefest possible summary of the material facts in a case whose hearings have covered over three months, from January 5 to April 10, 1900, and whose record requires 2,677 pages, has extended to great length, and the committee will not present any general considerations in this report. The Senate should, as a duty to itself and to the country, demonstrate by its action in this case that seats in the United States Senate procured as Senator Clark's has been procured can not be retained by the deliberate judgment of the Senate.

The Senate also owes a duty to the people of Montana who, conscious of the bad repute into which the State had fallen by reason of vast expenditures of money in connection with its elections, manifested such a public sentiment that the legislature of 1895 passed a statute which, if obeyed, would have redeemed the State from its bad name. For the direct and gross violations of that statute and the consequent discredit which continues to rest upon the State, Montana has a right to expect a prompt and decisive remedy from the action of the Senate upon the report of this committee.

The committee report and unanimously recommend the adoption by the Senate of the following resolution:

"*Resolved*, That William A. Clark was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Montana."

Appendix to Report.

COPY OF STATEMENT FURNISHED BY SENATOR CLARK.

[Testimony, page 1828.]

Disbursements made by W. A. Clark for political purposes from August 1st, 1898, to September 1st, 1899.

1898.			
August 12,	paid	C. W. Clark	$35,000.00
October 17,	"	C. W. Clark	20,000.00
October 20,	"	Walter Cooper	200.00
November 5,	"	L. O. Leonard	250.00
November 7,	"	C. H. Padley	250.00
November 7,	"	L. O. Leonard	150.00
November 9,	"	J. H. Miles	100.00
November 9,	"	T. Kilgallon	200.00
November 10,	"	C. H. Padley	200.00
November 11,	"	John Leary	50.00
November 23,	"	C. W. Clark	40,000.00
November 23,	"	A. J. Davidson	5,000.00
1899.			
January 6,	paid	C. C. Padley	250.00
February 4,	"	Z. T. Cason	500.00
February 6,	"	George Alderson	250.00
February 13,	"	W. A. Clark & Bro., for C. W. C	20,592.05
February 14,	"	J. B. Wellcome	15,000.00
February 27,	"	J. B. Wellcome	90.00
March 2,	"	J. B. W. for Jno. Simpson	400.00
March 2,	"	J. B. W., for photographs	250.00
March 31,	"	Walter Tallant, subscription	1,000.00
April 3,	"	Walter Tallant, secretary	500.00
April 5,	"	Simpson	100.00
April 25,	"	Thomas Bryant	100.00
April 25,	"	T. Kilgallon	92.00
May 3,	"	Thos. Bryant	100.00
May 11,	"	Thos. Bryant	100.00
May 19,	"	W. M. Bickford, expense account	581.85
June 8,	"	Thos. Bryant	83.50
July 31,	"	C. W. Clark	950.00

MONTANA ELECTION LAWS DEFINING AND PUNISHING "CRIMES AGAINST THE ELECTIVE FRANCHISE."

[Portions of the act of February 25, 1895, being sections of the penal code of 1895.]

"Sec. 83. No person shall, in order to aid or promote his own nomination as a candidate for public office, by a caucus, convention, or nomination paper, directly or indirectly, by himself or through another person, or by a political committee, give, pay, expend, or contribute, or promise to give, pay, expend, or contribute, any money or other valuable thing, except for personal expenses, as hereinafter provided.

"Sec. 85. No person shall, in order to aid or promote his own election to a public office, directly or indirectly, by himself or through another person, give, pay, expend, or contribute any money or other valuable thing, except as hereinafter provided, for personal expenses and to a political committee.

"Sec. 86. A candidate for nomination or for election to a public office, and any other person, may incur and pay, in connection with such nomination or election; his own personal expenses for traveling and purposes properly incidental to traveling, for writing, printing, and preparing for transmission, any letter, circular, or other publication, which is not issued at regular intervals, whereby he may make known his own position or views upon public or other questions; for stationery and postage, for telegraph, telephone and other public messenger service, and for other petty personal expenses; but all such expenses shall be limited to those which are directly incurred and paid by him, and by him alone; and every person shall be required to include such personal expenses in any statement which may be required of him under this act. And in no other case whatever shall the total sum paid, or agreed to be paid, by any candidate for his own personal expenses, as authorized by this

act, exceed the sum of one thousand dollars by any candidate for United States Senator, for Congress, or for any State office; nor shall such personal expenses exceed the sum of one hundred dollars by any candidate for a county or other office.

"SEC. 87. A person who is nominated as a candidate for public office by a caucus, convention, or nomination paper, and any person who shall, with his own assent, be voted for for public office, may make a voluntary payment of money or a voluntary or unconditional promise of payment of money to a political committee as hereinafter defined for the promotion of the principles of the party which the committee represents and for the general purposes of the committee. But in no case, by direct or indirect voluntary contribution, shall such total aggregate voluntary payments exceed the sum of one thousand dollars by any candidate for the United States Senate, for Congress, or for State offices; nor shall such total aggregate voluntary payments exceed the sum of fifty dollars by any candidate for member of the State legislature, or one hundred dollars for any county or other office within the State, nor the sum of one hundred dollars by any candidate for any other office: *Provided*, That nothing in this act contained shall be construed to authorize or permit any candidate to make such payment to more than one committee or person, acting otherwise than under the authority or in behalf of a political committee, in any county.

"SEC. 88. The term "political committee," under the provisions of this act, shall apply to every committee or combination of persons who shall aid or promote the success or defeat of any political party or principle in a public election, or shall aid or take part in the nomination, election, or defeat of a candidate for public office. Every such committee shall have a treasurer, who is a legal voter of the State, and shall cause to be kept by him detailed accounts of all money and the equivalent of money which shall be received by or promised to the committee, or any person acting under its authority or in its behalf, and of all such expenditures, disbursements, or promises of payment or disbursement which shall be made by the committee or any person acting under its authority or in its behalf; and no person acting under the authority or in the behalf of such committee shall receive any money or equivalent of money, or expend or disburse the same, until the committee has chosen a treasurer to keep its accounts, as herein provided.

"SEC. 89. A person who, acting under the authority or in behalf of a political committee, shall receive any money or equivalent of money, or promise of the same, or shall expend any money or its equivalent, or shall incur any liability to pay money or its equivalent, shall at any time thereafter, on demand of the treasurer of such committee, and in any event within fourteen days after such receipt, expenditure, promise, or liability, give to such treasurer a detailed account of the same, with all vouchers required by this act; and such account shall constitute a part of the accounts and records of such treasurer.

"SEC. 90. The treasurer of every political committee which shall receive or expend or disburse any money, or equivalent of money, or incur any liability to pay money, in connection with any election, if the aggregate of such receipts or of such expenditures, disbursements, and liabilities shall exceed ten dollars, shall, within thirty days after such election, file a statement setting forth all the receipts, expenditures, disbursements, and liabilities of the committee, and of every officer and other person acting under its authority or in its behalf. Such statement shall include the amount in each case received, the name of the person or committee from whom it was received, and the date of its receipt, and shall also include the amount of every expenditure or disbursement, the name of the person or committee to whom the expenditure or disbursement was made, and the date of every such expenditure or disbursement, and shall clearly state the purpose for which it was expended or disbursed. The statement shall also give the date and amount of every existing unfulfilled promise or liability, both to and from such committee, remaining uncanceled and in force at the time the statement is made, with the name of the person or committee to or from whom the unfulfilled promise or liability exists, and clearly state the purpose for which the promise or liability was made or incurred.

"SEC. 91. Every person who, acting otherwise than under the authority or in behalf of a political committee having a treasurer, as hereinbefore provided, receives money or the equivalent of money, or expends or disburses or promises to expend or disburse money or its equivalent, to an amount exceeding ten dollars, for the purpose of aiding or promoting the success or defeat of a political party candidate or principle in a public election, or of aiding or taking part in the nomination, election, or defeat of a candidate for public office, shall file such statement as is herein required to be filed by a treasurer of a political committee in the county in which he is a legal voter, and shall be subject to all the requirements of this act, the same as a political committee and the treasurer thereof; but no person other than a legal voter of the State shall receive, expend, or disburse any money or equivalent of money, or promise to expend or disburse the same, for either of the purposes above named,

except for personal expenses, as herein provided, or under the authority or in behalf of a political committee.

"SEC. 92. No person shall, directly or indirectly, by himself or through another person, make a payment or promise of payment to a political committee, or to an officer or other person acting under its authority or in its behalf, in any other than his own name; nor shall such committee, officer, or other person knowingly receive a payment or promise of payment, or enter or cause the same to be entered in the accounts or records of such committee, in any other name than that of the person by whom such payment or promise of payment is made.

"SEC. 94. The statement required by this act to be filed by the treasurer of a political committee shall be filed with the clerk of the county in which the treasurer is a legal voter, except that, in case a political committee has its headquarters in some other town or city than that in which the treasurer is a legal voter, the treasurer shall file the statement required of him with the clerk of the county in which such headquarters are maintained at the time of the election to which such statement relates. A statement relating to any other than a municipal election shall be filed in duplicate, and one copy shall be forthwith forwarded by the county clerk receiving the same to the secretary of state, by whom it shall be placed on file.

"SEC. 95. The supreme court and the district court shall have full equity powers to compel any person who fails to file a statement as required by this act, or who files a statement which does not conform to the provisions of this act in respect to sufficiency in detail, conformity to the truth, or otherwise, to comply with the provisions of this act by filing such a statement as is required, and shall compel such compliance upon the petition of any candidate voted for or of any five persons qualified to vote at the election on account of which the expenditures, or a part thereof, were or are alleged to have been made. No such petition shall be brought later than sixty days after such election against anyone who has filed his account within the thirty days required, excepting that a petition may be brought within thirty days of any payment which was not stated in the statement so filed. Proceedings under this section shall be advanced upon the dockets of said courts, if requested by either party, so that they may be tried and decided with as little delay as possible. No petition brought under this act shall be withdrawn or discontinued without the consent of the attorney-general.

"SEC. 96. No person called to testify in any proceedings under the preceding section shall be liable to criminal prosecution under this act or otherwise, for any matters or causes in respect of which he shall be examined or to which his testimony shall relate, except to prosecution for perjury committed in such testimony.

"SEC. 97. If any statements which are filed under this act shall apparently fail to be in conformity with the requirements thereof, it shall be the duty of the clerk with whom any such statement is filed forthwith to notify the person making the same of such failure, and to request him to amend and correct the same.

"SEC. 98. Every person making a statement required by this act shall make oath that the same is in all respects correct and true, to the best of his knowledge and belief.

"SEC. 99. All statements which are filed in accordance with the provisions of this act shall be preserved for not less than fifteen months from the time of the election to which they relate, and shall, during that period, be open to public inspection.

"SEC. 102. Every payment in respect of any expense incurred, which is to be accounted for under this act, shall be vouched for by a receipted bill stating the particulars of expenses, and every voucher, receipt, or account required by this act shall be preserved for at least six months from the election to which it relates.

"SEC. 103. This act shall apply to all public elections, whether for officers or upon questions to be submitted to the people, except elections of township officers, and shall apply to caucuses and conventions for the nomination of candidates to be voted for at such elections, and to nomination papers for the nomination of candidates to be voted for at such elections, except that Ss. 83, 85, and 92 of this act shall not apply to the proprietors and publishers of publications issued at regular intervals in respect to the ordinary and regular conduct of business as such proprietors and publishers.

"SEC. 104. Whoever shall violate any of the provisions of Ss. 83, 84, 85, 88, 89, 93, 94, 98, 99, and 102 of this act shall be punished by a fine not exceeding one thousand dollars, and by imprisonment in the county jail for not more than three months. Whoever shall violate any of the provisions of Ss. 90, 91, and 92 of this act shall be punished by a fine not exceeding one thousand dollars and by imprisonment in the county jail for not more than three months."

VIEWS OF THE MINORITY.

Views of two members of the Committee on Privileges and Elections in the case of W. A. Clark, now sitting as a Senator from Montana.

We agreed and still agree to the resolution reported by the committee through its chairman. That resolution was adopted by the committee itself. But the report is merely the writing of the chairman with the aid of one other member, and never was submitted to any meeting of the committee, and therefore can not be considered as the words of the committee.

It is true that we saw and read that report, by the grace of the chairman, and dissented from many parts thereof, and gave the chairman notice of such dissent, when the chairman informed us that we were not bound by the wording of the report.

It was our misfortune not to agree with a majority of the committee in the general conduct of the investigation of this case. We believed that in this important inquiry the committee was bound by, and ought to act on, the ordinary rules of evidence.

And in this contention we merely followed another member of the committee who is one of our great lawyers and who is fresh from a long service as a nisi prius judge under Federal authority. That great lawyer, in gentle but forceful language, admonished us of the great danger of disregarding the common rules of evidence established by great judges through the centuries and known to all lawyers. But it was said the committee was not a court and had a right to receive "hearsay" evidence in order to get on the track of better evidence. And we did receive it constantly, and in great volumes.

We tried merely to discharge our duties as members of this committee and as judges in this most important cause. The chairman, however, left the committee little to do. The committee made an order at the beginning appointing the chairman and another member to determine what witnesses should be summoned, and the two did determine that matter at first, but the chairman kindly relieved the other members of that labor and determined that matter for the committee.

This report of the chairman declares that, as to many matters stated separately, some members of the committee think or believe one way and some think or believe another way. So we preferred to state our individual findings for ourselves.

It is our opinion from the evidence that the friends of Senator Clark illegally and improperly used large amounts of money and thereby caused the election, and that this election is not valid, but under the law of the land is void, and therefore we agreed to the resolution reported by the chairman.

We consider it our duty to call attention to the general features of this case. There were in Montana two factions in the Democratic party. Marcus Daly was considered the head of one faction and W. A. Clark was considered the head of the other.

In the summer of 1898 there was a meeting of "Clark men," as they were called, to consider political matters, concerning the general election to be held in November of that year.

Mr. A. J. Campbell was invited and attended that meeting, which was held privately. It was agreed at that meeting to try to elect a legislature of Democrats of their own faction of the party, or not of the Daly faction. And W. A. Clark agreed to pay the expenses. And large sums of money were sent out, by the three men who acted as a committee, to the various counties. A Democratic convention was held in September. And at that convention A. J. Campbell was chosen its president, with the aid of all of the "Clark men." And at the same convention A. J. Campbell was nominated for Congress, with the same aid; and in November, 1898, he was elected to Congress with the same aid. So, to the extent named, Mr. Campbell got the benefit of that private meeting of which he was a member, and the benefit of the money sent out by the committee to the executive committees in various counties.

Mr. Campbell was a well-known opponent of the Daly faction prior to and in 1898.

The witness Whiteside had been employed by one of Marcus Daly's corporations as a contractor to build a large house prior to 1898. A. J. Campbell was employed, for the first time, in the summer of 1898 to do one piece of work as a lawyer for one of Daly's corporations.

The evidence tends to show that Whiteside was unfriendly to W. A. Clark, and that he made a threat to "explode a bomb" if Clark became a candidate for the Senate; and that about the same day Marcus Daly, in New York, made a threat "to run W. A. Clark and his family out of the State of Montana."

On or about the 15th day of December, 1898, A. J. Campbell and Whiteside met. Whiteside called on Mr. Campbell in his office to obtain the advice of Mr. Campbell, and informed Mr. Campbell of his plan to act with Mr. Clark's friends and secure Mr. Clark's confidence and then betray and destroy him. Mr. Campbell had no difficulty in advising Whiteside as to how he could best betray and destroy his

friend, W. A. Clark. That interview was private, and all we know of it is what the parties have consented to give us; but we learn of them that Mr. Campbell gave to Whiteside advice full of grim, blunt wisdom.

After Mr. Campbell had heard the plan to entrap and betray his friend, he told Whiteside, in substance, "Do not rely on your own evidence to prove the charges." Thus Campbell and Whiteside became united in a common cause in December, 1898. And from that time Whiteside had the benefit of Campbell's advice. And Whiteside, if you credit his account of himself, acted well and naturally the part of spy and traitor and did "explode a bomb."

After the legislature adjourned, Mr. Campbell, with Marcus Daly's money, went into the business of buying newspapers and hiring editors, and set them to work. He also became actively engaged in the business of hiring detectives with Daly's money. Among other hard cases he employed one Benjamin Hill and set him to hunting up evidence against his friend. And Mr. Campbell gives a graphic account of how Hill brought to his office a sealed letter from Bickford to Roote, and how he caused Hill to open the letter for Campbell to read. And, after reading, it was interesting to hear Mr. Campbell describe how the letter was carefully resealed and sent on by Hill to its destination.

Mr. Campbell sent his man Hill, with his clerk, Mr. Little, to get certain affidavits. The affidavits were obtained, and the men who made them received about $100 each for their pay from Mr. Little and about $150 more for each out of checks drawn by Little on Campbell and paid by him out of Daly's money. Mr. Campbell stated this matter composedly, and, though he did not justify what was done, as he did the opening and reading of a sealed letter, he stated that he assumed the responsibility for the transaction. The man Hill, for hunting up witnesses and buying and making affidavits, received from Mr. Campbell about $1,500 out of Daly's money, according to the evidence.

Mr. Campbell became Daly's agent to disburse money without limit as to amount, and he disbursed it in that way. And in 1899 Mr. Campbell was employed by a corporation controlled by Mr. Daly at a salary of $5,000 per annum.

When last heard from Mr. Campbell had disbursed about $40,000 of Daly's money in this case, and had incurred liabilities for fees to eminent counsel, amounts not named, and still had power to go on spending without limit as to amount. He conducted this case as leading counsel, and became also one of the principal witnesses, but other counsel made the argument.

Mr. Campbell employed many detectives or spies, and paid them most liberally with Daly's money; and he wrote divers letters to his professional detective, L. D. McLean. In one of them he says:

"It is hinted this morning that there were some matters being investigated by the grand jury which might implicate myself, Fred Whiteside, or perhaps W. A. Clark, of Virginia City. It is a mere rumor, and I don't believe there is anything in it at all. It may be it has something to do with elections last fall, which will probably not implicate me, but might implicate some of the so-called Daly people. * * * Perhaps you had better get a list of the grand jury and find some fellow that you can 'jolly' a little."

Attorney-General Nolan claimed and received the combined assistance of Messrs. Campbell and Whiteside. He attended before the grand jury and examined witnesses concerning this case and took notes of the testimony in shorthand and afterwards wrote out his notes—not in the words of the witnesses, but the substance in narrative form—and afterwards he attached this so-called evidence before the grand jury to the information which he filed in the supreme court against Wellcome; and to aid Campbell and Whiteside in their search after evidence, the attorney-general wrote a formal letter to Mr. A. J. Campbell promising immunity from prosecution and the governor's pardon to any and all witnesses who would testify about bribery of legislators.

This so-called evidence before the grand jury was much used in this case, and Attorney-General Nolan was examined as a witness before the committee as to matters relevant and irrelevant. He could not be induced to see the slightest impropriety in his disclosure of the secrets of the grand jury, or in this wholesale promise of pardons specially given for the use of Mr. Campbell in the work in which he was then engaged. This attorney-general came to Washington, took an active part in the prosecution and in suggesting witnesses, and on the witness stand could not conceal his bias.

A large part of the evidence taken by the committee and submitted to the Senate is irrelevant to the matter of inquiry. Take as a sample the matter of what is called the attempt to bribe the supreme court and the attorney-general. This transaction, so far as we are informed, occurred six or seven months after the Senatorial election; no fact proved connects Mr. Clark with any part of that transaction. Dr. Treacy had

no sort of connection, directly or indirectly, with Mr. Clark; and if he had, there was no connection between the election in January and the supreme judges in the fall of that year.

You can not lawfully charge a man with one crime and prove that he committed that crime by proving that he did commit another crime. The Constitution provides that the accused must "be informed of the nature and cause of the accusation." No mention of the judges of the supreme court of Montana was made in the charges against Mr. Clark. All of that evidence was nothing more than what lawyers call "coloring matter." And it was admitted against the protest of the Senator from Maryland and others.

And in the conduct of this case much other mere "coloring matter" was received as evidence.

In the report made for the committee there are several curious statements of a part of the evidence as to the thing stated. For example, it is stated that Senator Clark, in June, 1899, destroyed the checks which he had drawn on his bank. But the report fails to state that for years past it was his habit to destroy his checks when his account was rendered by the bank and examined. And the report failed to state that the committee had the bank account of Mr. Clark during all the time in which it was charged that money had been illegally used.

And there is another feature of that report which should be noticed. Statements are made as facts which are based only on the testimony of a witness of doubtful credit, and that testimony plainly contradicted.

The only proposition for which we contend is, that this is a judicial case, and a committee of the Senate ought to consider and report it as judges.

E. W. PETTUS.
W. A. HARRIS.

(See Cong. Rec., vol. 34, pp. 3429–3435.)

The report of the Committee on Privileges and Elections as hereinbefore set forth was called up in the Senate May 3, 1900 (Cong. Rec., vol. 33, pp. 5021, 5022), and was the subject of remarks by Mr. Clark May 15, 1900 (Cong. Rec., vol. 33, pp. 5531–5536). At the conclusion of his remarks Mr. Clark submitted a copy of a letter written by him and addressed to the chief executive of the State of Montana, resigning his seat in the Senate.

(Cong. Rec., vol. 33, p. 5536.)

TUESDAY, *June 5, 1900.*

Mr. Chandler, from the majority of the Committee on Privileges and Elections, submitted a supplemental report to accompany the resolution reported from the committee, declaring that William A. Clark was not duly and legally elected to a seat in the Senate of the United States.

The report was ordered to be printed under the rule.

(Cong. Rec., vol. 33, p. 6698.)

SUPPLEMENTAL REPORT OF THE COMMITTEE.

Supplemental report (to accompany Senate Res. No. 284).

The Committee on Privileges and Elections on April 23, 1900, made a report to the Senate (No. 1052) unanimously recommending the adoption by the Senate of the following resolution:

"*Resolved*, That William A. Clark was not duly and legally elected to a seat in the Senate of the United States by the legislature of the State of Montana."

The committee also reported the findings and reasons leading to their recommendation. Two members of the committee submitted on the same day certain views of the minority which, while agreeing to the resolution reported by the committee, condemned some alleged methods adopted by the committee and criticised some alleged acts of the chairman. These views of the minority were not seen by the majority until after the report was printed, but the text of the principal report had been seen by the two members of the committee and some changes had been made therein in deference to their suggestions. On the 15th day of May Senator Clark addressed the Senate on a question of privilege, and, after making a lengthy statement, informed the Senate that on the 11th day of May he had notified the governor of Montana that he resigned as Senator; and after making his address Mr. Clark retired from the Senate. His statement contained various criticisms of the report which had been made by the committee.

Upon an examination of the criticisms made by Senator Clark and those made in

the additional views of the two members, a majority of the committee make a supplemental report, as follows:

The distinct criticisms made by Mr. Clark on May 15 of the report of the committee are not serious in their character, and it is fortunate that they were made, because they may be taken as being all the criticisms which the party most at interest can claim can justly be made. The correctness of all other statements made by the committee not criticised by Senator Clark may be taken to be admitted by him. All his statements will not be now reviewed, but some of them should be noticed by the committee.

He complains that the method of procedure of the committee was unfair and nonjudicial, and that testimony was received contrary to the established rules of evidence, hearsay and irrelevant testimony; and that the case was like the Dreyfus case, where there was a constant presumption of guilt instead of innocence.

The answers to this complaint are simple.

(1) That no such testimony was received except after deliberate decision by the committee for the purpose of ascertaining what additional witnesses it might be necessary to summon, as stated by the chairman on page 432 of the testimony, as follows:

"The CHAIRMAN. It would only be admissible as laying the foundation for sending for other witnesses."

(2) That no single finding of the committee has been based upon hearsay testimony.

The finding of the whole committee that the election was null and void was based upon the admitted or undisputed facts with their attendant circumstances, and no facts are recited in the report of the committee beyond the admitted and undisputed facts except in those cases where any denial of those facts is distinctly recited.

The methods of procedure were in no case unfair, but were such as ordinarily prevail in investigations like this.

The presumption of innocence was at no time disregarded, and findings unfavorable to Mr. Clark were made as a court or jury would have made them upon a full and fair consideration of all the facts in the case.

He denies the conclusion of the committee that a sufficient number of legislators were corrupted to change the result of the election.

This criticism is merely the complaint that the committee differed in opinion from him and his eminent counsel and made findings contrary to their desires.

He complains that stress was laid by the committee upon the comparative financial condition of two or three legislators before and after the Senatorial contest, and asserts that their explanations of the circumstances would have been received, the presumption being that if their financial condition was better that result happened honestly.

The answer to this complaint is that while such is the ordinary presumption, the many facts in this case overcome that presumption, in the opinion of the committee, and that there were not, as Mr. Clark now asserts, satisfactory explanations of the circumstances.

Speaking particularly of the facts which the committee claim are "admitted or undisputed," he refers to the statement made by the committee that he had been constantly a candidate for office. He does not deny the fact stated by the committee, but proceeds to distinctly admit it. The statement was not made as the "leading part" of the third subdivision of the committee's report, but only as preliminary to the statement in such third subdivision that Senator Clark, being a candidate for Senator, organized a Clark committee and gave that committee unlimited authority to make political expenditures from money which he agreed to furnish and which was estimated at not less than $110,000.

He continues to claim that he was not a candidate for Senator until December, 1898, and defies anyone to show the contrary. The contrary is easily shown by statements of his own committee. Mr. Hauser states that he was a candidate and Mr. Davidson states that he was a candidate. The whole sum and substance of the movement of himself and friends were only to make Mr. Clark a United States Senator, and his money was furnished and expended for that purpose.

He complains that testimony was excluded concerning the character of Mr. Daly's efforts to defeat him when he was a candidate for Senator in 1893, and he read in the Senate a long ex parte affidavit of George E McGrath. It appears that this affidavit was made February 19, 1900, concerning transactions which Mr. McGrath said he knew about in 1893, and which were never previously put on paper. The committee properly declined to retry the contest of 1893.

He also complains that testimony was excluded of Folk and wife as to an attempt by Mr. Whiteside to bribe Mr. Folk with an offer af $1,000 to give him access to the ballots connected with Mr. Whiteside's own election to the State senate. The com-

mittee, on due consideration, twice decided to reject this evidence as raising a collateral issue, the trial and decision of which might lead to an interminable investigation. It may be added, however, that the chairman of the committee on both occasions was in favor of receiving the evidence, however much the incidental inquiry might delay the case.

He denies the averment that he early began negotiations with Mr. Hobson, the Republican leader, saying of this averment: "Not one statement of which is sustained by the testimony."

The statement of the committee was based partly upon the fact that the so-called "Whiteside exposure" took place January 10, and that on January 15 Senator Clark wrote a letter to Senator Hobson declaring himself to be a protectionist, and there was no dispute that this letter was written in order to secure through Senator Hobson Republican votes for Mr. Clark for Senator.

He also denies that he bought the $48,000 of Mr. Powers's stock in Mr. Hobson's bank on account of the Senatorial controversy. By his own testimony (p. 1891) it appears that he bought the stock for the following reason:

"Mr. CAMPBELL. Where is the stock now?

"Senator CLARK. It is in my bank now, in the bank of W. A. Clark & Co., Butte, Mont. I was going to say, if the committee will allow me, that I would like to give, briefly, a little narrative of that transaction.

"After the election was over Senator Phillips spoke to me about the bank stock, the stock owned by Mr. Powers in the Fergus County Bank, and said that Mr. Powers was somewhat indignant as to the action of Mr. Hobson in voting for me, and that he might give him trouble in some way. He was a little concerned about it. I asked him some questions about it, what stock Mr. Powers owned, and what he thought about the value of the stock. He said he was certain that the stock was first-class and would return good dividends. So I said, 'If it is a good investment, if I am assured that it is a good investment, and Mr. Powers should give any trouble to Mr. Hobson about this stock, I would be very willing to buy it,' as I was seeking good investments.

"I went, I think I went, to Mr. Hobson, or met him. I am not sure that I went for that purpose.

"Mr. CAMPBELL. You went to whom? To Mr. Hobson?

"Senator CLARK. Mr. Hobson. I spoke to Mr. Hobson about the stock and mentioned something about the conversation with Mr. Phillips, and asked him about the stock, and if there was any danger of his getting into trouble with his partner, Mr. Powers, who was interested with him. He said he did not know that there was, but there might be; it might be possible that something might arise that would put him in bad shape, so far as his financial interest was concerned there. I think he said something about his telling him to sell or to buy his stock. That conversation is not very clear in my mind, but it was something of that nature."

As to the statements of Senator Clark that the result of the admission of perjured testimony was "damaging in the extreme" to his case, the attention of the Senate should be distinctly called to the statement made by the committee on page 13, that all the witnesses whose conduct has occasioned comment had been originally employed by Senator Clark, or his committee, or his friends.

He complains of the committee for giving any weight to those parts of the Montana laws against bribery, which limit expenditures by candidates and require candidates and their committees to make returns.

The expressed view of the committee was that the disobedience of those laws, which rendered Mr. Clark and his committee liable to criminal prosecutions, furnished "strong additional reasons for believing the other evidence which seems to them to establish the corruption charged." Those laws were specially made by the legislature of Montana on February 25, 1895, in order to redeem the State from its bad condition and repute, and should not have been defied by Mr. Clark, Mr. McDermott, Mr. Davidson, and his other assistants.

He states that no proof was adduced that he had any knowledge of corruption on the part of his agents, and that no charge of complicity had been made in the report. His language in his letter of May 11 to the governor of Montana is as follows:

"None of the charges affecting my personal honor or which allege that I had personally been guilty of corrupt practices have been sustained by the finding of the committee."

Against this assertion there should be placed the explicit and unequivocal statement of the committee in their report, on page 12, in the following words:

"It is also a reasonable conclusion upon the whole case that Senator Clark is fairly to be charged with knowledge of the acts done in his behalf by his committee and his agents conducting his canvass. He arrived in Helena from Butte on January 4, and was in constant conference with his committee and agents.

In view of the issue thus made, it is important to reexamine some of the facts showing exactly what Senator Clark's personal connection has been with the circumstances which have resulted in his resignation from the Senate.

It is not intended to reiterate at any length facts stated in the report to prove the correctness of what is asserted in the foregoing extract.

The preliminary arrangements for so influencing the nominations and elections to the legislature that he could be chosen Senator were made by Mr. Clark personally, as appears under the third head of the report. Nothing since the hearing closed has tended to impair the facts stated concerning Senator Clark's own personal connection with the course of his canvass for election as Senator.

In the case of Mr. E. C. Day, recited under the fourteenth head of the report, it appears that the transactions originated with Mr. Clark himself, who, on February 13, in writing, personally directed that the $5,000 should be given to Mr. Day for his services in the legislature and as a retainer as counsel in the future. Mr. Clark says that he wishes to correct a misstatement. He says, "I never wrote a letter couched in such language," but he then proceeds to say that the amount was paid to Mr. Day as a testimonial of friendship. The gloss which Mr. Clark now tries to put upon a very serious transaction of his own is not consistent with the language of Mr. Day, quoted in the report. In opposition to Mr. Clark's statement in the Senate may be put his testimony before the committee as follows:

"Mr. CAMPBELL. Mr. Day voted for you during the canvass?

"Senator CLARK. Mr. Day voted for me.

"Mr. CAMPBELL. Yes; he was one of the leaders of your force?

"Senator CLARK. Yes, sir.

"Mr. CAMPBELL. And was the recognized leader for what was called the Clark faction of the Democratic party?

"Senator CLARK. He ran as speaker of the house of representatives, I believe, representing our forces.

"Mr. CAMPBELL. And upon the floor of the house he was the recognized leader for the Clark forces, was he not?

"Senator CLARK. I am not sure of that. I think he was. I never was in the house of representatives or in the joint assembly.

"Mr. CAMPBELL. Do you not know, as a matter of fact, that he was the man who made the motion to take a second ballot upon the day on which your election occurred?

"Senator CLARK. Yes; I believe he was. I think he was recognized as the leader of the Clark forces in the house of representatives.

"Mr. CAMPBELL. And four days after your election you made him a present of $5,000?

"Senator CLARK. Yes, sir.

"Mr. CAMPBELL. What was that for?

"Senator CLARK. It was in consideration of my friendship for Mr. Day, and for the work performed by him in trying to organize the legislature—to be elected speaker and in order to control our forces, in which, however, we failed. I recognized that he was worthy of this consideration. We expected to have, from the talk that was going around, more or less trouble or litigation, and Mr. Day was to take charge of everything of that kind, and has done so."

In the case of Mr. McLaughlin, stated under the sixth head of the report, Mr. Clark says of the statement of the committee that "In December, 1898, Senator Clark began negotiations with one H. W. McLaughlin, a member of the legislature, for the purchase of his wood lots and sawmills." "This statement, Mr. President, is not correct;" and he proceeds to justify this charge by stating that the negotiations were begun by Mr. Bickford and not by himself in the month of September before Mr. McLaughlin was ever nominated for the legislature. The fact was that Mr. McLaughlin and Mr. Bickford did enter into preliminary negotiations, without doubt growing out of Mr. McLaughlin's expected nomination and election to the legislature. The committee regarded all the excuses given for the purchase by Mr. Clark directly and personally of all Mr. McLaughlin's property at an extravagant price as a very clear case of improper arrangement with a member of the legislature. Although Mr. Clark calls the McLaughlin incident a "weak case" and a "flimsy expedient," the facts are convincing as to the character and purpose of the so-called "purely business enterprise."

As to the Woods case, stated under the seventh head of the report, Mr. Clark says that the statement of the report that he knew of Mr. Bickford's attempt to purchase the indebtedness which Woods owed is absolutely unfounded, and that he never heard of the transaction until it was disclosed in the testimony during the investigation. It is true that the scheme for controlling Mr. Woods by buying up his indebtedness originated with Mr. Bickford and that Mr. Bickford on December 31, 1898,

went to Missoula with five $1,000 bills and four $500 bills, which he had obtained from C. W. Clark for that purpose. But it also appears that Senator Clark in response to letters from Dr. Ector took up the case of Mr. Woods and came to comprehend what was intended. Mr. Ector's letter to Mr. Clark of December 7, 1898, and Mr. Clark's letters to Mr. Ector of December 10, 1898, and January 4, 1899, leave little doubt that Senator Clark knew what Mr. Bickford was engaged in doing, especially in view of the fact that Mr. Ector's letters of November 17, 1898, and January 3, 1899, are not produced.

In the case of Mr. B. F. Fine, stated under the twelfth head of the report, it is not denied that the arrangement with him to work for Mr. Clark, for which he received $5,000 for nominal or useless services, was made by Mr. Clark personally during the session of the legislature after Mr. Clark's election. The criticism made by Senator Clark is "that there was no agreement, but merely a statement made by me to him after my election." This different form of putting the case is not material. The committee did not claim that Mr. Fine would not have voted for Mr. Clark had it not been for this arrangement, but that it was like the case of Mr. E. C. Day, a payment afterwards for services as a member of the legislature under circumstances which at least aroused suspicion that there was an understanding to that effect before the election.

In the case of Mr. Z. T. Cason, who gives an account of Mr. Bickford's efforts to induce him to endeavor to corrupt Mr. Marcyes, it appears from Mr. Clark's own testimony that he had interviews with Mr. Cason, and at last, on the 3d day of February, 1899, sent to Mr. Cason $500 in a letter giving thanks for his services. The personal activity of Senator Clark in conducting the details of his canvass is thus very clearly indicated. The testimony of Mr. Cason was not credited by the committee because he wrote a recantation at the instigation of Mr. Jesse B. Root, Mr. Wellcome's law partner, upon receiving $1,500 from Mr. Root for copying and signing the recantation and going into hiding in Baker City, Oreg., as stated on page 13 of the report. But Senator Clark's own testimony as to his relation with Cason and his letter to him inclosing the $500 stand as undisputed facts.

As to the approach to Mr. Justice William H. Hunt, of the supreme court of Montana, stated on page 14 of the report, while it does not directly appear that Senator Clark had knowledge of this approach made by Dr. Treacy, who also in a similar way approached Attorney-General Nolan, yet there stands against Senator Clark the significant fact, proved by Mr. Clark's letter to Rev. A. B. Martin, that he urged Mr. Martin to approach Chief Justice Brantley in order to prevent the disbarment of "that splendid man, John B. Wellcome." This admitted fact certainly justifies a strong suspicion that the other attempts to reach the court made by Dr. Treacy, under the circumstances narrated in the report, were known to Senator Clark.

Reference will now be made in this report to the criticisms of the chairman made by the minority of the committee in their addendum to the report, by annexing the following memorandum by the chairman.

MEMORANDUM BY THE CHAIRMAN.

The statement that the chairman left the committee little to do is unjust. The chairman did nothing except what such an officer is expected to do. Every important ruling was made either by decision of the committee or by the chairman in the first instance after an order of the committee was made prescribing that course of proceeding, with the understanding that any member of the committee might dissent on any point and have it decided by the vote of the committee.

The minority say that the committee made an order at the beginning appointing the chairman and another member to determine what witnesses should be summoned and it was determined that way at first, but the chairman kindly relieved the other member of that labor and determined that matter for the committee. The Senator from Alabama and the chairman were appointed to consider in the first instance applications for subpœnas for witnesses. Forty-four witnesses were summoned and heard for the prosecution; 41 witnesses summoned and heard for the defense, and 7 witnesses summoned directly by the committee. As to witnesses for the prosecution and defense, the lists which were submitted in the first instance by the two sides were deliberately considered by the chairman and the Senator from Alabama, and every question arising was passed upon.

Those lists covered three-quarters of the witnesses summoned. Subsequently in some few cases the chairman summoned witnesses where previous decisions to summon had established a principle which covered the new requests, and there the formality of consulting the Senator from Alabama may have been omitted. Such cases probably did not exceed a dozen. Various witnesses are upon the list who came to

Washington without being summoned, and were called to the stand by the respective parties. The question of summoning witnesses to prove the attempt upon the supreme court of Montana was decided by the whole committee; and it may be further and finally added that, so far as Senator Clark was concerned, there was no refusal to summon any witness whom his counsel insisted upon obtaining.

While the chairman was sick at his house he received an important communication, which seemed to him to require the instantaneous summoning of two witnesses. For those witnesses he telegraphed immediately, and at once sent to the committee a report of what he had done, in the following words, on the 3d of March, 1900:

"There are two more witnesses whom I have taken the responsibility of summoning, and do not wish to state the facts and reasons until I am sure that I shall get them here. The principal witness claims to be sick."

The circumstances connected with the summoning of this principal witness are detailed in memorandum which is in the hands of the committee. His name is J. A. Largent, of Greatfalls, Mont.

Another statement, on page 24, of the two Senators is that the report fails to state in connection with the destruction by Senator Clark, in June, 1889, of his checks, that it was his habit to destroy such checks. The two Senators are mistaken. The report distinctly states that fact on page 11, where it says that the destruction of the checks was "in accordance with what he testified was his custom."

Another statement of the two Senators is that "statements are made as facts which are based only on the testimony of a witness of doubtful credit, and that testimony plainly contradicted." This is an error. The report from beginning to end shows no statement made as a fact unless it is an undisputed fact, and no conclusion appears to be reached by the majority of the committee on contradicted testimony without the contradiction being plainly noted; and one important statement appearing on page 8 should be constantly borne in mind, that, laying aside substantially all the controverted facts, "there would still remain sufficient evidence in the case to lead the committee to find, as they do, that Mr. Clark's election is void.

WM. E. CHANDLER.

At the second session of the Fifty-sixth Congress Mr. Chandler submitted a resolution in the Senate on Saturday, the 2d day of March, 1901, declaring Mr. Clark to be personally responsible for the offenses set forth in the report of the Committee on Privileges and Elections, submitted April 23, 1900.

(Cong. Rec., vol. 34, pp. 3420, 3421.)

Upon this resolution Mr. Chandler addressed the Senate March 2, 1901, his remarks being found in the Congressional Record, volume 34, pages 3421 to 3435.

[Fifty-seventh Congress, second session; Fifty-eighth Congress, first and second sessions; Fifty-ninth Congress, first and second sessions.]

REED SMOOT,
Of Utah.

On Monday, February 23, 1903, the credentials of Reed Smoot, elected a Senator by the Legislature of Utah for the term of six years beginning March 4, 1903, were presented to the Senate of the United States and placed on file. On the same day a memorial, signed by 18 citizens of Utah, was also presented protesting against his being "permitted to qualify by taking the oath of office or to sit as a Member of the United States Senate." On the following Thursday another protest, signed by John L. Leilich, also one of the signers of the original memorial, was filed, charging that Reed Smoot was a polygamist and that as an apostle of the Church of Jesus Christ of Latter Day Saints—commonly called the Mormon Church—he had taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator." The original memorial was a document of considerable length and is set forth in full in the report of the Committee on Privileges and Elections, which forms a part of this history of the case.

On the first day of a special session of Congress, which convened on the 5th of March, 1903, following a statement by the chairman of the Committee on Privileges and Elections with reference to cases involving the question of the qualification of persons submitting proper credentials, Reed Smoot was allowed to be sworn in as a Senator without objection. Subsequently, on January 25, 1904, at the second session of the Fifty-eighth Congress, a resolution was reported by the chairman of the Committee on Privileges and Elections authorizing an investigation by that committee of the right and title of Reed Smoot to a seat in the Senate. On January 27, 1904, this resolution was reported by the Committee to Audit and Control the Contingent Expenses of the Senate, to which it was referred, and agreed to by the Senate.

After an investigation and consideration of the case of more than two years' duration, it was not until the last month of the first session of the Fifty-ninth Congress, or, to be exact, until June 11, 1906, that the committee submitted a report, accompanied by a resolution, declaring Reed Smoot not to be entitled to a seat in the Senate. A minority report, signed by five members of the committee, was also presented and made a part of the record. There was a division among the members of the committee with reference to the question of whether or not the case should be handled as one of expulsion, and one member of the committee, who joined in the committee report, stated on the floor of the Senate that it was his view that Reed Smoot could not be deprived of his seat, under the Constitution, except by expulsion. In the proceedings by the committee no evidence was produced tending to substantiate the charge that Reed Smoot was a polygamist and no such charge was made on the floor of the Senate; neither was his personal character assailed by Senators for or against the resolution.

The debate in the Senate on the above-mentioned resolution did not commence until the second session of the Fifty-ninth Congress had convened, but it continued at various times during the months of December, 1906, January, 1907, and February of the same year, the final vote on the resolution being taken on February 20, four years almost to a day after the filing of his credentials. The Senate amended the committee resolution in such a manner as to require a two-thirds vote to declare Reed Smoot not entitled to a seat in the Senate. This amendment, offered by Mr. Hopkins, was adopted by a vote of 49 to 22. A substitute amendment to the resolution, offered by Mr. Carmack, that Reed Smoot "be expelled" from the Senate, failed of adoption by a vote of 27 to 43. The final vote on the resolution declaring Reed Smoot not entitled to a seat in the Senate, as amended by Mr. Hopkins, failed of adoption by a vote of 28 to 42.

The history of the case here given consists of a statement of the proceedings of the Senate in the case as published in the Congressional Record, the report of the Committee on Privileges and Elections, the views of the minority of the committee, a statement of the days on which the question was debated in the Senate with reference to the record of the same as published in the Congressional Record, references to the speeches by different Senators for and against the committee resolution as found in the Congressional Record, the result of the vote on the "two-thirds" amendment to the resolution, the vote on the "expulsion" amendment to the resolution, and the final vote on the resolution as amended.

[Fifty-seventh Congress, second session.]

MONDAY, FEBRUARY 23, 1903.

Mr. Kearns presented the credentials of Reed Smoot, elected a Senator by the Legislature of the State of Utah for the term of six years beginning March 4, 1903, which were read and placed on file.

Mr. Burrows presented a memorial of citizens of Utah, remonstrating against the admission of Reed Smoot to a seat in the Senate as a Senator of the United States from the State of Utah; which was placed on file. (Cong. Rec., vol. 36, p. 2496.)

THURSDAY, FEBRUARY 26, 1903.

Mr. Burrows presented a memorial of John L. Leilich, of Utah, remonstrating against the admission of Reed Smoot to a seat in the Senate as a Senator of the United States from the State of Utah; which was placed on file. (Cong. Rec., vol. 36, p. 2689.)

[Fifty-eighth Congress, first session.]

THURSDAY, MARCH 5, 1903.

Mr. Hoar, for the chairman of the Committee on Privileges and Elections, made a statement to the effect that he (the chairman) understood the orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators to be that when any gentleman brings with him or presents a credential consisting of the certificate of his due election from the executive of his State he is entitled to be sworn in, and that all questions relating to his qualification should be postponed and acted upon by the Senate afterwards.

His reasons for this procedure are here set forth as follows:

"If there were any other procedure the result would be that a third of the Senate might be kept out of their seats for an indefinite time on the presenting of objection without responsibility, and never established before the Senate by any judicial inquiry. The result of that might be that a change in the political power of this Government which the people desired to accomplish would be indefinitely postponed."

The same day Mr. Smoot took the oath of office as Senator from Utah. (Cong. Rec., vol. 37, p. 1.)

[Fifty-eighth Congress, second session.]

MONDAY, JANUARY 25, 1904.

Mr. Burrows, from the Committee on Privileges and Elections, reported the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the Senate as a Senator from the State of Utah; and said committee, or any subcommittee thereof, is authorized to sit during the sessions of the Senate and during the recess of Congress, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee." (Cong. Rec., vol. 38, p. 1100.)

WEDNESDAY, JANUARY 27, 1904.

Mr. Kean, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted by Mr. Burrows on the 25th instant, authorizing the Committee on Privileges and Elections, or any subcommittee thereof, to investigate the right and title of Reed Smoot to a seat in the Senate as a Senator from the State of Utah, reported it with an amendment striking out "and during the recess of Congress;". The Senate proceeded by unanimous consent to consider the resolution, and agreed to it as amended. (Cong. Rec., vol. 38, p. 1239.)

TUESDAY, APRIL 26, 1904.

Mr. Burrows, from the Committee on Privileges and Elections, reported a resolution authorizing the committee in the Smoot case to sit during the recess of the Senate. The resolution was referred to the Committee to Audit and Control the Contingent Expenses of the Senate, subsequently reported by Mr. Kean from that committee, and agreed to. (Cong. Rec., vol. 38, p. 5628.)

[Fifty-ninth Congress, first session.]

SATURDAY, JUNE 2, 1906.

Mr. Burrows, from the Committee on Privileges and Elections, who were instructed by the resolution of the Senate of January 27, 1904, to investigate the right and title of Reed Smoot to a seat in the Senate as a Senator from the State of Utah, reported that in the opinion of the committee he was not entitled to a seat in the Senate of the United States. He stated that a formal report would be made later. He stated that the committee was divided on the question of the nature of the resolution which should follow the acceptance by the Senate of the committee report; whether it should be one to expel the Senator, or whether a declaration that he was not entitled to his seat would be sufficient. (Cong. Rec., vol. 40, p. 7715.)

MONDAY, JUNE 11, 1906.

Mr. Burrows, from the Committee on Privileges and Elections, submitted a report No. 4253), accompanied by the following resolution:

"*Resolved*, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah."

Mr. Foraker asked and obtained leave to submit the views of a minority of the Committee on Privileges and Elections, who dissented from the resolution reported by the majority.

Both reports were ordered printed. (Cong. Rec., vol. 40, p. 8218.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Burrows (chairman), Foraker, Depew, Beveridge, Dillingham, Hopkins, Knox, Dolliver, Pettus, Dubois, Bailey, Overman, and Frazier.]

IN THE SENATE OF THE UNITED STATES.

JUNE 11, 1906—Ordered to be printed.

Mr. Burrows, from the Committee on Privileges and Elections, submitted the following report (Rept. 4253, pt. 1):

The Committee on Privileges and Elections, who were charged by the Senate with the duty of investigating the right and title of Reed Smoot to a seat in the Senate as a Senator from the State of Utah, respectfully submit the following report:

On the 23d day of February, 1903, the credentials of Reed Smoot as a Senator of the United States from the State of Utah were presented to the Senate. On the same day and at the same hour there was also presented and placed on file a protest from certain citizens of Utah, praying for an investigation into the right of Mr. Smoot to the seat to which he claimed to have been elected.

Subsequently, and on the 5th day of March, 1903, Mr. Smoot took the oath of office as Senator from Utah. At the same time the attention of the Senate was, in behalf of the Committee on Privileges and Elections, called to the method of procedure in cases like that of Mr. Smoot. It was then stated, without question on the part of any member of the Senate, that in cases where the credentials of a Senator consist of "a certificate of his due election from the executive of his State he is entitled to be sworn in, and that all questions relating to his qualifications should be postponed and acted upon by the Senate afterwards." Under this rule the credentials of Mr. Smoot, with the protest against his right to a seat in the Senate, were referred to the Committee on Privileges and Elections under a resolution adopted by the Senate January 27, 1904, directing the committee to investigate the right and title of Mr. Smoot to a seat in the Senate as Senator from the State of Utah.

The resolution is as follows:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the Senate as Senator from the State of Utah; and said committee, or any subcommittee thereof, is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

The protest against the seating of Mr. Smoot.

The protest before referred to against the seating of Mr. Smoot as a Senator from the State of Utah is stated in such protest to be "upon the ground and for the reason that he is one of a self-perpetuating body of fifteen men, who, constituting the ruling authorities of the Church of Jesus Christ of Latter-Day Saints, or 'Mormon Church,' claim, and by their followers are accorded the right to claim, supreme authority, divinely sanctioned, to shape the belief and control the conduct of those under them in all matters whatsoever, civil and religious, temporal and spiritual, and who thus uniting in themselves authority in church and state do so exercise the same as to inculcate and encourage a belief in polygamy and polygamous cohabitation; who countenance and connive at violations of the State law prohibiting the same, regardless of pledges made for the purpose of obtaining statehood, and of covenants made with the people of the United States, and who by all the means in their power protect and honor those who, with themselves, violate the laws of the land and are guilty of practices destructive of the family and of the home."

In support of this protest the protestants make certain charges and assertions, the substance of which is as follows:

1. The Mormon priesthood, according to the doctrines of that church, is vested with supreme authority in all things spiritual and temporal.

2. The first presidency and twelve apostles (said Reed Smoot being one of said twelve apostles) are supreme in the exercise of the authority of the Mormon Church in all things temporal and spiritual. In support of this second proposition instances

are given of the interference of the first presidency and twelve apostles in the political affairs of the State of Utah, and quotations at length are given from the declarations of officials in the Mormon Church regarding the authority of the leaders in said church to dictate to the membership thereof concerning the political action of said members.

3 and 4. That the first presidency and twelve apostles of the Mormon Church have not abandoned the principles and practice of political dictation; neither have they abandoned their belief in polygamy and polygamous cohabitation.

5. That the first presidency and twelve apostles (of whom Reed Smoot is one) also practice or connive at and encourage the practice of polygamy, and have without protest or objection permitted those who held legislative offices by their will and consent to attempt to nullify enactments against polygamous cohabitation.

6. That the supreme authorities of the Mormon Church, namely, the first presidency and twelve apostles (of whom Mr. Smoot is one), not only connive at violations of the law against polygamy and polygamous cohabitation, but protect and honor the violators of such laws.

The protest further asserts that the leaders of the Mormon Church (of whom Mr. Smoot is one) are solemnly banded together against the people of the United States in the endeavor of said leaders to baffle the designs and frustrate the attempts of the Government to eradicate polygamy and polygamous cohabitation.

The protest further charges that the conduct and practices of the first presidency and twelve apostles (of whom Mr. Smoot is one) are well known to be, first, contrary to the public sentiment of the civilized world; second, contrary to express pledges which were given by the leaders of the Mormon Church in procuring amnesty; third, contrary to the express conditions upon which the escheated property of the Mormon Church was returned; fourth, contrary to the pledges given by the representatives of that church in their plea for statehood; fifth, contrary to the pledges required in the enabling act and given in the State constitution of Utah; sixth, contrary to a provision in the constitution of Utah providing that "there shall be no union of church and state, nor shall any church dominate the State or interfere with its functions," and seventh, contrary to law. The protest concludes by asking that the Senate make inquiry touching the matters stated in said protest.

This protest is followed by certain charges made by one John L. Leilich under oath, which are in the main of the same tenor and effect as the charges made in the protest with the additional charge that Mr. Smoot is a polygamist, having a legal wife and a plural wife, and the further charge that Mr. Smoot has, as an apostle of the Mormon Church, taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."

Answer of Mr. Smoot.

To the statements made in the protest and the charges by Mr. Leilich Mr. Smoot made answer, which answer is in the nature of a demurrer to all the charges contained in the protest and to the charges made by Mr. Leilich, except two, namely, that Mr. Smoot is a polygamist and that he is bound by some oath or obligation which is inconsistent with the oath taken by him as a Senator. Both these charges he denies, and further denies, specifically and categorically, the charges made in the protest and by Mr. Leilich.

Authority of the Senate and nature of the investigation.

Before proceeding to an examination of the protest and answer, and the testimony taken by the committee, it may be well to examine, briefly, the authority of the Senate in the premises and the nature and scope of the investigation.

The Constitution provides (Art. 1, sec. V, par. 1) that "Each House shall be the judge of the elections, returns, and qualifications of its own Members." It is now well established by the decisions of the Senate in a number of cases that in order to be a fit representative of a sovereign State of the Union in the Senate of the United States one must be in all respects obedient to the Constitution and laws of the United States and of the State from which he comes, and must also be desirous of the welfare of his country and in hearty accord and sympathy with its Government and institutions. If he does not possess these qualifications, if his conduct has been such as to be prejudicial to the welfare of society, of the nation or its Government, he is regarded as being unfit to perform the important and confidential duties of a Senator, and may be deprived of a seat in the Senate, although he may have done no act of which a court of justice could take cognizance. Thus William Blount, a Senator from the State of Tennessee, was, in the year 1797, deprived of his seat in the Senate for conduct "inconsistent with his public trust and duty as a Senator." His offense consisted in the writing of a letter to one Carey, an official interpreter to the Cherokee Nation, the conduct

of Mr. Blount in writing said letter being characterized by the committee of investigation in that case as follows:

"The plan hinted at in this extraordinary letter to be executed under the auspices of the British is so capable of different constructions and conjectures that your committee at present forbear giving any decided opinion respecting it, except that to Mr. Blount's own mind it appeared to be inconsistent with the interests of the United States and of Spain, and he was therefore anxious to conceal it from both. But when they consider his attempts to seduce Carey from his duty as a faithful interpreter and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers of the United States residing among them; the measures he has proposed to excite a temper which must produce the recall or expulsion of our superintendent from the Creek Nation; his insidious advice tending to the advancement of his own popularity and consequence, at the expense and hazard of the good opinion which the Indians entertain of this Government and of the treaties subsisting between us and them, your committee have no doubt that Mr. Blount's conduct has been inconsistent with his public duty, renders him unworthy of a further continuance of his present public trust in this body, and amounts to a high misdemeanor."

The vote on the expulsion of Mr. Blount resulted as follows: Yeas 25, nays 1. (Senate Election Cases, pp. 1165–1170.)

In the year 1807, John Smith, a Senator from the State of Ohio, was accused of being associated with Aaron Burr in a conspiracy "against the peace and prosperity" of the United States. In the report of the committee—of which John Quincy Adams was chairman—appointed to investigate the case the committee say:

"In examining the question whether these forms of judicial proceedings or the rules of judicial evidence ought to be applied to the exercise of that censorial authority which the Senate of the United States possesses over the conduct of its members, let us assume as the test of their application either the dictates of unfettered reason, the letter and spirit of the Constitution, or precedents, domestic or foreign, and your committee believe that the result will be the same—that the power of expelling a member must, in its nature, be discretionary, and in its exercise always more summary than the tardy process of judicial tribunals.

"The power of expelling a member for misconduct results on the principles of common sense, from the interest of the Nation that the high trust of legislation should be invested in pure hands. When the trust is elective it is not to be presumed that the constituent body will commit the deposit to the keeping of worthless characters. But when a man whom his fellow-citizens have honored with their confidence on the pledge of his spotless reputation has degraded himself by commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member, which should have no remedy of amputation to apply until the poison had reached the heart.

"The question upon the trial of a criminal cause before the courts of common law is not between guilt and innocence, but between guilt and the possibility of innocence. If a doubt can possibly be raised, either by the ingenuity of the party or of his counsel, or by the operation of general rules in their unforeseen application to particular cases, that doubt must be decisive for acquittal, and the verdict of not guilty perhaps in nine cases out of ten means no more than that the guilt of the party has not been demonstrated in the precise, specific, and narrow forms prescribed by law. The humane spirit of the laws multiplies the barriers for the protection of innocence and freely admits that these barriers may be abused for the shelter of guilt. It avows a strong partiality favorable to the person upon trial and acknowledges the preference that ten guilty should escape rather than that one innocent should suffer. The interest of the public that a particular crime should be punished is but as one to ten compared with the interest of the party that innocence should be spared. Acquittal only restores the party to the common rights of every other citizen; it restores him to no public trust; it invests him with no public confidence; it substitutes the sentence of mercy for the doom of justice, and to the eyes of impartial reason in the great majority of cases must be considered rather as a pardon than a justification.

"But when a member of a legislative body lies under the imputation of aggravated offenses and the determination upon his cause can operate only to remove him from a station of extensive powers and important trust, this disproportion between the interest of the public and the interest of the individual disappears; if any disproportion exists, it is of an opposite kind. It is not better that ten traitors should be members of this Senate than that one innocent man should suffer expulsion. In either case, do doubt, the evil would be great. But in the former it would strike at the vitals of the nations; in the latter it might, though deeply to be lamented, only be the calamity of an individual."

The resolution reported by the said committee declaring "That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States, has been guilty of conduct incompatible with his duty and station as a Senator of the United States, and that he be therefore, and hereby is, expelled from the Senate of the United States," received 19 affimative votes to 10 in the negative. (Senate Election Cases, pp. 1170–1184.)

In 1862 Jesse D. Bright was expelled from the Senate for writing a letter to Jefferson Davis, "president of the Confederation of States," in March, 1861, introducing one Thomas B. Lincoln, who wished to dispose of an improvement in firearms. Some at least of the Senators who voted for Mr. Bright's expulsion asserted in effect that they did not claim that Mr. Bright had been guilty of treason, misprision of treason, or any other offense against the laws of this country. He was deprived of his seat in the Senate because it was believed that his desires and conduct were opposed to the welfare and interests of the nation.

In the course of the debate upon the question of expelling Mr. Bright Mr. Sumner used the following language:

"* * * But the question may be properly asked if this inquiry is to be conducted as in a court of justice, under all the restrictions and technical rules of judicial proceedings? Clearly not. Under the Constitution, the Senate, in a case like the present, is the absolute judge, free to exercise its power according to its own enlightened discretion. It may justly declare a Senator unworthy of a seat in this body on evidence defective in form, or on evidence even which does not constitute positive crime. * * * It is obvious that the Senate may act on any evidence which shall be satisfactory to show that one of its members is unworthy of his seat without bringing it to the test of any rules of law. It is true that the good name of the individual is in question; but so also is the good name of the Senate, not forgetting also the welfare of the country; and if there are generous presumptions of personal innocence, so also are there irresistible instincts of self-defense which compel us to act vigorously, not only to preserve the good name of the Senate, but also to preserve the country." (Congressional Globe, 2d sess. 37th Cong., pt. 1, pp. 412, 413, 414.)

In the same debate Mr. Davis, of Kentucky, said:

"* * * But what is the law? We are not sitting as a court trying the honorable Senator. There are some gentlemen, able men, very able men, men of enlarged patriotism, of eminent public and private virtue that have pursued the profession of the law so long, either as practitioners, counselors and solicitors, or as judges, that their minds have become too contracted for enlarged statesmanship and the great principles of policy and moral justice, upon which governments ought to be administered, and upon which alone they can be wisely administered. They have dwarfed their minds to such an extent that they can not reason upon the expansive principle and sentiment and consideration that ought to guide and control the largest and wisest statesmanship.

"There is no law which defines any particular class of offenses that shall be sufficient to expel a Senator from his seat. The common law does not. There is no statute law that does. There are no rules of evidence establishing technical rules of testimony that are to guide and control and govern this body in getting its lights and reaching its conclusions when a Senator is thus on trial. The general rule and principle of law and of reason and common sense is that whatever disqualifies a member of the Senate from the proper discharge of his duties, whatever it may be, is sufficient, and ought to be held sufficient, for his expulsion, and whatever evidence satisfies the mind reasonably and according to moral certainty and truth of the existence of that cause is sufficient evidence without resorting to the technical rules of testimony upon which to convict him. That is the law of this country. It is the law of England. It is the law of Parliament. I will read from Story's Commentaries on the Constitution, section 836, a short paragraph:

"'* * * * In July, 1797, William Blount was expelled from the Senate for a high misdemeanor entirely inconsistent with his public trust and duty as a Senator. The offense charged against him was an attempt to seduce an American agent among the Indians from his duty and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. It was not a statutable offense; nor was it committed in his official character; nor was it committed during the session of Congress, nor at the seat of government. Yet, by an almost unanimous vote [25 yeas to 1 nay] he was expelled from that body and he was afterwards impeached (as has already been stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any mis-

demeanor which, though not punished by any statute, is inconsistent with the trust and duty of a Senator.'

"There is the touchstone. Any conduct, any opinions, any line of action as a Senator which is inconsistent with the duty of a Senator, is a sufficient cause for his expulsion and ought to be the rule of reason and of common sense. * * * The principle deduced from the authorities is this: There is no common law, no statutory law, there is no parliamentary law that binds the Senate to any particular definition of crime or offense in acting in this or any other case of the kind. On the contrary, as these authorities establish, it is a matter coming within the discretion of the tribunal trying the Senator." (Congressional Globe, 2d sess. 37th Cong., pt. 1, pp. 434, 435.)

In the progress of the debate Mr. McDougall said:

"* * * It is no question of law. We have not asked whether the Senator from Indiana is guilty or not guilty. We have to judge him in our best judgment, and by that we try him; and we say yea or nay, as we think, whether he be a true man or not to sit in the Federal councils to conduct the affairs of the United States." (Congressional Globe, 2d sess. 37th Cong., pt. 1, p. 655.)

To the same effect were the remarks made in the course of the same debate by Mr. Lane, Mr. Howe, Mr. Johnson, and Mr. Browning. (Congressional Globe, 2d sess. 37th Cong., pt. 1, pp. 417, 418, 560, 584, 623, 624.)

In the year 1867 Philip F. Thomas was denied a seat in the Senate of the United States, to which he had been duly elected, for the reason that he had resigned his seat in the cabinet of President Buchanan on account of his disagreement with the policy of the President in endeavoring to relieve the garrison of the forts in Charleston Harbor, and also because Mr. Thomas had given to his son, who was about to enter the service of the Confederate States, a sum of money, not to assist the son in going to the camp of the Confederate forces, but "that in case he was imprisoned or suffering he might have a sum of money with him." There was no well-founded claim that Mr. Thomas had been guilty of any act or conduct of which any court would take cognizance; the most that was claimed was that his conduct was such as to give "aid, countenance, and encouragement to persons engaged in armed hostility to the United States." (Senate Election Cases pp. 333–339.)

In the British Parliament the same principle has been recognized in a number of cases and is now fully established.

In the year 1812 Benjamin Walsh was expelled from the House of Commons as "unworthy and unfit to continue a member of this House," on account of said Walsh having been guilty of "gross fraud and notorious breach of trust," although his offense was one "not amounting to felony." (67 Commons Journal, 175–176.) In that case the chancellor of the exchequer said:

"He could not think that because an act of Parliament did not make a moral crime a legal one the House of Commons should be prevented from taking cognizance of it." (Hansard's Parliamentary Debates, first series, vol. 21, p. 1199.)

In the year 1814 Sir Thomas Cochrane was expelled from the House of Commons for being concerned in a conspiracy to spread the false report that the French army had been defeated, Napoleon killed, and that the allied sovereigns were in Paris, the object to be attained by such false report being "to occasion a temporary rise and increase in the prices of the public Government funds," to the injury of those who should purchase such funds "during such last-mentioned temporary rise and increase in the prices thereof." (69 Commons Journal, 427–433.)

The protestants.

The main protest in this case was signed by 18 reputable citizens of the State of Utah. One of the signers, Dr. W. M. Paden, is the pastor of one of the leading Protestant churches of Salt Lake City and a graduate of Princeton University; another, Mr. P. L. Williams, is the general counsel of a railroad in Utah and the Western States; another, Mr. E. W. Wilson, is the cashier of a national bank in Salt Lake City; another, Mr. C. C. Goodwin, the editor of one of the leading papers of that city; another, Mr. W. S. Neldin, the president of a wholesale drug company doing business not only in Utah, but in other of the Western States; another, Mr. Ezra Thompson, a gentleman who has held the office of mayor of Salt Lake City for two terms; another, Mr. J. J. Corwin, a man engaged in real estate, who has been a resident of Utah for about sixteen years; five others, Mr. George R. Hancock, Mr. W. M. Ferry, Mr. Harry C. Hill, Hon. C. E. Allen, and Mr. H. G. McMillan, are men holding positions in the mining industry of Utah. Mr. Allen was the first Representative in Congress from the State of Utah. Another of the signers of the protest, Mr. G. H. Lewis, was formerly assistant United States attorney and is now master in chancery of the United States circuit court.

Rev. Abiel Leonard was, up to the time of his death, which occurred in November, 1903, the Bishop of the Diocese of Utah of the Protestant Episcopal Church. From the standing and character of the signers, it is evident that the protest is not the offspring of suspicion or prejudice, but that such protest emanates from men of such character and respectability as to be entitled to serious and careful consideration and the facts therein stated to be worthy of investigation by the Senate.

As regards the charge that Mr. Smoot has a plural wife, this fact, if proved, is conceded by Mr. Smoot and his counsel to be sufficient to disqualify him from holding a seat in the Senate. But this accusation seems to have been made by Mr. Leilich, unadvisedly and on his own responsibility, and without any sufficient evidence in support of the same. This charge is not made in the main protest, and counsel for the protestants at the outset of the investigation very frankly admitted that they had no proof to offer in support of this allegation.

Encouragement of polygamy and polygamous cohabitation by the Mormon authorities.

The first reason assigned by the protestants why Mr. Smoot is not entitled to a seat in the Senate is in effect that he belongs to a self-perpetuating body of 15 men who constitute the ruling authorities of the Church of Latter-Day Saints, or "Mormon Church," so called; that this ruling body of the church both claims and exercises the right of shaping the belief and controlling the conduct of the members of that church in all matters whatsoever, civil and religious, temporal and spiritual. It is then alleged that this self-perpetuating body of 15 men, of whom Mr. Smoot is one, uniting in themselves authority in both church and state so exercise this authority as to encourage a belief in polygamy as a divine institution and by both precept and example encourage among their followers the practice of polygamy and polygamous cohabitation.

That the first presidency and twelve apostles of the Mormon Church are a self-perpetuating body of 15 men, seem to be well established by the testimony of the one most competent to speak upon that subject, the president of the Church of Latter-Day Saints, Mr. Joseph F. Smith, who testifies, as will be seen on pages 91 and 92 of volume 1 of the printed copy of the proceedings in the investigation, that vacancies occurring in the number of the twelve apostles are filled by the apostles themselves with the consent and approval of the first presidency.

The testimony of Mr. Smith is as follows:

"Senator McComas. And the twelve apostles were then first named?

"Mr. Smith. Yes, sir.

"Senator McComas. When vacancies occurred thereafter, by what body were the vacancies in the twelve apostles filled?

"Mr. Smith. Perhaps I may say in this way: Chosen by the body, the twelve themselves, by and with the consent and approval of the first presidency.

"Senator Hoar. Was there a revelation in regard to each of them?

"Mr. Smith. No, sir; not in regard to each of them. Do you mean in the beginning?

"Senator Hoar. I understand you to say that the original twelve apostles were selected by revelation?

"Mr. Smith. Yes, sir; that is right.

"Senator Hoar. Is there any revelation in regard to the subsequent ones?

"Mr. Smith. No, sir; it has been the choice of the body.

"Senator McComas. Then the apostles are perpetuated in succession by their own act and the approval of the first presidency?

"Mr. Smith. That is right."

To the same effect is the testimony of Francis M. Lyman.

It further appears that any one of the twelve apostles may be removed by his fellow-apostles without consulting the members of the church in general. It is also in proof that the first presidency and twelve apostles govern the church by means of so-called revelations from God, which revelations are given to the membership of the church as emanating from divine authority. It is also shown that those members of the Mormon Church who refuse to obey the revelations so communicated by the priesthood thereby become out of harmony with the church and are thus practically excluded from the blessings, benefits, and privileges of membership in the church.

It is also well established by the testimony that the members of the Mormon Church are governed in all things by the first presidency and twelve apostles. That this authority is extended to the membership through a series and succession of subordinate officials, consisting of presidents of seventies, presiding bishops, elders, presidents of stakes, bishops, and other officials. That one of the chief requirements by the leaders of the church is that members shall take counsel of their religious superiors in all things whatsoever, whether civil or religious, temporal or spiritual. That the failure to receive and obey counsel in any of these matters subjects the one who

refuses to the discipline of the church. That this discipline is administered in the first instance by the subordinate officials, subject to the right to appeal to the higher officials of the church, and ultimately to the first president and twelve apostles. These rules, enforced, as they are, by the discipline of the Mormon Church constitute the first president and twelve apostles a hierarchy, a body of men at the head of a religious organization governing their followers with absolute and unquestioned authority in all things relating to temporal and political, as well as to spiritual affairs.

The testimony taken before the committee also shows beyond a reasonable doubt that this authority of the first presidency and 12 apostles is so exercised over the members of the Mormon Church as to inculcate a belief in the divine origin of polygamy and its rightfulness as a practice, and also to encourgae the membership of that church in the practice of polygamy and polygamous cohabitation. While this is denied on the part of the officials of the church, the truthfulness of the claim of the protestants in this regard is shown by a great number of facts and circumstances, no one of which is perhaps conclusive in itself, but when taken together form a volume of testimony so cogent and convincing as to leave no reasonable doubt in the mind that the truth is as stated by the protestants. It is proved without denial that the Book of Doctrine and Covenants, one of the leading authorities of the Mormon Church, and still circulated by that church as a book equal in authority to the Bible and the Book of Mormon, contains the revelation regarding polygamy, of which the following is a part:

"61. And again, as pertaining to the law of the priesthood: If any man espouse a virgin and desires to espouse another and the first give her consent, and if he espouse the second, and they are virgins and have vowed to no other man, then he is justified he can not commit adultery, for they are given unto him; for he can not commit adultery with that that belongeth to him and to no one else.

"62. And if he have 10 virgins given unto him by this law he can not commit adultery, for they belong to him and they are given unto him; therefore he is justified.

"63. But if one or either of the 10 virgins, after she is espoused, shall be with another man she has committed adultery and shall be destroyed, for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfill the promise which was given by my Father before the foundation of the world; and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.

"64. And again, verily, verily, I say unto you, if any man hath a wife who holds the keys of this power and he teaches unto her the law of my priesthood, as pertaining these things, then shall she believe and administer unto him or she shall be destroyed, said the Lord your God, for I will destroy her; for I will magnify my name upon all those who receive and abide in my law.

"65. Therefore, it shall be lawful in me, if she receives not this law for him to receive all things whatsoever I, the Lord his God, will give unto him, because she did not minister unto him according to my word; and she then becomes the transgressor; and he is exempt from the law of Sarah who ministered unto Abraham, according to the law, when I commanded Abraham to take Hager to wife."

It is also shown that numerous other publications of the Mormon Church are still circulated among the members of that church with the knowledge and by the authority of the church officials, which contain arguments in favor of polygamy. The Book of Doctrine and Covenants is not only still put forth to the members of the church as authoritative in all respects, but the first presidency and 12 apostles have never incorporated therein the manifesto forbidding the practice of polygamy and polygamous cohabitation, nor have they at any time or in any way qualified the reputed revelation to Joseph Smith regarding polygamy. And this Book of Doctrine and Covenants, containing the polygamic revelation, is regarded by Mormons as being of higher authority than the manifesto suspending polygamy.

Bearing in mind the authority of the first presidency and 12 apostles over the whole body of the Mormon Church, it is very evident that if polygamy were discountenanced by the leaders of that church it would very soon be a thing of the past among the members of that church. On the contrary, it appears that since the admission of Utah into the Union as a State the authorities of the Mormon Church have countenanced and encouraged the commission of the crime of polygamy instead of preventing it, as they could easily have done.

A sufficient number of specific instances of the taking of plural wives since the manifesto of 1890, so called, have been shown by the testimony as having taken place among officials of the Mormon Church to demonstrate the fact that the leaders in this church, the first presidency and the 12 apostles, connive at the practice of taking plural wives, and have done so ever since the manifesto was issued which purported to put an end to the practice. It has been shown by the testimony, so clearly as to leave no doubt of the fact, that as late as 1896 one Lillian Hamlin became the plural wife of

Abraham H. Cannon, who was then an apostle of the Mormon Church. This is shown by the proof of these facts:

Down to the year 1895 Lillian Hamlin was a single woman. In 1896 she received attentions from Abraham H. Cannon, these attentions being of a character to indicate that there was more than a friendly relation existing between the two. In June, 1896, Abraham H. Cannon informed his plural wife that he was going to California with Joseph F. Smith and Lillian Hamlin to be married to Lillian Hamlin at some place outside the United States. While in California Joseph F. Smith went with Abraham H. Cannon and Lillian Hamlin from Los Angeles to Catalina Island. After the return of the party to Los Angeles, Abraham H. Cannon and Lillian Hamlin lived together as husband and wife. Returning to Salt Lake City, Abraham H. Cannon told his plural wife that he had been married to Lillian Hamlin. From that time it was generally reputed in the community and understood by the families of both Abraham H. Cannon and Lillian Hamlin that a marriage had taken place between them; that they had been married on the high seas by Joseph F. Smith. Lillian Hamlin assumed the name of Cannon, and a child to which she afterwards gave birth bears the name of Cannon and inherited a share of the estate of Abraham H. Cannon. The prominence of Abraham H. Cannon in the church, the publicity given to the fact of his taking Lillian Hamlin as a plural wife, render it practically impossible that this should have been done without the knowledge, the consent, and the connivance of the headship of that church.

George Teasdale, another apostle of the Mormon Church, contracted a plural marriage with Marion Scholes since the manifesto of 1890. The President of the Mormon Church endeavors to excuse this act upon the pretext that the first marriage of George Teasdale was not a legal marriage, but the testimony taken from the divorce proceedings which separated George Teasdale from his lawful wife, wholly controverts this assertion on the part of President Smith.

It is also in evidence that Walter Steed, a prominent Mormon, contracted a plural marriage after the manifesto of 1890. Charles E. Merrill, a bishop of the Mormon Church, took a plural wife in 1891, more than a year after the issuing of the manifesto. The ceremony uniting said Merrill to his plural wife was performed by his father, who was then and until the time of his death an apostle in the Mormon Church. It is also shown that John W. Taylor, another apostle of the Mormon Church, has been married to two plural wives since the issuing of the so-called manifesto.

Matthias F. Cowley, another of the 12 apostles, has also taken one or more plural wives since the manifesto. While the proof that Apostles Taylor and Cowley have married plural wives since the manifesto may not be so free from all possible doubt as is the proof in the case of Abraham Cannon, the fact that the proofs presented to the committee showing such marriages by Taylor and Cannon stand wholly uncontroverted, and the further fact that Apostles Taylor and Cowley, instead of appearing before the committee and denying the allegation, evade service of process issued by the committee for their appearance, and refuse to appear after being requested to do so, warrant the conclusion that the allegation is true and that said Taylor and Cowley have taken plural wives since the manifesto.

While the fact does not appear from any sworn testimony in the case, it is a matter of common report that Taylor and Cowley have recently been dropped from the list of apostles. But this fact in no way counteracts the influence of the Mormon leaders in their encouragement of polygamy. When Taylor and Cowley took their more recent plural wives they were numbered among the apostles in good standing. The fact that they had taken plural wives since the manifesto was well known to their associates for months and years. But they were continued as apostles, and no action was taken in the case of either until the facts were revealed to the world by this investigation. And it is worthy of note that these apostles have not been complained of or brought to trial before the church courts for disobeying the manifesto, nor have they been deprived of their offices or honors in the church (as was done in the case of Moses Thatcher for a political offense), but they are still members of the church in good standing, each still holds the office of an elder in the church, and each is still a member of the high priesthood of the church.

The dropping of Taylor and Cowley from the quorum of the 12 apostles was so evidently done for popular effect that the act merits no consideration whatever, except as an admission by the first presidency and 12 apostles that Apostles Taylor and Cowley have each taken one or more plural wives since the manifesto.

It is also proved that about the year 1896 James Francis Johnson was married to a plural wife, Clara Mabel Barber, the ceremony in this instance being performed by an apostle of the Mormon Church. To these cases must be added that of Marriner W. Merrill, another apostle; J. M. Tanner, superintendent of church schools; Benjamin Cluff, jr., president of Brigham Young University; Thomas Chamberlain, counselor

to the president of a stake; Bishop Rathall, John Silver, Winslow Farr, Heber Benion, Samuel S. Newton, a man named Okey, who contracted a plural marriage with Ovena Jorgensen in the year 1897, and Morris Michelson about the year 1902. In the case of Benjamin Cluff, jr., before referred to, the polygamous marriage was tacitly sanctioned by President Joseph F. Smith when he "referred to Sister Cluff and the work she had been doing among the children in Colonia Diaz, Mexico."

It is morally impossible that all these violations of the laws of the State of Utah by the contracting of plural marriages could have been committed without the knowledge of the first presidency and the 12 apostles of the Mormon Church. In two of the above cases, that of George Teasdale and that of Benjamin Cluff, jr., the fact of the plural marriage was directly communicated to the president of the church, Joseph F. Smith, and in the other cases, with the possible exception of James Francis Johnson, the fact of a plural marriage having been celebrated was so well known throughout the community that it is not conceivable that such marriages would not have been called to the attention of the leaders of the church. Indeed, there was no denial on the part of the first president or any one of the 12 apostles that they learned of the fact that plural marriages were being contracted by officials of the Mormon Church and that no attention was paid to the matter. The excuse given by them was that it was not their duty to interfere in such matters; that the law furnished a remedy. Furthermore, it was shown by the testimony of one of the 12 apostles and of other witnesses that "under the established law of the church no person could secure a plural wife except by consent of the president of the church."

Suppression of testimony by Mormon leaders.

It is a fact of no little significance in itself, bearing on the question whether polygamous marriages have been recently contracted in Utah by the connivance of the first presidency and 12 apostles of the Mormon Church, that the authorities of said church have endeavored to suppress, and have succeeded in suppressing, a great deal of testimony by which the fact of plural marriages contracted by those who were high in the councils of the church might have been established beyond the shadow of a doubt. Before the investigation had begun it was well known in Salt Lake City that it was expected to show on the part of the protestants that Apostles George Teasdale, John W. Taylor, and M. F. Cowley, and also Prof. J. M. Tanner, Samuel Newton and others who were all high officials of the Mormon Church had recently taken plural wives, and that in 1896 Lillian Hamlin was sealed to Apostle Abraham H. Cannon as a plural wife by one of the first presidency and 12 apostles of the Mormon Church. All, or nearly all, of these persons except Abraham H. Cannon, who was deceased, were then within reach of service of process from the committee. But shortly before the investigation began all these witnesses went out of the country.

Subpœnas were issued for each one of the witnesses named, but in the case of Samuel Newton only could the process of the committee be served. Mr. Newton refused to obey the order of the committee, alleging no reason or excuse for not appearing. It is shown that John W. Taylor was sent out of the country by Joseph F. Smith on a real or pretended mission for the church. And it is undeniably true that not only the apostles, but also all other officials of the Mormon Church, are at all times subject to the orders of the governing authorities of the church.

It would be nothing short of self-stultification for one to believe that all these most important witnesses chanced to leave the United States at about the same time and without reference to the investigation. All the facts and circumstances surrounding the transaction point to the conclusion that every one of the witnesses named left the country at the instance of the rulers of the Morman Church and to avoid testifying before the committee. It is, furthermore, a fact which can not be questioned that every one of these witnesses is under the direction and control of the first presidency and 12 apostles of the Mormon Church. Had those officials seen fit to direct the witnesses named to return to the United States and give their testimony before the committee, they would have been obliged to do so. The reason why the said witnesses left the country and have refused to come before the committee is easy to understand, in view of the testimony showing the contracting of plural marriages by prominent officials of the Mormon Church within the past few years.

It was claimed by the protestants that the records kept in the Mormon temple at Salt Lake City and Logan would disclose the fact that plural marriages have been contracted in Utah since the manifesto with the sanction of the officials of the church. A witness who was required to bring the records in the temple at Salt Lake City refused to do so after consulting with President Smith. It is claimed by counsel for Mr. Smoot that this witness was not mentally competent to testify; but his testimony may be searched in vain for any internal evidence of such incompetency, and there was nothing in the appearance of the witness when testifying to suggest to the committee that he

was not as competent to testify as any witness who was examined during the course of the investigation.

The witness who was required to bring the records kept in the temple at Logan excused himself from attending on the plea of ill health. But the important part of the mandate of the committee—the production of the records—was not obeyed by sending the records, which could easily have been done.

In the case of other witnesses who were believed to have contracted plural marriages since the year 1890 all sorts of shifts, tricks, and evasions were resorted to in order to avoid service of a subpœna to appear before the committee and testify.

These instances of the suppression of testimony by the direct order or tacit consent of the ruling authorities of the Mormon Church warrant the committee in believing that the suppressed testimony would, if produced, strongly corroborate the testimony which was given, showing that those who direct the affairs of the Mormon Church countenance and encourage polygamous marriages, as well as polygamous cohabitation, and that the allegations of the protestants in that regard are true.

Mormon Officials Living in Polygamous Cohabitation.

Aside from this it was shown by the testimony, and in such a way that the fact could not possibly be controverted, that a majority of those who give the law to the Mormon Church are now, and have been for years, living in open, notorious, and shameless polygamous cohabitation. The list of those who are thus guilty of violating the laws of the State and the rules of public decency is headed by Joseph F. Smith, the first president, "prophet, seer, and revelator" of the Mormon Church, who testified in regard to that subject as follows:

"Mr. TAYLOR. Is the cohabitation with one who is claimed to be a plural wife a violation of the law of the church as well as of the law of the land?

"Mr. SMITH. That was the case, and is the case even to-day.

"Mr. TAYLOR. What was the case; what you are about to say?

"Mr. SMITH. That it is contrary to the rule of the church, and contrary as well to the law of the land, for a man to cohabit with his wives. * * * I have cohabited with my wives; not openly—that is, not in a manner that I thought would be offensive to my neighbors—but I acknowledged them; I have visited them. They have borne me children since 1890, and I have done it, knowing the responsibility and knowing that I was amenable to the law. * * *

"Mr. TAYLOR. In 1892, Mr. Smith, how many wives did you have?

"Mr. SMITH. In 1892?

"Mr. TAYLOR. Yes.

"Mr. SMITH. I had 5. * * *

"Mr. TAYLOR. My question is, How many children have been born to him by these wives since 1890?

"Mr. SMITH. I had 11 children born since 1890.

"Mr. TAYLOR. Those are all the children that have been born to you since 1890?

"Mr. SMITH. Yes, sir; those are all.

"Mr. TAYLOR. Were those children by all of your wives; that is, did all of your wives bear children?

"Mr. SMITH. All of my wives bore children.

"Mr. TAYLOR. Since 1890?

"Mr. SMITH. That is correct.

"The CHAIRMAN. I understand since 1890?

"Mr. SMITH. Since 1890. I said that I have had born to me 11 children since 1890, each of my wives being the mother of from 1 to 2 of those children. * * *

The CHAIRMAN. Mr. Smith, I will not press it, but I will ask you if you have any objection to stating how many children you have in all.

Mr. SMITH. Altogether?

"The CHAIRMAN. Yes.

"Mr. SMITH. I have had born to me, sir, 42 children—21 boys and 21 girls—and I am proud of every one of them. * * *

"The CHAIRMAN. Do you obey the law in having 5 wives at this time and having them bear to you 11 children since the manifesto of 1890?

"Mr. SMITH. Mr. Chairman, I have not claimed that in that case I have obeyed the law of the land.

"The CHAIRMAN. That is all.

"Mr. SMITH. I do not claim so, and, as I said before, that I prefer to stand my chances against the law." (Vol. 1, pp. 129, 133, 148, 197, 382.)

The list also includes George Teasdale, an apostle; John W. Taylor, an apostle; John Henry Smith, an apostle; Marriner W. Merrill, also an apostle; Heber J. Grant, an apostle; M. F. Cowley, an apostle; Charles W. Penrose, an apostle; and Francis M.

Lyman, who is not only an apostle, but the probable successor of Joseph F. Smith as president of the church. Thus it appears that the first president and 8 of the 12 apostles, a considerable majority of the ruling authorities of the Mormon Church, are noted polygamists.

In addition to these, the list includes Brigham H. Roberts, who is one of the presidents of 70s and a leading official of the church; J. M. Tanner, superintendent of the church schools; Andrew Jenson, assistant historian of the church; Thomas H. Merrill, a bishop of the church; Alma Merrill, one of the presidency of a church stake; Angus M. Cannon, patriarch of the Mormon Church; a man named Greenwald, who is at the head of a church school; George Reynolds, one of the first 7 presidents of 70s and first assistant superintendent of Sunday schools of the world; George H. Brimhall, president of Brigham Young University; and Joseph Hickman, teacher in Brigham Young University. All the officials named were appointed, either directly or indirectly, by the first presidency and 12 apostles; and in the case of J. M. Tanner, his appointment to his present office was made after he had been compelled to resign his position as president of the agricultural college because of the fact that he was a polygamist.

These facts abundantly justify the assertion made in the protest that "the supreme authorities in the church, of whom Senator-elect Reed Smoot is one, to wit, the first presidency and 12 apostles, not only connive at violation of, but protect and honor the violators of the laws against polygamy and polygamous cohabitation."

It will be seen by the foregoing that not only do the first presidency and 12 apostles encourage polygamy by precept and teaching, but that a majority of the members of that body of rulers of the Mormon people give the practice of polygamy still further and greater encouragement by living the lives of polygamists, and this openly and in the sight of all their followers in the Mormon Church. It can not be doubted that this method of encouraging polygamy is much more efficacious than the teaching of that crime by means of the writings and publications of the leaders of the church, and this upon the familiar principle that "actions speak louder than words."

And not only do the president and a majority of the 12 apostles of the Mormon Church practice polygamy, but in the case of each and every one guilty of this crime who testified before the committee, the determination was expressed openly and defiantly to continue the commission of this crime without regard to the mandates of the law or the prohibition contained in the manifesto. And it is in evidence that the said first president, addressing a large concourse of the members of the Mormon Church at the tabernacle in Salt Lake City in the month of June, 1904, declared that if he were to discontinue the polygamous relation with his plural wives he should be forever damned and forever deprived of the companionship of God and those most dear to him throughout eternity. Thus it appears that the "prophet, seer, and revelator" of the Mormon Church pronounces a decree of eternal condemnation throughout all eternity upon all members of the Mormon Church who, having taken plural wives, fail to continue the polygamous relation. So that the testimony upon that subject, taken as a whole, can leave no doubt upon any reasonable mind that the allegations in the protest are true, and that those who are in authority in the Mormon Church, of whom Mr. Smoot is one, are encouraging the practice of polygamy among the members of that church, and that polygamy is being practiced to such an extent as to call for the severest condemnation in all legitimate ways.

The manifesto a deception.

Against these facts the authorities of the Mormon Church urge that in the year 1890 what is generally termed a manifesto was issued by the first presidency of that church, suspending the practice of polygamy among the members of that church. It may be said, in the first place, that this manifesto misstates the facts in regard to the solemnization of plural marriages within a short period preceding the issuing of the manifesto. It now appears that in a number of instances plural marriages had been solemnized in the Mormon Church, and, in the case of those high in authority in that church, within a very few months preceding the issuing of the manifesto.

It is also observable that this manifesto in no way declares the principle of polygamy to be wrong or abrogates it as a doctrine of the Mormon Church, but simply suspends the practice of polygamy to be resumed at some more convenient season, either with or without another revelation. It is now claimed by the first president and other prominent officials of the Mormon Church that the manifesto was not a revelation, but was, at the most, an inspired document, designed "to meet the hard conditions then confronting" those who were practicing polygamy and polygamous cohabitation, leaving what the Mormon leaders are pleased to term "the principle of plural mar-

riage" as much a tenet of their faith and rule of practice when possible, as it was before the manifesto was issued. Upon that subject Joseph F. Smith testified as follows:

"Mr. TAYLOR. The revelation which Wilford Woodruff received in consequence of which the command to take plural wives was suspended did not, as you understand, change the divine view of plural marriage, did it?

"Mr. SMITH. It did not change our belief at all.

"Mr. TAYLOR. It did not change your belief at all?

"Mr. SMITH. Not at all, sir.

"Mr. TAYLOR. You continued to believe that plural marriages were right?

"Mr. SMITH. We did. I did at least. I do not answer for anybody else. I continue to believe as I did before. (Vol. 1, p. 107.)

"Senator HOAR. The apostle says that a bishop must be sober and must be the husband of one wife.

"Mr. SMITH. At least."

And one of the twelve apostles has declared the fact to be that "the manifesto is only a trick to beat the devil at his own game." Further than this, it is conceded by all that this manifesto was intended to prohibit polygamous cohabitation as strongly as it prohibited the solemnization of plural marriages. In the case of polygamous cohabitation the manifesto has been wholly disregarded by the members of the Mormon Church. It is hardly reasonable to expect that the members of that church would have any greater regard for the prohibition of plural marriage.

The contention that the practice of polygamy is rightful as a religious ceremony and therefore protected by that provision of the Constitution of the United States which declares "that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," ought to be forever set at rest by the repeated decisions of the Supreme Court of the United States. In the case of the Mormon Church *v.* The United States, Justice Bradley, in delivering the opinion of the court, said:

"One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thuge of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one on that account would hesitate to brand these practices now as crimes against society, and obnoxious to condemnation and punishment by the civil authority."

In the case of Davis *v.* Beason, Justice Field, in delivering the opinion of the court, said:

"Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind."

One living in polygamous cohabitation is in law a polygamist.

The members of the first presidency and twelve apostles of the Mormon Church claim that there is a distinction between what they term polygamy—that is, the contracting of plural marriages—and polygamous cohabitation with plural wives. But under the circumstances this distinction is little short of ridiculous. As is demonstrated by the testimony, the so-called manifesto was aimed at polygamous cohabitation, as well as against the taking of plural wives, and it is the veriest sophistry to contend that open notorious cohabitation with plural wives is less offensive to public morals than the taking of additional wives. Indeed, it is the testimony of some of those who reside in communities that are cursed by the evils of polygamy that polygamous cohabitation is fully as offensive to the sense of decency of the inhabitants of those communities as would be the taking of plural wives.

And this excuse of the Mormon leaders is as baseless in law as it is in morals. In the case of Murphy *v.* Ramsay, decided by the Supreme Court of the United States and reported in the United States Supreme Court Reports, volume 114, page 15, it

was decided that any man is a polygamist who maintains the relation of husband to a plurality of wives, even though in fact he may cohabit with only one. The court further held in the same case that a man occupying this relation to two or more women can only cease to be a polygamist when he has finally and fully dissolved the relation of husband to several wives. In other words, there is and can be no practical difference in law or in morals between the offense of taking plural wives and the offense of polygamous cohabitation. The same doctrine is affirmed in the case of Cannon *v.* United States (116 U. S. Supreme Court Reports, p. 55).

Mr. Smoot responsible for the conduct of the organization to which he belongs.

It is urged in behalf of Mr. Smoot that, conceding it to be true that the first president and some of the apostles are living in polygamy and that some of the leaders of the Mormon Church encourage polygamous practices, Mr. Smoot himself is not a polygamist, does not practice polygamy, and that there is no evidence that he has personally and individually encouraged the practice of polygamy by members of the Mormon Church, and that he ought not to be condemned because of the acts of his associates. This position is wholly untenable. Mr. Smoot is an inseparable part of the governing body of the Mormon Church—the first presidency and twelve apostles—and those who compose that organization form a unit, an entirety, and whatever is done by that organization is the act of each and every member thereof, and whatever policy is adopted and pursued by the body which controls the Mormon Church Mr. Smoot must be held to be responsible for as a member of that body. That one may be legally, as well as morally, responsible for unlawful acts which he does not himself commit is a rule of law too elementary to require discussion. "What one does by another he does by himself" is a maxim as old as the common law. And as the first presidency and twelve apostles of the Mormon Church have authority over the spiritual affairs of the members of that church, it follows that such governing body of said church has supreme authority over the members of that church in respect to the practice of polygamy and polygamous cohabitation.

In England in former years, and under the canon law, matters of marriage, divorce, and legitimacy were under the jurisdiction of the ecclesiastical courts of the Kingdom, in which the punishment was in the nature of a spiritual penalty for the good of the soul of the offender, this penalty in many cases being that of excommunication or expulsion from the church. (1 Blackstone's Commentaries, 431; 3 Blackstone's Commentaries, 92; 4 Blackstone's Commentaries, 153 and note; Reynolds *v.* United States, 98 U. S., 145, 164-165.) And in later years, while the civil law now prohibits and punishes bigamy, the authorities of every Christian church in this country take cognizance of matrimonial affairs and by the authority of the church in spiritual matters prevent and punish by censure or expulsion any infraction of the rules of the church regarding marriage.

The testimony taken upon this investigation shows beyond controversy that the authority of the first presidency and the twelve apostles of the Mormon Church over the members of said church is such that were the said first presidency and twelve apostles to prohibit the practice of polygamy and polygamous cohabitation by its members and abandon the practice themselves and expel from the church all who should persist in the practice, those offenses would instantly cease in that church. And the fact that not a single member of the Mormon Church has ever fallen into disfavor on account of polygamous practices is conclusive proof that the ruling authorities of that church countenance and encourage polygamy.

The conduct of Mr. Smoot in this regard can not be separated from that of his associates in the government of the Mormon Church. Whatever his private opinions or his private conduct may be, he stands before the world as an integral part of the organization which encourages, counsels, and approves polygamy, which not only fails to discipline those who break the laws of the country, but, on the contrary, loads with honors and favors those who are among the most noted polygamists within the pale of that church.

It is an elementary principle of law that where two or more persons are associated together in an act, an organization, an enterprise, or a course of conduct, which is in its character or purpose unlawful, the act of any one of those who are thus associated is the act of all, and the act of any number of the associates is the act of each one of the others.

An eminent legal authority says:

"Every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design. The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is that by the act of conspiring together the

conspirators have jointly assumed to themselves, as a body, the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said by anyone in furtherance of that design a part of the res gestae and therefore the act of all." (2 Greenleaf on Evidence, secs. 93, 94. See also Commonwealth *v.* Warren, 6 Mass., 74; People *v.* Mather, 4 Wend., 229, 260; People *v.* Peckens, 153 N. Y., 576, 586, 593; United States *v.* Gooding, 12 Wheaton, 459, 469; American Fur Company *v.* United States, 2 Peters, 358, 365; Nudd et al. *v.* Burrows, 91 U. S., 426, 438; United States *v.* Mitchell, 1 Hughes, 439 (Federal cases No. 15790); Stewart *v.* Johnson, 3 Har. (N. J.), 87; Hinchman *v.* Ritchie, Brightley's N. P. (Pa.), 143; Freeman *v.* Stine, 34 Leg. Int. (Pa.), 95; Spies et al. *v.* People, 122 Illinois, 1.)

The case last cited illustrates this principle more forcibly than any of the others referred to. In that case, which is commonly known as "the anarchists' case," there was, as to some of the defendants, very little evidence, and as to others of the defendants no satisfactory evidence that they were present at the commission of the murder with which they were charged, or advised or intended the murder which was committed by an unknown person. But it was proved that the defendants were members of an organization known as the International Association of Chicago, having for its object the destruction of the law and government and incidentally of the police and militia as the representatives of law and government, and that some of the defendants had, by spoken and printed appeals to workingmen and others, urged the use of force, deadly weapons, and dynamite in resistance to the law and its officers.

In denying the motion for a new trial in the anarchists' case the judge who presided at the trial used the following language:

"Now on the question of the instructions, whether these defendants, or any of them, anticipated or expected the throwing of the bomb on the night of the 4th of May is not a question which I need to consider, because the conviction can not be sustained, if that is necessary to a conviction, however much evidence of it there may be, because the instructions do not go upon that ground. The jury were not instructed to find the defendants guilty if they believed they participated in the throwing of that bomb, or advised or encouraged the throwing of that bomb, or anything of that sort. Conviction has not gone upon the ground that they did have any personal participation in the particular act which caused the death of Degan, but the conviction proceeds upon the ground, under the instructions, that they had generally, by speech and print, advised large classes of the people, not particular individuals, but large classes, to commit murder, and have left the commission, time, and place, to the individual will and whim, or caprice, or whatever it may be, of each individual man who listened to their advice, and influenced by that advice somebody not known did throw the bomb which caused Degan's death." (Century Magazine, April, 1893, p. 835.)

It will be seen by the decision of the court upon the motion for a new trial in the case of Spies et al. *v.* People that the anarchists were not convicted upon the ground that they had participated in the murder of which they were convicted. Whether they were or were not participants in the commission of this crime was not the main question at issue. They were convicted because they belonged to an organization which, as an organization, advised the commission of acts which would lead to murder.

Of like import is the decision in the case of Davis *v.* Beason, decided by the Supreme Court of the United States in 1889, the decision being reported in volume 133, United States Supreme Court Reports, page 333. At the time of this decision the revised statutes of the State of Idaho provided that no person "who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election or to hold any position or office of honor, trust, or profit within this Territory."

This provision of law the Supreme Court of the United States held to be constitutional and legal. It will be observed that this act disfranchises certain persons and makes them ineligible to any position or office of honor, trust, or profit, not for committing the crime of polygamy, nor for teaching, advising, counseling, or encouraging others to commit the crime, but because of their membership in an organization which teaches, advises, counsels, and encourages others to commit the crime of polygamy. In Wooley *v.* Watkins (2 Idaho Rep., 555, 566), the court say:

"Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be members of such organizations or associations are such overt acts of recognition and participation as make them particeps criminis and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes." (See also Innis *v.* Bolton, 2 Idaho Rep., 407, 414.)

It being a fact that the first presidency and the twelve apostles of the Mormon Church teach, advise, counsel, and encourage the members of that church to practice polygamy and polygamous cohabitation, which are contrary to both law and morals, and Mr. Smoot, being a member of that organization, he must fall under the same condemnation.

And the rule in civil cases is the same as that which obtains in the administration of criminal law. One who is a member of an association of any nature is bound by the action of his associates, whether he favors or disapproves of such action. He can at any time protect himself from the consequences of any future action of his associates by withdrawing from the association, but while he remains a member of the association he is responsible for whatever his associates may do.

Mr. Smoot has countenanced and encouraged polygamy.

But the complicity of Mr. Smoot in the conduct of the leaders of the Mormon Church in encouraging polygamy and polygamous cohabitation does not consist wholly in the fact that he is one of the governing body of that church. By repeated acts, and in a number of instances, Mr. Smoot has, as a member of the quorum of the twelve apostles, given active aid and support to the members of the first presidency and twelve apostles in their defiance of the laws of the State of Utah and of the laws of common decency, and their encouragement of polygamous practices by both precept and example.

It is shown by the testimony of Mr. Smoot himself that he assisted in the elevation of Joseph F. Smith to the presidency of the Mormon Church. That he has since repeatedly voted to sustain said Joseph F. Smith, and that he so voted after full knowledge that said Joseph F. Smith was living in polygamous cohabitation and had asserted his intention to continue in this course in defiance of the laws of God and man. He also assisted in the selection of Heber J. Grant as president of a mission when it was a matter of common notoriety that said Heber J. Grant was a polygamist. He voted for the election of Charles W. Penrose as an apostle of the Mormon Church after testimony had been given in this investigation showing him to be a polygamist. It is difficult to perceive how Mr. Smoot could have given greater encouragement to polygamy and polygamous cohabitation than by thus assisting in conferring one of the highest honors and offices in the Mormon Church on one who had been and was then guilty of these crimes. As trustee of an educational institution he made no protest against the continuance in office of Benjamin Cluff, jr., a noted polygamist, as president of that institution, nor made any effort to discover the truth that said Cluff had taken another plural wife long after the manifesto. Nor did he make any protest, as such trustee, against the election of George H. Brimhall, another polygamist, in the place of Benjamin Cluff, jr.

Since his election as an apostle of the Mormon Church Mr. Smoot has been intimately associated with the first president and with those who—with himself—constitute the council of the twelve apostles. The fact that many of these officials were living in polygamous relations with a number of wives was a matter of such common knowledge in the community that it is incredible that Mr. Smoot should not have had sufficient notice of this condition of affairs to at least have put him on inquiry. If he did not know of these facts, it was because he took pains not to be informed of them. At no time has he uttered a syllable of protest against the conduct of his associates in the leadership of the Mormon Church, but, on the contrary, has sustained them in their encouragement of polygamy and polygamous cohabitation, both by his acts (as hereinbefore set forth) and by his silence. In the judgment of the committee, Mr. Smoot is no more entitled to a seat in the Senate than he would be if he were associating in polygamous cohabitation with a plurality of wives.

Domination of Leaders of the Mormon Church in Secular Affairs.

A careful examination and consideration of the testimony taken before the committee in this investigation leads to the conclusion that the allegations in the protest concerning the domination of the leaders of the Mormon Church in secular affairs are true, and that the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints exercise a controlling influence over the action of the members of that church in secular affairs as well as in spiritual matters; and that contrary to the principles of the common law, under which we live, and the constitution of the State of Utah, the said first presidency and twelve apostles of the Mormon Church dominate the affairs of the State and constantly interfere in the performance of its functions. The domination by the leaders of the church under their claim to exercise divine authority in all matters is manifested in a general way in innumerable instances.

The right to do so is openly claimed by those who profess to speak in behalf of the church. As late as February 25, 1904, one of the twelve apostles, in a public address,

said "that from the viewpoint of the gospel there could be no separation of temporal and spiritual things, and those who object to church people advising and taking part in temporal things have no true conception of the gospel of Christ and the mission of the church."

The method by which the first presidency and twelve apostles of the Mormon Church direct all the temporal affairs of the members of that church under the claim that such direction is by divine authority, is by requiring the members of the church in all their affairs, both spiritual and temporal, and especially the latter, to "take counsel." This means that they are to be advised by their immediate superiors. These superiors in turn take their instructions from those above them, and so on back to the point whence most, if not all, these directions emanate—that is, the first presidency and twelve apostles.

As was said by Mr. Chief Justice Zane, of Utah, in 1887:

"At the head of this corporate body, according to the faith professed, is a seer and revelator, who receives in revelations the will of the infinite God concerning the duty that man owes to himself, to his fellow-beings, to society, to human government, and to God. In subordination of this head are a vast number of officials of various kinds and descriptions, comprising a most minute and complete organization. The people comprising this organization claim to direct and lead by inspiration which is above all human wisdom, subject to a power above all municipal government, above all man-made law." (Vol. 1, p. 809.)

The phrase "take counsel" does not mean that the members of the church shall inquire of those above them in all cases concerning their action, but that they shall receive counsel—that is, direction—from those above them, and this counsel they are to implicitly obey. If they fail to do so they are excommunicated from the church and deprived, not only of the privileges of membership in the church, but, as they are assured and believe, they thereby forfeit all hope of happiness in a future life. The absolute submission of the great mass of the Mormon Church is illustrated by the fact that is laid down by the leaders of the church as a cardinal principle to the members that, if their file leaders say white is black, "it is their duty to say 'white is black.'"

Instances of the interference of the leaders of the Mormon Church in the secular affairs of their followers could be multiplied almost without number.

In one case a bishop of the church was deposed from his offices in the church because he promised to obey the laws against polygamy.

Another official of the Mormon Church was excommunicated for belonging to an organization for the enforcement of the laws and opposing the interference of the church in public affairs.

Another Mormon official was degraded in the church for refusing to obey his file leader.

In another case the members of a firm doing business in Salt Lake City were expelled from the Mormon Church because they persisted in engaging in mining operations contrary to the command of the authorities of the church.

In another instance the church authorities interfered in the matter of the establishment of an electric-light plant.

In 1903 two members of the Mormon Church who built a dancing pavilion in opposition to the "counsel" of the church authorities were summoned for trial and excommunication, and finally compromised the matter by turning over to the church officials the management of the pavilion and 25 per cent of the net earnings.

In another case there was a general understanding that the church, by its authorities, directed the location of a railroad station. In 1869 four members of the Mormon Church were excommunicated for apostasy in desiring to open up mines against the teachings of the holy priesthood."

In another and recent instance, occurring as late as the early part of 1903, a Mormon official was deposed from his official position for writing a letter to a newspaper criticising Mr. Smoot and his political ambitions.

In another instance, occurring in 1897, a Mormon official was deposed from his official relation to the church for distributing at a school election a ticket different from that prescribed by the church authorities.

In the year 1905 a teacher in the Mormon Church was cut off from the church for apostasy, the ostensible foundation for this charge being a criticism of the head of the church for his polygamous practices; the real ground being that the accused had persisted in engaging in the manufacture of salt, against the interests of the president of the church and some of his associates.

In what is known as the Birdsall case the officials of the Mormon Church assumed jurisdiction of a controversy concerning the title to real estate, and not only directed a conveyance of the title to a tract of land, but went further and enforced its decree

by spiritual penalties. As has already been stated, no member of the Mormon Church (with possibly a single exception) has ever been disciplined for polygamy or polygamous cohabitation in defiance of the law and of the manifesto; but an obscure and feeble woman was excommunicated from the church and driven to the verge of insanity for refusing to obey the dictates of the church leaders and relinquish the title to a piece of land in favor of one who had no shadow of legal title thereto. As was testified by one of the witnesses for the protestants:

"Whenever a man disregards the teachings and instructions or counsels of the leaders of the church he has the spirit of apostasy."

A forcible illustration of the domination of the leaders of the Mormon Church over the secular affairs of the people is furnished by the fact that while a majority of these leaders have for years been living in polygamous relations, in defiance of law, no one dares to attempt to bring them to justice for fear of the consequences which would be visited by the church on the one who should make the complaint. And whenever one has been daring enough to make complaint for polygamous cohabitation against any member of the church the officers of the law have refused to prosecute, or those who were prosecuted and convicted have been released after the infliction of a merely nominal punishment.

The control which the governing body of the Mormon Church exercises over the secular affairs of the State of Utah is well illustrated by the fact that for many years past what are known as "religion classes" have been taught in connection with the public schools of that State. In these classes the youth of Utah are instructed in doctrines of the Mormon Church by teachers in the public schools, supported by State taxation, the course of study being prescribed by officials of the church. This course of study includes the lives of noted Mormons whose chief claim to eminence in the church lies in their having taken a multiplicity of wives and in their continuance in the crime of polygamous cohabitation.

The teaching of the doctrines, faith, and practice of the Mormon Church in the public schools of Utah, under the direction of the high priesthood of the church, is not only contrary to the general law governing the use of schoolhouses, as expounded by the courts of this country, but is also expressly forbidden by the constitution of the State of Utah, which provides, in article 1, section 4, as follows:

"No public money or property shall be appropriated for or applied to any religious worship, exercises, or instruction, or for the support of any ecclesiastical establishment." (Schofield *v.* School Dist., 27 Conn., 499; Spencer *v.* Joint School Dist., 15 Kans., 259; School District *v.* Arnold, 21 Wis., 657.)

Such teaching is also prohibited by a statute of the State of Utah, which declares that "No atheistic, infidel, sectarian, religious, or denominational doctrines shall be taught in any of the district schools of this State." (Revised Statutes of Utah, sec. 1848.)

The conduct of the ruling authorities of the Mormon Church in directing the teaching of "religion classes" in the schoolhouses of Utah affords a fair illustration of the contempt with which the rulers of that church treat all laws and restrictions which stand in the way of their desires, or of their own interests or what they conceive to be the interests of the church of which they are the head.

The fact that these religion classes have been discontinued since their existence was revealed by this investigation serves to emphasize the truth that the Mormon Church dominates the affairs of the State of Utah in educational matters as well as in other respects.

Political domination of the Mormon Church.

But it is in political affairs that the domination of the first presidency and twelve apostles of the Mormon Church is most efficacious and most injurious to the interests of the State. The constitution of the State of Utah provides "There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions." (Vol. 1, p. 25.) Notwithstanding this plain provision of the constitution of Utah, the proof offered on the investigation demonstrates beyond the possibility of doubt that the hierarchy at the head of the Mormon Church has for years past formed a perfect union between the Mormon Church and the State of Utah, and that the church through its head dominates the affairs of the State in things both great and small. Even before statehood was an accomplished fact, and while the State was in process of formation, and afterwards, during the sessions of the first and succeeding legislatures, it was notorious that a committee appointed by the leaders of the Mormon Church was supervising the legislation of the State.

At about the same time, or shortly prior thereto, it became known throughout Utah that the leading officials of the Mormon Church desired that the voters belonging to that church should so divide on political lines that about one-half should be-

long to one of the great political parties of the nation and the other half to the other party, leaving a considerable number unassigned to either party, so that their votes could be cast for one party or the other, as might be necessary to further the interests of that church.

It is, of course, intended by the leaders of the church that this influence shall be secretly exerted, and this in many cases, if not in most cases, easily accomplished by means of the perfect machinery of the church, which has been adverted to, by which the will of the first presidency and twelve apostles is transmitted through ecclesiastical channels, talked over in prayer circles of the high councils of the church, and then promulgated to the members of the church as "the will of the Lord." Notwithstanding this attempt at secrecy, it has for many years been a matter of common knowledge among the people of those States in which the Mormon Church is strongest that political influence is being continually exerted in the matter of State and lower municipal officials. As was said by one of the witnesses who testified on the investigation: "Whenever they indorse a man, he will be elected. Whenever they put upon him the seal of their disapprobation, he will not be."

It was shown in the investigation that in the State of Idaho candidates for office, in order to have any hope of success, must visit Salt Lake City and arrange for such success with the leaders of the Mormon Church. The result of this is that whatever the Mormon Church desires to have done, either by way of legislation or in the way of administration of the affairs of the State, is done, and whatever the Mormon Church desires shall not be done, is not done. So well recognized is this fact that in a State convention held in Idaho in the year 1904 one of the leading Mormons made the proposition that in case a certain resolution should be withdrawn he would go to Utah and ask the president of the Mormon Church to cease interfering in Idaho politics. Thus it appears that the Mormon Church dominates the affairs of the State of Idaho to an extent only less than it does the affairs of the State of Utah. As an illustration of this fact, it was shown that a bill in which the Mormon Church was vitally interested was passed by the Legislature of Idaho shortly after the visit of one of the apostles of the Mormon Church, who came there for the purpose of procuring such legislation.

A striking illustration of the power of the Mormon Church in Utah in matters of legislation appears in the history of what is known as the Evans bill, which was passed by both houses of the Legislature of Utah in 1901, in order to prevent prosecutions for polygamous cohabitation. This bill was favored by the president of the Mormon Church and by a majority of the apostles and was passed by a Mormon legislature. It was vetoed by a Mormon governor, the principal reason for the veto being that the attempted legislation would bring about an amendment to the Constitution of the United States under which those guilty of the crime of polygamous cohabitation would be prosecuted and punished in the Federal courts.

Perhaps one of the most instructive instances of the exercise of the power of the Mormon Church in political affairs was in the matter referred to in the protest as the case of Moses Thatcher. In that case the testimony taken before the committee leaves no doubt that not far from the time when the leaders of the Mormon Church required their followers to divide between the two parties it was ordered by the Mormon leaders that those officials of the church who desired to engage in politics in behalf of one of the political parties should go out and influence the people of the Mormon Church in favor of that party, while those who were of the contrary opinion should remain at home and not attempt to influence the members of that church to adopt their way of thinking. Mr. Thatcher saw fit to disobey this edict and not only to become a candidate for the United States Senate, but to go out among the people and endeavor to win converts to the party of which he was a member. For this offense against the political dictation of the first presidency and twelve apostles Mr. Thatcher was deposed from his position as an apostle, deprived of all his offices in the Mormon Church, denied the privileges which are accorded to every Mormon in good standing, and the whole influence of the leaders of the Mormon Church was put forth to compass his defeat.

As was well said by Mr. Thatcher at the time of this occurrence, this action on the part of the ruling authorities of the church transformed the Mormon Church into a great political machine, the steering apparatus of which was in the hands of the 12 or 15 men at the head. All this occurred because Mr. Thatcher refused to "take counsel"—that is, to follow the dictates of the Mormon Church as to who should become candidates for office and who should not become such.

Specific directions given by the heads of the Mormon Church to those under them seem to have varied according to circumstances. Several years ago, and before the admission of Utah into the Union as a State, it would appear that the apostles of the Mormon Church would convey to the members of that church instructions concerning their political action openly and in public addresses. The people would be told from the pulpits of the Mormon Church what ticket they ought to support.

As late as 1892 a bishop of the Mormon Church called together a number of the members of that church who belonged to a party opposing the party of the bishop, and told those whom he had thus called together that he had received a message from the first presidency to the effect that the candidate of the party to which the bishop belonged should be elected to Congress. In the same year and at the same election the president of the Mormon Church took occasion to write a letter to the bishops of his church indorsing the candidacy of a certain gentleman for Representative in Congress. In 1898 one of the apostles of the Mormon Church in a letter to one of the first presidents of seventies virtually advocated the election of a certain candidate for a seat in the United States Senate.

In 1902 an apostle of the Mormon Church went through one of the counties of Idaho, telling the Mormon voters that it was the will of the church that they should vote a certain ticket.

In later years the method of domination by the Mormon Church in political affairs has been, to a great extent, by means of a rule requiring those of any prominence in the church to "take counsel" before becoming candidates for public office. This virtually puts into the hands of the Mormon priesthood the filling of the various offices in the State. If the church takes to itself the right to decide who shall be the candidates for offices, there is no other choice left to either candidates or people. Under this rule the people can not vote for anyone who is a prominent member of the Mormon Church unless the ruling authorities of the church permit him to be a candidate. This rule thereby becomes a species of political usurpation, striking at the very foundations of our Government. Our entire political system is based on the theory that every voter has the right to vote for anyone he pleases, and that the people have a right to call upon whomsoever they will to represent them and to administer the affairs of the Nation and of the Commonwealth. But the rule which has been promulgated and enforced by the officials of the Mormon Church precludes any member of that church from serving the Nation or the State unless he has been designated for such service by the hierarchy which governs said church. This means that the State shall subsist in all things in and through the "counsel" of the church.

The pretext under which the leaders of the Mormon Church excuse their selection of candidates for public office is that it is a rule of the church designed to prevent high officials in the church from becoming engaged in public affairs to the neglect of their ecclesiastical functions.

This veil is too thin to conceal the real motives and designs of the Mormon priesthood. Were that the true reason for the adoption of the rule, it would be made to apply to all the higher officials of the Mormon Church under all circumstances, and all would be prohibited from becoming candidates for public offices. And in such case the object of the rule would be attained by requiring of every church officer who becomes a candidate for public office that he resign his church office, and this without favor or distinction.

But the rule is not so framed or administered. Under this rule one may be a candidate for public office or may not be, according to the will of the first presidency and twelve apostles of the Mormon Church. Under the rule as it is applied one of the twelve apostles may be elected to the Senate (as in the case of Mr. Smoot) or he may be defeated (as in the case of Mr. Thatcher). If one of the higher officials of the Mormon Church becomes a candidate for public office, he may retain his official station in the church, as in the case of Mr. Smoot and Mr. Roberts, or he may be broken of his office and deprived of his privileges in the church, as happened to Mr. Thatcher, these diffreing applications of the rule depending wholly on the will or caprice of the first presidency and the twelve apostles. Under this rule Mr. Roberts was defeated for the office of Representative in Congress, and under the rule he was afterwards elected to the same office.

But the domination of the higher officials in the Mormon Church does not cease with the selection by them of a candidate for public office. It is a fact of no little importance in this case that where the Mormon Church is strong the candidates favored by the ruling authorities of that church are generally elected.

The fact that Gentiles are sometimes elected to office in preference to Mormons in localities where the Mormons are in the ascendancy does not tend to prove the absence of church influence. It is shown by the testimony that the officials of the Mormon Church sometimes prefer one Mormon to another and sometimes prefer a Gentile to a Mormon. So well is it understood in Utah that the power of the Mormon Church in political affairs must be recognized and deferred to that in the election of Senators and of other officials the Mormons must be given what they claim as their share of the offices to be filled.

In order to realize the potency of the influence which the ruling authorities of the Mormon Church exercise in political affairs, it must be kept in mind that this influence proceeds from men who are believed by their followers to be oracles of God;

that whatsoever they speak is the word of God; and that the first presidency of the Mormon Church and the council of the twelve apostles are "the mouthpiece of God." In the efforts put forth by the rulers of the church to defeat Moses Thatcher, the Mormon people were told that the first presidency and eleven of the apostles were inspired and that Moses Thatcher, the twelfth apostle, was not inspired.

The committee has not overlooked nor failed to give due consideration to the testimony of witnesses called in behalf of Mr. Smoot, who testified that there was no interference by the Mormon Church in the political affairs of Utah or Idaho. But, leaving out of consideration any political or personal bias for Mr. Smoot which those witnesses may have manifested, there is very little in their testimony aside from and beyond their individual opinion and judgment as regards the political conditions in the States named. The testimony of these witnesses in no way controverts the facts before referred to, from which facts the conclusion is irresistible that the controlling authorities of the Mormon Church do dominate the political affairs of the State of Utah and control to some extent the political affairs of the State of Idaho. Without disproof of these facts, or strong proof of countervailing facts, mere opinions of witnesses, however intelligent and however candid, do not suffice.

Not only is Mr. Smoot one of those by and through whom the political affairs of Utah are dominated, but his election to the Senate was, it is believed, the result of soch domination.

When Mr. Smoot concluded to become a candidate for the Senate, he was careful to obtain the "consent" of the first presidency and twelve apostles to his candidacy. But this so-called "consent" of the rulers of the church was naturally regarded by the people of Utah, who were familiar with the ways of the Mormon high-priesthood, as being, under the circumstances, equivalent to an indorsement, and made it impossible for anyone else to become an aspirant for the same position with any hope of success.

A practical union of church and state.

The fact that the adherents of the Mormon Church hold the balance of power in politics in some of the States enables the first presidency and twelve apostles to control the political affairs of those States to any extent they may desire. Thus, a complete union of church and state is formed. This is in accordance with the teachings of the priesthood of the Mormon Church, as promulgated in the writings of men of high authority in the church, to the effect that the church is supreme in all matters of government, as well as in all things pertaining to the private life of the citizen. In one of a series of pamphlets, "On the Doctrines of the Gospel," by Apostle Orson Pratt, it is affirmed:

"The kingdom of God is an order of government established by divine authority. It is the only legal government that can exist in any part of the universe. All other governments are illegal and unauthorized. God having made all things and worlds has the supreme right to govern them by His own laws and by officers of His own appointment. Any people attempting to govern themselves and by laws of their own making and by officers of their own appointment, are in direct rebellion against the kingdom of God." (Vol. 1, p. 666.)

The union of church and state in those States under the domination of the Mormon leaders is most abhorrent to our free institutions. John Adams declared that the attempt of the Church of England to extend its jurisdiction over the colonies "contributed as much as any other cause to arouse the attention, not only of the inquiring mind but of the common people, and to urge them to close thinking of the constitutional authority of Parliament over the colonies," and to bring on the War of Independence. After the colonies had achieved their independence, the complete enfranchisement of the church from the control of the state and of the state from the control of the church was brought about through the efforts of men like Thomas Jefferson and James Madison in Virginia, and those of almost equal prominence in other States. And thus the natural desire of the people of this Nation for the entire separation of church and state was incorporated in the Constitution of the United States by the first amendment to that instrument.

The right to worship God according to the dictates of one's own conscience is one of the most sacred rights of every American citizen. No less sacred is the right of every citizen to vote according to his conscientious convictions without interference on the part of any church, religious organization, or body of ecclesiastics which seeks to control his political opinions or direct in any way his use of the elective franchise.

In the interest of religious freedom and to protect the State from the influence of the Mormon Church, the framers of the constitution of Utah incorporated in that instrument the provision which has been quoted in a preceding part of this report. That provision of the constitution of Utah has been persistently and contemptuously disregarded by the first presidency and the twelve apostles of the Mormon Church

ever since Utah was admitted into the Union. They have paid as little regard to this mandate of the constitution of Utah as they have to the law which prohibits polygamy and the law which forbids polygamous cohabitation.

Oath of vengeance.

In the protest signed and verified by the oath of Mr. Leilich it is claimed that Mr. Smoot has taken an oath as an apostle of the Mormon Church which is of such a nature as to render him incompetent to hold the office of Senator. From the testimony taken it appears that Mr. Smoot has taken an obligation which is prescribed by the Mormon Church and administered to those who go through a ceremony known as "taking the endowments." It was testified by a number of witnesses who were examined during the investigation that one part of this obligation is expressed in substantially these words:

"You and each of you do covenant and promise that you will pray and never cease to pray Almighty God to avenge the blood of the prophets upon this nation, and that you will teach the same to your children and to your children's children unto the third and fourth generation."

An effort was made to destroy the effect of the testimony of three of these witnesses by impeachment of their reputation for veracity. This impeaching testimony was not strengthened by the fact that the witnesses by whom it was given were members of the Mormon Church, and would naturally disparage the truthfulness of one who would give testimony unfavorable to that church. The testimony of the witnesses for the protestants, before referred to, was corroborated by the testimony of Mr. Dougall, a witness sworn in behalf of Mr. Smoot, and no attempt was made to impeach the character of this witness. It is true that a number of witnesses testified that no such obligation is contained in the endowment ceremony; but it is a very suspicious circumstance that every one of the witnesses who made this denial refused to state the obligation imposed on those who take part in the ceremony.

The evidence showing that such an obligation is taken is further supported by proof that during the endowment ceremonies a prayer is offered asking God to avenge the blood of Joseph Smith upon this nation, and certain verses from the Bible are read which are claimed to justify the obligation and the prayer. The fact that such a prayer is offered and that such passages from the Bible are read was not disputed by any witness who was sworn on the investigation. Nor was it questioned that by the term "the prophets" as used in the endowment ceremony, reference is made to Joseph and Hyrum Smith.

That an obligation of vengeance is part of the endowment ceremony is further attested by the fact that shortly after testimony had been given on that subject before the committee, Bishop Daniel Connelly of the Mormon Church denounced the witnesses who had given this testimony as traitors who had broken their oaths to the church.

The fact that an oath of vengeance is part of the endowment ceremonies and the nature and character of such oath was judicially determined in the third judicial court of Utah in the year 1889 in the matter of the application of John Moore and others to become citizens of the United States. In an opinion denying the application, the court say:

"In these applications the usual evidence on behalf of the applicants as to residence, moral character, etc., was introduced at a formal hearing and was deemed sufficient. Objection was made, however, to the admission of John Moore and William J. Edgar upon the ground that they were members of the Mormon Church, and also because they had gone through the endowment house of that church and there had taken an oath or obligation incompatible with the oath of citizenship they would be required to take if admitted. * * *

"Those objecting to the right of these applicants to be admitted to citizenship introduced 11 witnesses who had been members of the Church of Jesus Christ of Latter Day Saints, commonly called the Mormon Church. Several of these witnesses had held the position of bishop in the church, and all had gone through the endowment house and participated in its ceremonies. The testimony of these witnesses is to the effect that every member of the church is expected to go through the endowment house, and that nearly all do so; that marriages are usually solemnized there, and that those who are married elsewhere go through the endowment ceremonies at as early date thereafter as practicable in order that the marital relations shall continue throughout eternity.

"On behalf of the applicants 14 witnesses testified concerning the endowment ceremonies, but all of them declined to state what oaths are taken or what obligations or covenants are there entered into, or what penalties are attached to their violation; and these witnesses, when asked for their reason for declining to answer,

stated that they did so 'on a point of honor,' while several stated they had forgotten what was said about avenging the blood of the prophets. * * *

"The witnesses for the applicants, while refusing to disclose the oaths, promises, and covenants of the endowment ceremonies and the penalties attached thereto, testified generally that there was nothing in the ceremonies inconsistent with loyalty to the Government of the United States, and that the Government was not mentioned. One of the objects of this investigation is to ascertain whether the oaths and obligations of the endowment house are incompatible with good citizenship, and it is not for applicants' witnesses to determine this question. The refusal of applicants' witnesses to state specifically what oath, obligations, or covenants are taken or entered into in the ceremonies renders their testimony of but little value, and tends to confirm rather than contradict the evidence on this point offered by the objectors. The evidence established beyond any reasonable doubt that the endowment ceremonies are inconsistent with the oath an applicant for citizenship is required to take, and that the oaths, obligations, or covenants there made or entered into are incompatible with the obligations and duties of citizens of the United States." (Vol. 4, pp. 340–343.)

The obligation hereinbefore set forth is an oath of disloyalty to the Government which the rules of the Mormon Church require, or at least encourage, every member of that organization to take.

It is in harmony with the views and conduct of the leaders of the Mormon people in former days, when they openly defied the Government of the United States, and is also in harmony with the conduct of those who give the law to the Mormon Church to-day in their defiant disregard of the laws against polygamy and polygamous cohabitation. It may be that many of those who take this obligation do so without realizing its treasonable import; but the fact that the first presidency and twelve apostles retain an obligation of that nature in the ceremonies of the church shows that at heart they are hostile to this nation and disloyal to its Government.

And the same spirit of disloyalty is manifested also in a number of the hymns contained in the collection of hymns put forth by the rulers of the Mormon Church to be sung by Mormon congregations.

There can be no question in regard to the taking of the oath of vengeance by Mr. Smoot. He testified that he went through the ceremony of taking the endowments in the year 1880 and the head of the Mormon Church stated in his testimony that the ceremony is now the same that it has always been.

An obligation of the nature of the one before mentioned would seem to be wholly incompatible with the duty which Mr. Smoot as a member of the United States Senate would owe to the nation. It is difficult to conceive how one could discharge the obligation which rests upon every Senator to so perform his official duties as to promote the welfare of the people of the United States and at the same time be calling down the vengeance of heaven on this nation because of the killing of the founders of the Mormon Church 60 years ago.

Mr. Smoot not entitled to a seat in the Senate.

The more deliberately and carefully the testimony taken on the investigation is considered, the more irresistibly it leads to the conclusion that the facts stated in the protest are true; that Mr. Smoot is one of a self-perpetuating body of men, known as the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church; that these men claim divine authority to control the members of said church in all things, temporal as well as spiritual; that this authority is, and has been for several years past, so exercised by the said first presidency and twelve apostles as to encourage the practice of polygamy and polygamous cohabitation in the State of Utah and elsewhere, contrary to the constitution and laws of the State of Utah and the law of the land; that the first presidency and twelve apostles do now control, and for a long time past have controlled, the political affairs of the State of Utah, and have thus brought about in said State a union of church and state, contrary to the constitution of said State of Utah and contrary to the Constitution of the United States, and that said Reed Smoot comes here, not as the accredited representative of the State of Utah in the Senate of the United States, but as the choice of the hierarchy which controlls the church and has usurped the functions of the State in said State of Utah.

It follows, as a necessary conclusion from these facts, that Mr. Smoot is not entitled to a seat in the Senate as a Senator from the State of Utah, and your committee reports the following resolution:

"*Resolved*, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah."

J. C. BURROWS,
Chairman.

VIEWS OF THE MINORITY.

[S. Rept. 4253, pt. 2.]

Mr. Foraker, from the Committee on Privileges and Elections, submitted the following as the views of the minority:

The undersigned members of the Committee on Privileges and Elections, having had under consideration Senate Resolution No. 205, Fifty-seventh [1] Congress, second session, adopted January 27, 1903,[2] being unable to agree with the majority of the committee, submit the following minority report:

They attach hereto and make a part hereof a full statement of the case, showing all charges affecting or intending to affect the right and title of Reed Smoot to a seat in the Senate as a Senator from the State of Utah, together with an abstract of all the material, relevant, and competent testimony offered with respect thereto, and their conclusions deduced therefrom.

They ask that the same may be printed for purposes of reference as a part of this report, and respectfully refer to the same as a more complete statement of the following findings and propositions, and the testimony and arguments in support of the same, upon which they base their dissent from the conclusions and report of the majority of the committee:

I. Reed Smoot possesses all the qualifications prescribed by the Constitution to make him eligible to a seat in the Senate, and the regularity of his election by the legislature of the State of Utah is not questioned in any manner.

II. Aside from his connection with the Mormon Church, so far as his private character is concerned, it is, according to all the witnesses, irreproachable, for all who testify on the subject agree or concede that he has led and is leading an upright life, entirely free from immoral practices of any kind. He is not a polygamist; has never had but one wife, and has been noted from early manhood for his opposition to plural marriages, and probably did as much as any other member of the Mormon Church to bring about the prohibition of further plural marriages.

III. So far as mere belief and membership in the Mormon Church are concerned he is fully within his rights and privileges under the guaranty of religious freedom given by the Constitution of the United States, for there is no statutory provision, and could not be, prohibiting either such belief or such membership.

Moreover, having special reference to the Mormons residing in Utah and their peculiar belief, it was provided in the act of Congress, passed July 16, 1894, that the people of Utah should provide in their constitution "by ordinance irrevocable without the consent of the United States and the people of said States—

"1. That perfect toleration of religious sentiment shall be secured, and that no inhabitants of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited."

In consequence there was embodied in the constitution of the State of Utah a compliance with this requirement, and thereupon the Territory was duly admitted as a State of the Union.

Accordingly, members of the Mormon Church, open and avowed believers in its doctrines and teachings, have been admitted without question to both Houses of Congress as Representatives of the State.

IV. There remain but two grounds on which the right or title of Reed Smoot to his seat in the Senate is contested. They are:

1. That he is shown to have taken what is spoken of in the record as the "endowment oath," by which he obligated himself to make his allegiance to the church paramount to his allegiance to the United States; and

2. That by reason of his official relation to the church, as one of its apostles, he is responsible for polygamous cohabitation which yet continues among the Mormons, notwithstanding it is prohibited by law.

As to the "endowment oath," it is sufficient in this summary to say that the testimony is collated and analyzed in the annexed statement, and thereby shown to be limited in amount, vague and indefinite in character, and utterly unreliable, because of the disreputable and untrustworthy character of the witnesses.

There were but seven witnesses who made any pretense of testifying about any such obligation. One of these was shown by the testimony of two uncontradicted witnesses to be mentally unsound. Another, to have committed perjury in the testimony given before the committee on another point. The third was shown by the uncontradicted testimony of a number of witnesses to have a bad reputation for truth and veracity, and to be thoroughly unreliable. A fourth admitted that he had been

[1] This was evidently intended to be Fifty-eighth.

[2] This was evidently intended to be 1904.

for years intemperate, and was shown by indisputable testimony to have lost his position on that account, and thereupon and for that reason to have withdrawn from the church and to have assumed such a hostile and revengeful attitude as to entirely discredit him as a reliable witness. The other three witnesses were so indefinite as to their statements that their testimony amounted at most to nothing more than an attempt to state an imperfect and confessedly uncertain recollection.

All that it is attempted to show as to the character of this oath is positively contradicted by Reed Smoot and a great number of witnesses, whose standing and character and whose reputation for truth and veracity are unquestioned, except only in so far as their credibility may be affected by the fact that they are or have been members of the Mormon Church.

Upon this state of evidence we are of opinion that no ground has been established on which to predicate a finding or belief that Mr. Smoot ever took any obligation involving hostility to the United States, or requiring him to regard his allegiance to the Mormon Church as paramount to his allegiance and duty to the United States.

V. The only remaining question is whether or not by virtue of his official relation to the church as one of its apostles he has any responsibility for the continuation of polygamous cohabitation by members of that church.

The testimony on this point is also carefully collated and analyzed in the annexed statement.

It will be found by an examination of that testimony that he has never at any time, and particularly he has not since the manifesto of 1890, countenanced or encouraged plural marriages; but that on the contrary he has uniformly upheld the policy of the church, as announced by that proclamation, by actively advocating and exerting his influence to effect a complete discontinuance of such marriages, and that in the few instances established by the testimony where plural marriages and polygamous cohabitation, as a result of them, have occurred since 1890 they have been without any encouragement, countenance, or approval whatever on his part.

As to polygamous cohabitation in consequence of plural marriages entered into before the manifesto of 1890, there is no testimony to show that he has ever done more than silently acquiesce in this offense against law. In view of his important and influential position in the church, this acquiescence might be regarded as inexcusable if it were not for the peculiar circumstances attending the commission of this offense.

To understand these circumstances it is necessary to recall some historical facts, among which are some that indicate that the United States Government is not free from responsibility for these violations of the law. Instead of discountenancing and prohibiting polygamy when it was first proclaimed and practiced the Congress remained silent and did nothing in that behalf. While Congress was thus at least manifesting indifference, President Fillmore and the Senate of the United States in September, 1850, gave both recognition and encouragement by the appointment and confirmation of Brigham Young, the then head of the church, and an open and avowed advocate and representative of polygamy, to be governor of the Territory of Utah. When his term of office expired under this appointment he was reappointed by President Pierce and again confirmed by the Senate.

There was no legislation or action of any kind by Congress on this subject until the act of July 1, 1862, which was in language, as well as legal effect, nothing more than a prohibition of bigamy in the Territories and other places over which the United States had jurisdiction.

After this act, for a period of 20 years, plural marriages and polygamous cohabitation continued in the Territory of Utah practically unrestrained and without any serious effort on the part of the United States to restrict the same.

Finally, in response to an aroused public sentiment, Congress passed the act of March 22, 1882, by which it prohibited both plural marriages and polygamous cohabitation, but legitimized the children of all such marriages born prior to the 1st day of January, 1883. Under this act prosecutions were inaugurated to enforce its provisions, but it was soon demonstrated that public sentiment was such that only partial and very unsatisfactory success could be secured.

Then followed what is known as the Edmunds-Tucker Act of March 3, 1887, by which, among other things, the rules of evidence were so changed as to make it less difficult to secure evidence in prosecutions for polygamy and polygamous cohabitation. Again, by the terms of this act, all the children born within 12 months after its passage were legitimized.

This statute was upheld by the Supreme Court of the United States, and efforts to prosecute such offenses were redoubled with such success that on the 26th day of September, 1890, the then president of the church, Wilford Woodruff, issued what is known as the manifesto of 1890, forbidding further plural marriages. So far as the testimony discloses there have been but few plural marriages since, perhaps not more

than the bigamous marriages during the same period among the same number of non-Mormons.

The evidence shows that there were at this time about 2,400 polygamous families in the Territory of Utah. This number was reduced to 500 and some odd families in 1905. A few of these families may have removed out of the State of Utah, but so far as the testimony discloses the great reduction in number has been on account of the deaths of the heads of these families. It will be only a few years at most until all will have passed away. This feature of the situation has had a controlling influence upon public sentiment in the State of Utah with respect to the prosecutions for polygamous cohabitation since the manifesto of 1890.

Whether right or wrong, when plural marriages were stopped and the offense of polygamy was confined to the cohabitation of those who had contracted marriages before 1890, and particularly those who had contracted marriages before the statutes of 1882 and 1887, the disinclination to prosecute for these offenses became so strong, even among the non-Mormons, that such prosecutions were finally practically abandoned.

It was not alone the fact that if no further plural marriages were to be contracted polygamy would necessarily in the course of time die out and pass away, but also the fact that Congress, having by the statutes of 1882 and 1887 specifically legitimized the children of these polygamous marriages, it was inconsistent, if not unwise and impossible, in the opinion of even the non-Mormons, to prohibit the father of such children from living with, supporting, educating, and caring for them; but if the father was thus to live with, support, educate, and care for the children, it seemed harsh and unreasonable to exclude from this relationship the mothers of the children.

Such are some of the reasons assigned for the lack of a public sentiment to uphold successful prosecutions for polygamous cohabitation after 1890. It is unnecessary to recite others, for it is enough to say that whatever the real reason or explanation may be, the fact was that after 1890 it became practically impossible to enforce the law against these offenses, except in flagrant cases.

Such was the situation when the Territory applied for admission to the Union and Congress passed the enabling act of July 16, 1894, by which the people of Utah, in order to entitle them to admission into the Union, on terms prescribed by Congress, were required to incorporate in their constitution a proviso that "polygamous or plural marriages are forever prohibited;" not polygamous cohabitation, it will be observed, but only polygamous marriages. The testimony shows that there was a common understanding both in Congress and Utah that there were not only to be no more plural marriages, but that prosecutions for polygamous cohabitation had become so difficult that there was a practical suspension of them, and that time was the only certain solution of the perplexing problem.

This sentiment has not only ever since continued, but with the constant diminution of the number of polygamous families and the rapid approach of the time when all will have passed away, there has come a natural strengthening of the sentiment. The testimony in this respect is set forth at length in the annexed statement, but we make the following quotations in order that it may appear in this summary that there is this common disposition, among non-Mormons as well as Mormons.

Judge William McCarthy of the supreme court of Utah, a non-Mormon and an uncompromising opponent of polygamy, who has held many important offices of trust, among others that of Assistant United States Attorney for Utah, and who, as such, was charged with the duty of prosecuting these offenses, testified as follows:

"I prosecuted them (offenses of polygamous cohabitation) before the United States Commissioners up until 1893, when the United States Attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

In explanation of his action he testified—we quote from the annexed statement:

"That he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge, Judge McCarthy reached the conclusion that the public sentiment was against interfering with men in their polygamous relations, who had married before the manifesto."

E. B. Critchlow, a non-Mormon attorney at law of Salt Lake City, one of the principal managers of this proceeding against Mr. Smoot, who gave the case his personal attention, attending most of the meetings of committee, testified before the committee, again quoting from annexed statement:

"That after the manifesto of 1890 there was no inclination on the part of the prosecuting officer to 'push these matters as to present cohabitation,' 'thinking it was a matter that would immediately die out;' that it was well known that Apostle John Henry Smith was living in unlawful cohabitation; that non-Mormons generally made no objection to it; that they were disposed 'to let things go,' and that that was the

general feeling from the time of the manifesto in 1890 'down to very recent times—pretty nearly up to date, or practically up to date.'"

Mr. Critchlow further testified that the non-Mormons were disposed to overlook the continuous polygamous cohabitation of those who had taken plural wives before the manifesto, because they, the non-Mormons, felt satisfied that there would be no more plural marriages; that the thing would work itself out in the future, and that where the polygamists had their wives in separate houses and simply kept up the old relations without the offensive flaunting of them before the public, it had been practically passed over.

Orlando W. Powers, Esq., a leading lawyer of Utah, who was associate justice of the supreme court of the Territory, and who showed by his testimony much hostility to the Mormon Church, testified that there was this general feeling after the manifesto not to interfere with those whose marriages were prior thereto. He then added, "There is a question for statesmen to solve. We have not known what was best to do. It has been discussed and people would say that such and such a man ought to be prosecuted.

"Then they would consider whether anything would be gained; whether we would not delay instead of hastening the time that we hope to live to see; whether the institution would not flourish by reason of what they would term persecution. And so, notwithstanding a protest has been sent down here to you, I will say to you, the people have acquiesced in the condition that exists."

He explained that by "the people" he meant the Gentiles.

The following quotation from a speech by Senator Dubois, reported in the Congressional Record of February 5, 1903, page 1729 et seq., is to the same general effect:

"Mr. DUBOIS. * * * Various causes operated to cause the Mormons to abandon polygamy. There was a feeling among the younger members of the Mormon Church, and a very strong feeling, that polygamy should be done away with. So here was this pressure within the church against polygamy and the pressure by the Government from outside the church against polygamy. In 1891, I think it was, the president of the Mormon Church issued a manifesto declaring that thereafter there should be no polygamous marriages anywhere in the Mormon Church. The Mormons were then called together in one of their great conferences, where they meet by the thousands. This manifesto was issued to them by the first presidency, which is their authority; was submitted to them and all the Mormon people ratified and agreed to this manifesto, doing away with polygamy thereafter.

"The Senator from Maine (Mr. Hale) will recall that I came here as a Senator from Idaho shortly after that, and the Senator from Connecticut (Mr. Platt) will recall how bitter and almost intemperate I was in my language before his committee and on the floor of the other House in the denunciation of these practices of the Mormon Church. But after that manifesto was issued, in common with all of the Gentiles of that section who had made this fight, we said: 'They have admitted the right of our contention and say now, like children who have been unruly, we will obey our parents and those who have a right to guide us; we will do those things no more.' Therefore we could not maintain our position and continue punishing them unless it was afterwards demonstrated that they would not comply with their promise.

"After a few years in Idaho, where the fight was the hottest and the thickest, we wiped all of those laws from our statute books which aimed directly at the Mormon people, and to-day the laws on the statute books of Idaho against polygamy and kindred crimes are less stringent than in almost any other State in the Union. I live among those people; and, so far as I know, in Idaho there has not been a polygamous marriage celebrated since that manifesto was issued, and I have yet to find a man in Idaho or anywhere else who will say that a polygamous marriage has been celebrated anywhere since the issuance of that manifesto.

"Mr. HALE. Then, it must follow from that, as the years go by and as the older people disappear, polygamy as a practice will be practically removed.

"Mr. DUBOIS. There is no question about it; and I will say to the Senator, owing to the active part which we took in that fierce contest in Idaho, I with others, who had made that fight, thought we were justified in making this promise to the Mormon people.

"We had no authority of law; but we took it upon ourselves to assure them that those older men who were living in the polygamous relation, who had growing families which they had reared and were rearing before the manifesto was issued, and at a time when they thought they had a right under the Constitution to enter into polygamous relations—that those older men and women and their children should not be disturbed; that the polygamous man should be allowed to support his numerous wives and their children.

"The polygamous relations, of course, should not continue, but we would not compel a man to turn his families adrift. We promised that the older ones, who had

contracted those relations before the manifesto was issued, would not be persecuted by the Gentiles; that time would be given for them to pass away, but that the law would be strenuously enforced against any polygamous marriage which might be contracted in the future."

Much more testimony might be quoted of the same general character. It is sufficient, however, for the purpose of this summary to say that there is practically no testimony in conflict with that which has been quoted.

In other words, the conditions existing in Utah since Reed Smoot became an official of the Mormon Church in 1900 have been such that non-Mormons and Mormons alike have acquiesced in polygamous cohabitation on the part of those who married before the manifesto of 1890, as an evil that could best be gotten rid of by simply tolerating it until in the natural course of events it shall have passed out of existence.

With this disposition prevailing everywhere in the State of Utah among all classes—the Gentile or non-Mormon population as well as among the Mormons—the undersigned are of the opinion that there is no just ground for expelling Senator Smoot or for finding him disqualified to hold the seat he occupies because of the fact that he, in common with all the people of his State, has not made war upon, but has acquiesced in, a condition for which he had no original responsibility. In doing so he has only conformed to what non-Mormons, hostile to his church, as well as Mormons, have concluded is, under all the circumstances, not only the wisest course to pursue, but probably the only course that promises effective and satisfactory results.

J. B. Foraker.
Albert J. Beveridge.
Wm. P. Dillingham.
A. J. Hopkins.
P. C. Knox.

STATEMENT.

The minority respectfully submit the following statement as a part of their foregoing report.

January 27, 1903,[1] the Senate adopted the following Senate Resolution No. 205:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the Senate as Senator from the State of Utah, and said committee, or any subcommittee thereof, is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

At the time of the adoption of this resolution there were pending in the Senate two formal protests against the admission of Reed Smoot to the Senate, both having been filed before he took his seat. One of these protests is signed by W. M. Paden and 17 others and the other by John L. Leilich alone—Mr. Leilich being also one of the 17 who signed the principal protest.

Shortly before the adoption of the foregoing resolution at a preliminary hearing on the 16th day of January, 1903,[1] of which notice was duly given, counsel appeared before the committee representing Mr. Paden and others who signed the principal protest, and Mr. Smoot also appeared in person and by counsel. At that time statements were made by counsel for the respective parties, stating, in a general way, what they expected to prove and what their claims were as to the legal aspects of the case. Later the taking of testimony commenced.

Numerous witnesses were produced and examined before the committee, both on behalf of the protestants and on behalf of Mr. Smoot. The taking of this evidence was continued from time to time until the 25th day of January, 1905, when the further taking of testimony was closed and counsel were heard in argument. The committee took the case under consideration with a view to making a report. Afterwards, at the present session, the case was reopened for the further taking of testimony, after which the case was again argued by counsel.

In the protest signed by Mr. Leilich alone it was charged that Reed Smoot is a polygamist and that, as an apostle of the Church of Jesus Christ of Latter Day Saints—commonly called the Mormon Church—he had taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator." No one appeared, however, to sustain either of these charges. No evidence has been offered in support of either of them; but, on the contrary, both charges were refuted by a number of witnesses.

[1] This was evidently intended to be 1904.

The investigation made by the committee has been based chiefly upon the charges made in the protest signed by Mr. Paden and others. At the preliminary hearing already referred to counsel for the protestants presented, in a more formal way than had been done in the protest itself, the charges supposed to be embodied in that protest.

The charges thus presented are as follows:

First. The Mormon priesthood, according to the doctrine of that church and the belief and practice of its membership, is vested with, and assumes to exercise, supreme authority in all things temporal and spiritual, civil and political. The head of the church claims to receive divine revelations, and these Reed Smoot, by his covenants and obligations, is bound to accept and obey, whether they affect things spiritual or things temporal.

Second. The first presidency and twelve apostles, of whom Reed Smoot is one, are supreme in the exercise of this authority of the church, and in the transmission of that authority to their successors. Each of them is called prophet, seer, and revelator.

Third. As shown by their teaching and by their own lives, this body of men has not abandoned belief in polygamy and polygamous cohabitation. On the contrary—

(*a*) As the ruling authorities of the church they promulgate in the most solemn manner the doctrine of polygamy without reservation.

(*b*) The president of the Mormon Church and a majority of the twelve apostles now practice polygamy and polygamous cohabitation, and some of them have taken polygamous wives since the manifesto of 1890. These thing have been done with the knowledge and countenance of Reed Smoot. Plural-marriage ceremonies have been performed by apostles since the manifesto of 1890, and many bishops and other high officials of the church have taken plural wives since that time. All of the first presidency and twelve apostles encourage, countenance, conceal, and connive at polygamy and polygamous cohabitation, and honor and reward by high office and distinguished preferment those who most persistently and defiantly violate the law of the land.

Fourth. Though pledged by the compact and bound by the law of their Commonwealth, this supreme body, whose voice is law to its people and whose members were individually directly responsible for good faith to the American people, permitted, without protest or objection, their legislators to pass a law nullifying the statute against polygamous cohabitation.

In substance these charges, so far as they seem to be a proper subject of inquiry here, are:

1. That the Mormon Church exacts and receives from its members, including Reed Smoot, absolute obedience in all political matters.

2. That the Mormon Church is promulgating the doctrine of polygamy, and that the first presidency and all the twelve apostles, including Reed Smoot, "encourage, countenance, conceal, and connive at polygamy and polygamous cohabitation, and reward those who practice it."

No evidence has been submitted to the committee or has come to its knowledge in anywise affecting injuriously the general character of Reed Smoot. On the contrary, it has been admitted by the protestants, through their counsel, and a number of witnesses on both sides have testified, that his moral character is unimpeachable in every respect. In the protest of Mr. Paden and others it is explicitly stated that they do not charge him with any offense cognizable by law.

Some historical facts.

To a proper understanding of the voluminous evidence in the case, in so far as it tends to throw any light upon the question whether Reed Smoot is entitled to retain his seat in the Senate, it will be useful to set forth, in a preliminary way, certain indisputable historical facts.

The Mormon people, under the lead of Brigham Young, in their pilgrimage from Nauvoo, Ill., settled at the place now known as Salt Lake City in the summer of 1847. The place where they located was, at that time, Mexican territory. The Mormons, however, hoisted the Stars and Stripes on an eminence near the city, ever since called Ensign Peak.

On the 20th day of September, 1850, Brigham Young, the then head of the Mormon Church, was nominated for governor of the Territory of Utah by President Fillmore, and his appointment was confirmed by the Senate September 28, 1850. During his term of office under that appointment, and in the year 1852, Brigham Young, as the president of the Mormon Church, formally and publicly proclaimed polygamy as a doctrine of that church.

There is some dispute as to whether polygamy had not been proclaimed in 1844 by Joseph Smith, jr., Brigham Young's predecessor as president of the church; but it is not deemed necessary in this statement to consider the merits of that controversy.

The admitted fact is that from the time of Brigham Young's announcement in 1852 polygamy was openly practiced in Utah by many of the Mormon people, including Brigham Young himself.

When his term of office as governor of the Territory expired in 1854 he was appointed for another term of four years by President Pierce, his nomination being again confirmed by the Senate; he served out his second full term of four years. During all of this time he continued to be president of the church and to openly live in polygamous relations with several wives.

Act of 1862.

There seems to have been no attempt by the Government of the United States to interfere with the practice of polygamy in Utah until July 1, 1862, on which date an act of Congress entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah," became a law (12 Stat. L., 501).

The first section of that act is as follows:

"That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless,* That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract."

It will be observed that while this section of the act of 1862 made it a penal offense to take a plural wife or husband it did not punish or in anywise interfere with the continued cohabitation of those who had previously entered into the polygamous relation.

The Edmunds law.

Such cohabitation was not made an offense until March 22, 1882, when the so-called "Edmunds Act" became a law. (22 Stat. L., 30.) This act of 1882 amended the act of July 1, 1862 (which in the meantime had become section 5352 of the Revised Statutes). Section 3 of the amendatory act provided:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

In the seventh section of the same act it was provided as follows:

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated."

Soon after the Edmunds Act became a law, prosecutions were instituted in the Territorial courts against persons who were living in polygamy, those prosecutions being nearly all under the third section of the act, which made it an offense for a man to cohabit with more than one woman. From that time until October, 1890, the number of polygamous marriages in Utah decreased, but the practice was not entirely stopped.

The Edmunds-Tucker act.

By what is called the Edmunds-Tucker Act, approved March 3, 1887 (24 Stat. L., 635), the rules of evidence were changed so as to make a lawful husband or wife of a person accused of bigamy, polygamy, or unlawful cohabitation a competent witness.

By section 7 of that act the various acts of the legislative assembly of the Territory of Utah incorporating or continuing the corporation known as the Church of Jesus Christ of Latter-Day Saints were disapproved and annulled, and that corporation

dissolved, and it was further made the duty of the Attorney General of the United States to take proper proceedings in the supreme court of the Territory to wind up the affairs of the corporation. Section 11 of this act of 1887 further provided as follows:

"SEC. 11. That the laws enacted by the legislative assembly of the Territory of Utah which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of the father of any such illegitimate child are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father or to receive any distributive share in the estate of his or her father: *Provided*, That this section shall not apply to any illegitimate child born within twelve months after the passage of this act, nor to any child made legitimate by the seventh section of the act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two."

Reynolds. v. The United States.

Although the act of 1862, above referred to, made it a criminal offense to marry a plural wife in the Territories of the United States, and although polygamy was openly and publicly practiced, there seems to have been little effort on the part of the Government to suppress it in Utah for many years after that time. Finally, however, one George Reynolds was indicted and charged with bigamy under that act, and his case was taken to the Supreme Court of the United States.

The principal question involved was whether since polygmay was a duty under the religious doctrines of the Mormon Church, an act of Congress punishing the taking of a plural wife was an unconstitutional interference with religion. That case was decided at the October term, 1878. (Reynolds *v.* United States, 97 U. S., 145.) The court held that while it was not competent for Congress to make a mere belief a punishable offense, yet it was entirely competent for it to make criminal an act which the person committing it might consider to be a duty under his religious belief.

It is worthy of note that the belief of the Mormons in the unconstitutionality of the act in question was so strong that Reynolds, a member of the church, voluntarily enabled proof of his offense to be obtained in order that the constitutionality of the act might be tested.

The manifesto of 1890.

On the 26th of September, 1890, Wilford Woodruff, then president of the Mormon Church, issued what is called "The Manifesto," of which the following is a copy:

Official declaration.

To whom it may concern:

Press dispatches having been sent for political purposes from Salt Lake City, which have been widely published, to the effect that the Utah Commission, in their recent report to the Secretary of the Interior, allege that plural marriages are still being solemnized, and that 40 or more such marriages have been contracted in Utah since last June or during the past year; also that in public discourses the leaders of the church have taught, encouraged, and urged the continuance of the practice of polygamy:

I, therefore, as president of the Church of Jesus Christ of Latter-Day Saints, do hereby, in the most solemn manner, declare that these charges are false. We are not teaching polygamy, or plural marriage, nor permitting any person to enter into its practice, and I deny that either 40 or any other number of plural marriages have, during that period, been solemnized in our temples or in any other place in the Territory.

One case has been reported in which the parties alleged that the marriage was performed in the Endowment House, in Salt Lake City, in the spring of 1889, but I have not been able to learn who performed the ceremony; whatever was done in this matter was without my knowledge. In consequence of this alleged occurrence the Endowment House was, by my instructions, taken down without delay.

Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws and to use my influence with the members of the church over which I preside to have them do likewise.

There is nothing in my teachings to the church or in those of my associates during the time specified which can be reasonably construed to inculcate or encourage

polygamy, and when any elder of the church has used language which appeared to convey any such teachings he has been promptly reproved. And I now publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriage forbidden by the law of the land.

WILFORD WOODRUFF,
President of the Church of Jesus Christ of Latter-Day Saints.

At the semiannual general conference of the members of the Mormon Church, which was held on October 6, 1890, the foregoing declaration was unanimously accepted "as authoritative and binding." Two years later it was again approved by the general conference of the church. Since it was first approved by the general conference, in October, 1890, it has been and still remains a part of the fundamental law of the Mormon Church, which can be repealed or modified only by the action of a similar conference.

As to the effect of the manifesto on the power of the president of the Mormon Church, or any subordinate official, to celebrate a plural marriage we quote a part of the testimony of James E. Talmage. Dr. Talmage prepared and issued, under the auspices of the church authorities, a work called "Articles of Faith," which authoritatively sets forth the doctrines of the church, having been submitted to, approved by, and published by the church itself. (Vol. III, pp. 47 and 48.)

"Mr. WORTHINGTON. Doctor, you have used the expression here 'holding the keys' in connection with that revelation involving polygamy, when it was given to Joseph Smith, jr., that he was the only man who held the keys to that power. He only at that time, or some person delegated by him, could make a plural marriage that would be valid according to the laws of the church. Am I right in that?

"Mr. TALMAGE. Yes, sir.

"Mr. WORTHINGTON. From that time on down to the time that President Woodruff issued the manifesto, which the church approved in conference assembled, the same principle obtained?

"Mr. TALMAGE. Yes, sir.

"Mr. WORTHINGTON. That a plural marriage could not be valid according to the law of the church, only when celebrated by the president, or by somebody authorized by him to celebrate it. Is that right?

"Mr. TALMAGE. That is strictly true.

"Mr. WORTHINGTON. Then when this revelation which is called the manifesto came and it was submitted to the people and accepted by them, that power was taken away from the president, was it not?

"Mr. TALMAGE. Yes, sir.

"Mr. WORTHINGTON. So that since the 6th of October, 1890, the president of the church had no power to solemnize a plural marriage according to the law of the church, even?

"Mr. TALMAGE. That is true.

"Mr. WORTHINGTON. And no power to authorize anybody else to celebrate one?

"Mr. TALMAGE. That is true.

"Mr. WORTHINGTON. So that if any person has undertaken to enter into plural marriage, if any woman has become the plural wife of a husband since the 6th day of October, 1890, she is no more a wife by the law of the church than she is by the law of the land?

"Mr. TALMAGE. That is true.

"Mr. WORTHINGTON. And it is not in the power of the president to revive the old system so that he can make a valid plural marriage or authorize one, unless he does it through the general conference of the church?

"Mr. TALMAGE. Certainly. It is now a rule of the church that that power shall not be exercised. The power is there, but the exercise of it is entirely stopped, and a rule of the church thus made and sanctioned is equally binding with the law founded upon revelation, and the president therefore has in one sense, half voluntarily, inasmuch as he was the chief individual to bring it before the conference, but by the action of the conference, properly speaking, has surrendered that power as far as its exercise is concerned.

"Mr. WORTHINGTON. It takes the action of the people to restore it, does it not?

"Mr. TALMAGE. Most assuredly——." (3—48, 49.)

The enabling act.

The enabling act, under which Utah in January, 1896, was finally admitted into the Union, was passed by Congress on July 16, 1894 (28 Stat. L., 107). By section 3 of that act it was required that the State convention, which was authorized to be called to organize the State government, should provide:

"By ordinance irrevocable without the consent of the United States and the people of said States—

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: '*Provided,* That polygamous or plural marriages are forever prohibited.'"

It is very important to observe that while this act made it a condition to the admission of the State that polygamous or plural marriages should not be allowed, no provision of any kind was made against polygamous cohabitation. That offense was left to be governed by the constitution and laws of the State as the inhabitants of the State might determine.

The testimony shows that the distinction thus made by Congress in the enabling act between polygamous marriages and polygamous cohabitation was intentional. Polygamous marriages, as we have seen, were not forbidden by any act of Congress until 1862, 10 years after polygamy had become prevalent in Utah. It was 20 years later still, 1882, before Congress prohibited polygamous cohabitation.

From the time polygamy was first promulgated by Brigham Young, as president of the Mormon Church, until about five years thereafter, he was continued in office by the Government as governor of the Territory. Both the Edmunds Act of 1882 and the Edmunds-Tucker Act of 1887 recognized polygamous marriages to the extent of making legitimate all the children born of such marriages prior to the passage of those acts, respectively, who might be born within a period in one case of 9 months and 9 days and in the other 12 months after the passage of the act.

Polygamous cohabitation.

Under these laws families had been created, and children born of polygamous marriages had grown to manhood and womanhood. It is not surprising under such circumstances that there was a feeling on the part both of the Government officials in that Territory and of the people of the Territory that if further polygamous marriages should cease the continuance of polygamous relations theretofore created might be tolerated if they were not openly or flauntingly carried on.

To prohibit such relations would be to deny the parents of legitimate children to dwell together with such children. Some 25 or 30 witnesses have been examined on this subject, most of them non-Mormons and several of them witnesses called on behalf of the protestants. There is a practical unanimity among them that at least from the time of the admission of the State into the Union, which occurred on January 4, 1896, there was practically a universal disinclination to prosecute those who had plural families born of relations established before the manifesto of 1890.

As a sample of the evidence on this subject we refer to the testimony of Judge William M. McCarty, one of the associate justices of the supreme court of Utah. He was assistant United States attorney for the Territory of Utah from 1889 until 1902, when he was elected county attorney of Sevier County, in that Territory. He was reelected in 1894. In 1895 he was elected one of the district judges of the State of Utah.

He was reelected to that office in 1900, and in 1902 was elected to his present office. He is a non-Mormon, and has always been an uncompromising opponent of polygamy. He conducted some of the prosecutions for polygamous cohabitation between the date of the manifesto, in 1890, and the admission of the State into the Union in January, 1896. He testified:

"I prosecuted them before the United States commissioners up until 1893, when the United States attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

And Judge McCarty further testified that the superior to whom he referred as stopping the prosecution for polygamous cohabitation was John W. Judd, a Gentile.

In 1897 some prosecutions for polygamous cohabitations against men who were married before the manifesto came before Judge McCarty as district judge of the State. The accused in those cases admitted their guilt and were punished by a fine only, upon agreeing to cease cohabitation with their plural wives. Judge McCarty testified that it was after these prosecutions he obtained the first emphatic expression he had observed as to the state of public opinion in Utah at that time regarding such prosecutions.

He said that he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge Judge McCarty reached the conclusion that

the public sentiment of the State was against interfering with men in their polygamous relations who had married before the manifesto. (Vol. 2, 882 to 886; 889, 916.)

E. B. Critchlow, a Gentile lawyer, of Salt Lake City, who prepared the principal protests in this case and who, during the early sittings of the committee, assisted Mr. Tayler, counsel for the protestants, in presenting their case, testified as a witness on behalf of the protestants that after the manifesto of 1890 there was no inclination on the part of the prosecuting officer to "push these matters as to present cohabitation," "thinking it was a matter that would immediately die out;" that it was well known that Apostle John Henry Smith was living in unlawful cohabitation; that non-Mormons generally made no objection to it; that they were disposed "to let things go," and that that was the general feeling from the time of the manifesto in 1890 "down to very recent times—pretty nearly up to date or practically up to date."

Mr. Critchlow further testified that the non-Mormons were disposed to overlook the continuous polygamous cohabitation of those who had taken plural wives before the manifesto, because they—the non-Mormons—felt satisfied that there would be no more plural marriages; that the thing would work itself out in the future, and that where the polygamists had their wives in separate houses and simply kept up the old relations without the offensive flaunting of them before the public it had been practically passed over. (Vol. 1, 624, 625.)

Another witness called on behalf of the protestants was Orlando W. Powers, a leading lawyer of Utah, a non-Mormon, who was associate justice of the supreme court of the Territory of Utah in 1885 and 1886, and whose testimony in general shows his strong feeling against the Mormon Church. He testified that, speaking for those who fought the church party in the days when it was a power, they had felt and still feel that if the church would stop new plural marriages, those who had contracted such marriages before the manifesto would not be interfered with. After stating that the people who lived in the East had no understanding of the situation in this regard in Utah, Judge Powers added:

"That condition exists. There is a question for statesmen to solve. We have not known what was best to do. It has been discussed, and people would say that such and such a man ought to be prosecuted. Then they would consider whether anything would be gained; whether we would not delay instead of hastening the time that we hope to live to see; whether the institution would not flourish by reason of what they would term persecutions. And so, notwithstanding a protest has been sent down here to you, I will say to you the people have acquiesced in the condition that exists."

Then the witness added that by "The people" he meant the Gentiles. (Vol. 1, 884–885.)

William J. McConnell, ex-governor of Idaho and ex-Senator of the United States from that State, when asked whether there was any public sentiment in Idaho in reference to prosecutions for simply unlawful cohabitation, as distinguished from new polygamous marriages, replied:

"It was understood and agreed when we adopted our State constitution and were admitted to statehood, that these old Mormons who had plural families would be allowed to support their wives and children without molestation. It was agreed by all parties, Democrats and Republicans alike, that they should be allowed to drift along. We could, under the law, have prosecuted these people and perhaps have sent them to jail. We could doubtless have broken up these families, but we felt it better that these men should be allowed to support these old women and these children than to further persecute them." (2; 522.)

This witness was sharply cross-examined by Mr. Tayler and by the chairman on this subject, with the result that he made his testimony more emphatic. (2; 524, 526.)

On his redirect examination he further stated that he agreed to the foregoing testimony of Mr. Critchlow and Mr. Powers. (2; 531, 532.)

F. H. Holzheimer, a leading lawyer of Idaho, who was practicing his profession in Utah until November, 1902, testified that the issuing of the manifesto of 1890 brought about a very peculiar state of affairs, and that the question of how to take care of the problem was one which confronted the people of Utah, and which the witness did not think they have really solved.

He added:

"The consensus of opinion at that time was that those who had contracted marriages prior to the manifesto should be left alone. It was not, however, believed that they should openly violate the law and unlawfully cohabit with their numerous wives. I will say this, that where that has occurred it has been mostly in isolated cases. There have been a number of cases where children have been born, but in no case that I know of has it been done openly. It is true it is against the law, but it has not been done in such an open lewd manner as has been intimated nor has it been

general. And because of the peculiar state of affairs it was the opinion that the whole thing would die out; that it was only a matter of a short time when the question would be entirely settled, because there would be no new marriages." (2; 575–576.)

Frank Martin, a lawyer of Idaho, testified that he believed those who were living in polygamous cohabitation in his State ought to be punished. But he added:

"A majority of our people seem to think that the best way, as far as concerns those old fellows who contracted these relations before the manifesto, as long as they stop it and do not take any new wives, or as long as no new wives are taken, is to let it go, to let it gradually die out, to let the old ones die." (2; 622.)

James H. Brady, a Gentile of Idaho, who operates several irrigation canals in that State and owns a power plant at the American Falls, when asked what is the sentiment in Idaho regarding disturbing or leaving undisturbed the men who went into polygamy prior to the manifesto of 1890, answered:

"To be absolutely frank in the matter, my judgment is that a majority of the men in Idaho would favor leaving those old men to live out their lives just as they have started in." (2; 649.)

J. W. N. Whitecotton, a lawyer who resides at Provo City, where Senator Smoot lives, and who is intimately acquainted in most of the Mormon counties in Utah, was asked what has been the sentiment among non-Mormons in Utah in regard to the men who had entered into polygamy prior to the manifesto of 1890, and answered:

"Well, that is a pretty hard question to answer. The Gentiles in Utah have recognized that we have a very hard problem to deal with in that respect. It offers many embarrassing things. There has been a good deal said in this testimony—I have read it—about an understanding. I know nothing of any understanding in regard to that. But I do know this, that the people generally feel like they do not want to stir up this thing and set it to smelling any more. It has not a good odor.

"And there is another thing that they have taken into account in the neighborhood where I am, at least. When we get out to punish this man who is living in polygamy, put him in prison, they take into account somewhat the consequences that will come to his family. Now, the women who went into polygamy in Utah went into it because, although I think under a delusion, they thought it was a religious duty, and they are bound by the obligation. They feel that way.

"And under the rules of the church, as I understand them, a plural wife, if she is divorced from her husband, may not become the wife of another man, and those plural wives who have children are in a very precarious condition if they are to be entirely separated from the only protector they have. I think that the condition of these women and the children they have has probably entered as largely into the feeling of 'let the matter slide along and not bother it' as any other factor."

On his further examination on this subject, the following occurred:

"The CHAIRMAN. What is the sentiment in regard to those who contracted plural marriages before 1890 and are now living with their wives and having new children by them up to this time?

"Mr. WHITECOTTON. The sentiment is that it is an awful condition.

"The CHAIRMAN. That is a lawful condition?

"Mr. WHITECOTTON. That is an awful condition.

"The CHAIRMAN. Oh.

"Mr. WHITECOTTON. Leave off the 'l.' And we wish we were out of it. We do not know how to get out of it.

"The CHAIRMAN. What is the sentiment with respect to that class of people—approval or disapproval?

"Mr. WHITECOTTON. They have the disapproval of the people generally, but that does not go to the extent of causing a man to shoulder the responsibility of setting the law in motion against that man.

"The CHAIRMAN. So that that class of men are left without interference?

"Mr. WHITECOTTON. They are left practically without interference. They have our regrets, but we do not know how to get at them.

"Senator FORAKER. You have said that that is largely because of the regard the people have for the condition in which the plural wives and children would be left in case of a successful prosecution.

"Mr. WHITECOTTON. Yes, sir. I think that (regard for plural wives and children) is the chief cause of withholding the hand of prosecution. Those women are human, and so are their children, and they are not much to blame, either, especially the children." (2; 679–680.)

Hiram E. Booth, a practicing lawyer of Salt Lake City and one of the leading managers in the State of the Republican Party, upon being asked to explain why it is that, if the people of Utah, including a large part of the Mormon people, are so opposed to polygamy, those who are living in polygamous relations are not interfered with, said:

"Well, my explanation of that is that the principal fight of the Gentiles has been to do away with polygamous marriages. While during many years there were numerous prosecutions for unlawful cohabitation, it was not for the purpose of punishment so much, those people who lived in unlawful cohabitation, as it was to bring about a cessation of polygamous marriages. That was the principle for which we strove, to stop people from marrying in polygamy. This was finally brought about in 1890 by the manifesto of the president of the church, which was affirmed, or sustained, as they call it, by the conference on October 6, 1890, and again in 1891. We did not accept that in good faith at that time.

"That is, we were somewhat skeptical about it; but later we did. Now, there has been since that time a disinclination to prosecute men and women who live in unlawful cohabitation. One of my own reasons—the way I look at it—was this: My sympathy was with the plural wife and her children. By these prosecutions she suffered more really than the husband did. In nearly all of the cases I may say the plural wife is a pure-minded woman, a woman who believed that it was right according to the law of God for her to accept that relation, and that she can not be released from her obligations when they are once entered upon.

"Mr. BOOTH. I should say, with Judge Powers and Mr. Critchlow, that the general sentiment among the Gentile people in Utah is a disinclination to prosecute those cases.

"Mr. WORTHINGTON. If I understand you, when Senator Smoot was a candidate for Senator, and when he became an apostle, which was in April, 1900, things had settled down in Utah by the general acquiescence of the people that if there would be no new polygamous marriages the people who had entered into that relation before the manifesto should not be disturbed?

"Mr. BOOTH. Should not be disturbed; no, sir.

"Mr. WORTHINGTON. And that was the state of opinion there when he became an apostle?

"Mr. BOOTH. That was the state of opinion when he became an apostle.

"Mr. WORTHINGTON. And if he had gone against that state of opinion he would have been going against the public sentiment of the State, would he not?

"Mr. BOOTH. Yes.

"Mr. WORTHINGTON. Gentiles and Mormons?

"Mr. BOOTH. Gentiles and Mormons. I would say in that respect that where polygamous relations were carried on in such a way as to outrage public sentiment, in those cases, of course, a prosecution would have been demanded." (2; 714, 715, 723.)

Arthur Pratt, who was deputy United States marshal in Utah from 1874 until 1882, and again from 1886 to 1890, and who probably arrested more Mormons charged with polygamy or polygamous cohabitation than any other man, said that he had heard Mr. Whitecotton and Mr. Booth testify on this subject, and that he agreed with them, for the reasons stated by them—not out of any pity or sympathy for the men, but out of sympathy and out of the suffering that would be entailed on the women and the children. (2; 744.)

E. D. R. Thompson, a non-Mormon, who has lived in Salt Lake City since 1889, never been a Mormon, and who has taken a leading part in Republican politics in that State, testified:

"Well, the general idea has been that this condition of things would gradually die away by the lapse of time. It has been generally repugnant to most people who take any position as against the Mormons in this matter which would imply either prosecution or persecution. In other words, they did not care to be informers." (2; 991.)

Charles De Moisy (a non-Mormon), who is a commissioner of the State bureau of statistics of Utah, and has never been a Mormon, says, in regard to the sentiment among Gentiles in Utah as to the punishment of those who live in polygamous cohabitation where the marriages were celebrated before the manifesto, "I think there is a matter of indifference about it"—that he himself thinks—"the less said about those things the better." (2; 1003.)

Glen Miller, a non-Mormon, who was United States marshal in the Territory of Utah for four and a half years, and had been a member of the State senate for two years after Utah had been admitted into the Union, when asked what it the sentiment of Gentiles in Utah in regard to prosecutions for polygamous cohabitation between persons who were married before the manifesto, answered:

"Well, there has been a sentiment against that, as there has been against any informing against any of the infractions of law generally. They have felt that it was only a question of time that the practice would die out through the death of those who practiced it and the removal of that generation." (3; 160.)

John W. Hughes, who has never been a Mormon, and is the editor of a weekly paper in Salt Lake City, when asked the same question, replied:

"Well, the sentiment has been right along that these old fellows that are in polygamy—to let them alone and they will soon die out. Very soon none of them will be left. The great point with the Gentiles is that there will be no new plural marriages." (3; 163.)

Mrs. Mary G. Coulter, a non-Mormon, whose husband is a physician in Ogden, testified:

"Those of us who have witnessed the old-time antagonisms and who are living and working for the new growth and progress do not believe in inquisitorial methods. We believe that the work of education, the establishment of industries, the developing of the mining regions, the building of railroads especially, and the influx of people, owing to the colonization schemes which are succeeding there, will in time eradicate all of the old and objectionable conditions." (3; 170.)

Polygamy in other countries—how dealt with.

A situation analogous to that existing in Utah after polygamy had been forbidden by the law of the church, as well as by the law of the State, arises in countries where polygamy is lawful, when missionaries have converted polygamists to the Christian faith. The question then frequently arises whether polygamists shall be admitted to the church, and if so whether they shall be required to put away all of their families except one. In the argument of the case, counsel for the respondent has referred to certain publications by various Christian churches, showing the proceedings that have taken place in some such cases and the results. The Presbyterian and Reformed Review, vol. 7, for 1896, contains an article on "The baptism of polygamists in non-Christian lands" from which the following extracts are taken:

"At the regular meeting of the synod of India, held in Ludhiana, November, 1894, among the most important questions which came before the synod was this: Whether in the case of a Mohammedan or Hindoo with more than one wife, applying for baptism, he should in all cases, as a condition of baptism, be required to put away all his wives but one. After a very thorough discussion, lasting between two or three sessions of the synod, it was resolved, by a vote of 36 to 10, to request the general assembly, 'in view of the exceedingly difficult complications which often occur in the cases of polygamists who desire to be received into the church, to leave the ultimate decision of all such cases in India to the synod of India.' The memorialists add: 'It is the almost unanimous opinion of the members of the synod that, under some circumstances, converts who have more than one wife, together with their entire families, should be baptized.'

"Not only is it thus the fact that more than four-fifths of the members of the synod of India believe that it may sometimes be our duty, under the conditions of society in India, to baptize a polygamist without requiring him first to put away all his wives but one, but when the missionary ladies present during the sessions of synod, desirous of ascertaining the state of opinion among themselves on this subject, took a vote thereupon, of these 36 ladies, many of them intimately familiar with the interior of zenana life for years, all feeling no less hatred of polygamous marriage than their sisters in America, all but three signified their agreement with the majority of synod, of which minority of three two had been only a few days in India and were therefore without any experience touching the practical questions involved. Nor is this large majority of our missionaries singular in their belief on this subject.

"When some years ago the question was debated in the Panjab missionary conference, in which a large number of the missionaries and eminent Christian laymen of all denominations took part, 10 out of 12 of the speakers expressed the same opinion as that held by more than four-fifths of the synod of India to-day. So the Rev. Dr. James J. Lucas, of Saharanpur, says that the brethren who maintained the lawfulness of not requiring a polygamist to put away any of his wives as a prerequisite to baptism "are not even in a minority in the missionary body in India.'

"A few years ago the Madura Mission voted in favor of baptizing such, provided they had contracted their marriages in ignorance and there was no equitable way of securing a separation. Their action was disapproved by the American board, but it none the less illustrates again what is the judgment of a large part of those who, living in India, are in most intimate relation to the living facts, and who are thus far better qualified to form a right decision than can be the wisest men at home.

* * * * * * *

"Again, as bearing on the polygamist's duty, it should be noted that in the great majority of cases among the Hindus the second marriage is contracted because of the first wife having no children. So that when the general assembly requires the polygamist convert to put away all wives but the first, it requires him not only to signalize his conversion by violating a contract held valid alike by his Christian rulers

and a large part of his Christian brethren, but to do this in such a way as shall inflict the greatest amount possible of cruel injustice and suffering, by turning out of his house that wife who is the mother of his children (who will naturally in most cases have to go with her) and denying to her conjugal rights of protection and cohabitation which he had pledged her.

"The wrong involved is aggravated under the conditions of life in India, in that it will commonly be practically impossible for the wife turned off, whichever she be, to escape the suspicion of being an unchaste woman, and she will inevitably be placed in a position where, with good name beclouded and no lawful protector, she will be under the strongest temptation to live an immoral life. No doubt polygamy is wrong; but then, is not breach of faith and such injustice and cruelty to an innocent woman and her children also wrong? If there is a law against polygamy, is there not a law also against these things even more explicit and indubitable? In the case supposed both can not be kept. Which shall the man be instructed to break?

"The general assembly of 1875 appears to have imagined that the injustice was done away by enjoining a man to 'make suitable provision for her support that is put away, and for her children, if she have any.' But this utterly fails to meet the case. 'For the breach of faith required remains, since the marriage contract, both according to Scripture and the law of all Christian lands, as well as of India, binds the husband not only to support, but equally to protection and cohabitation. But by the deliverance of 1875 all missionaries in non-Christian lands are directed by the general assembly to instruct the convert that, in order to baptism, he must keep the compact as regards the first particular, but break it as regards the others.

"Moreover, the moral end sought will, even so, not be gained. The wife put away may live in a separate house and at a distance—but then polygamists sometimes keep different wives in different homes—and it will not be easy to persuade a Hindoo or Mohammedan community, especially if the man still continues to give her money as required by the assembly's law, that cohabitation really ceases."

In India and Christian Opportunity, a book published in 1904, the author of which is Harlan P. Beach, M. A., F. R. G. S., in dealing with the general subject of "Problems connected with new converts," the author, at page 222, says:

"1. *Polygamy.*—One difficulty in the way of receiving a professed convert, though affecting only a small percentage of candidates, is a most perplexing one; it is that of applicants who have more than one wife. As Hindoo or Mohammedan they have entered in good faith into marriage contracts with these wives, and if a man puts away all but one, what provision shall be made for the rejected, and on what principle shall he decide as to the one to be retained?

"While it is a question easily answered in missionary society councils at home, it is a more serious problem at the front. Some good missionaries hold that where the husband is living the Christian life in all sincerity it is better to receive into the church such a candidate—though not eligible to any church office—than to require him to give up all but one wife and thus brand with illegitimacy his children by them, as well as occasion the wives so put away endless reproach and embarrassments."

In India's Problem, Krishna or Christ, which was published in 1903, the author of which is John P. Jones, D. D., of southern India, A. B. C. F. M., the author, in dealing with this question, says, on pages 289 and 290:

"In the consideration of the problem many things must be kept in mind. None more important than the claims to a cordial welcome from the church of any man who, in true faith and Christian earnestness, seeks admittance. If it be demanded of the man that he put away all but one of those wives taken in heathenism, then we ask whether it is Christian, or even just, to cast away one to whom he was solemnly and religiously pledged according to the laws of the land and with whom he has been linked in love and harmony for years and from whom he has gotten children? And if he is to put away one or more of his wives, which one shall it be? Shall it be the first wife?

"Certainly that would not be Christian. Or shall it be the second wife who is the mother of his children and whom he probably married at the request of the first who was childless in order that he might raise seed unto himself? It is not easy on Christian grounds to decide such a problem as this, nor is it very Christian to put a ban upon any woman who, in accordance with their religion and their country's laws, has formed this sacred alliance with a man and has lived with him for years. Nor can it be right to brand with illegitimacy the children born of such a wedlock.

"I would not allow such persons, received into the Christian church, to become officers of the church. But I can not see why there may not be an humble place in the church of God for such and their families."

Whatever may be our personal views as to the propriety of the conduct of the people of Utah, in thus practically overlooking the continuance of polygamous relations where

those relations arose out of marriages celebrated before the manifesto of 1890, there can be no doubt that when Reed Smoot, in April, 1900, became an apostle of the Mormon Church, the great majority of the people of the State, non-Mormons as well as Mormons, had practically agreed that it would be unwise to prosecute those who are living in such relations, or to in anywise interfere with them, unless those relations were flagrantly obtruded upon public notice.

Reed Smoot not responsible for polygamy.

The charge of the protestants in this case, in substance, is that Reed Smoot connived at and encouraged, thereby becoming responsible for, the polygamous relations of certain of the officials of the church and of other polygamists. There is no evidence to support this charge except the fact that he acquiesced without protest in what the people of Utah generally accepted as unavoidable. In his answer and in his testimony, on his oath, he has positively denied that he has ever advised any person to violate the law either against polygamy or against polygamous cohabitation.

No witness has been produced who has testified that he ever heard the respondent give any such advice, or in any wise defend such acts. The most anybody has attempted to charge is that he has, like others, both Mormons and non-Mormons, ignored the offense of polygamous cohabitation both in the church and under the laws of the State when such polygamous cohabitation was in consequence of plural marriages solemnized before 1890.

In view of the general situation and the fact that non-Mormons, even the most active opponents of the church, had by common consent adopted the policy of acquiescence as the wisest plan to pursue as to polygamous cohabitation, relying on time and the course of nature to cure the trouble, we do not think such passive acquiescence on the part of Mr. Smoot can be held to amount to such an indorsement and encouragement of polygamous cohabitation as to make him responsible for it.

Polygamous marriages since 1890.

It is further charged that notwithstanding the acts of Congress forbidding them, and in defiance of the manifesto of 1890, polygamous marriages have been celebrated by the authorities of the church since 1890.

We have already shown that since the manifesto forbidding the celebration of plural marriages became the law of the church by being ratified at a semiannual conference of the church, neither the president of the church nor any other officer thereof has the power to celebrate a plural marriage which would be any more binding under the law of the church than it would be under the law of the land.

Evidence relating to such plural marriages since 1890 could, of course, be competent in this case only as it might, with other evidence, tend to show that the respondent has advised such marriages, or in some way connived at or approved them.

On this point there is some evidence tending to show, but not in fact showing, that in the period of over 15 years which has elapsed since the manifesto of 1890 was promulgated there may have been some 15 or 29 cases in which a member of the Mormon Church has cohabited with a woman as his plural wife with whom he sustained no such relation prior to 1890.

In only one instance has the evidence shown the actual performance of the marriage ceremony, and that occurred in Mexico. In that case it appears that a woman named Kennedy, in the year 1896, with her mother, on several occasions appealed to Apostle Teasdale, in Mexico, to marry her to a man who was already married and had a wife living, and that the apostle, whenever appealed to, refused to perform the marriage ceremony on the ground that it was forbidden by the church.

The parties then traveled in a wagon about 75 miles to an out-of-the-way place where, according to the testimony of the woman, Brigham Young, jr., another apostle, did marry her to the man in question. At the time this testimony was given Brigham Young, jr., was dead. No person testified to the ceremony except the woman who was married, and she stated that she did not tell Brigham Young that the man whom she was marrying had a wife living, and that so far as she knew he was not informed of that fact by any person.

There was no evidence offered tending to prove that the respondent had any knowledge of this alleged plural marriage until it came out in the testimony before the committee.

Among the cases of alleged plural marriage since 1890, referred to in the evidence, are those of two of the apostles, John W. Tayler and Mathias F. Cowley.

As to Apostle Taylor, L. E. Abbott gave testimony tending to show that it became public talk in or about 1902 that Tayler had then recently taken two plural wives.

As to Apostle Cowley, the testimony is exceedingly indefinite as to whether he took a plural wife at all since 1890, and if so, when.

The respondent was examined as a witness in his own behalf, after the testimony with reference to the alleged recent plural marriages of these two apostles had been introduced, and on this subject testified that he knew nothing about the alleged marriages until the testimony relating to them was introduced here before the committee. He further said that he would ask that an investigation be made by the church authorities, and if it turned out that the charges were true he would not again vote to sustain them as apostles.

The taking of testimony in this case was closed and the case submitted to the committee after argument by counsel in February, 1905. But at the beginning of the present session, it being made known to the committee that it was desired to introduce further evidence on behalf of the protestants, the case was reopened and further testimony was heard on behalf of both the protestants and the respondent. The testimony was closed the second time on March 27, 1906; but, consulting the convenience of counsel for the protestants, the hearing by the committee of the final arguments of counsel in this case was postponed until April 12, 1906.

On account of these delays, for which neither the respondent nor his counsel are in anywise responsible, the case was not finally submitted to the committee for determination until after the final conference of the Mormon Church, which was held at Salt Lake City on April 6, 1906. At that conference it was made known that Tayler and Cowley had resigned from their positions as apostles in the preceding October, and that the resignations had been accepted. The conference approved this action, and also filled the vacancies thus created by new appointments.

We deem it unnecessary to go at length into the evidence relating to the other alleged plural marriages since 1890, for the reason that there is no evidence whatever in the record which even tends to show, as to any such plural marriage, actual or alleged, that the respondent had any knowledge that it was intended such marriage should be celebrated, or that he ever countenanced it in any way, or that, since it took place, he has at any time or in any way expressed approval of it.

In 1890, when the manifesto was promulgated, there were in the Mormon Church, according to church statistics, in the United States some 2,451 polygamous families. In May, 1902, this number had been reduced to 897. How many are left and how many of them are in Utah it is impossible to say; but probably about 500 would be a fair estimate. Many of the heads of these families are of advanced age. The population of Utah at the present time is about 500,000.

These figures strongly tend to show that, as a matter of fact, new polygamous marriages in Utah, in any considerable numbers, can not have taken place since 1890. In further evidence of this fact, and as showing the state of public sentiment as to polygamous cohabitation, we insert here an extract from the Congressional Record of February 5, 1903, page 1729 et seq., showing a statement made by Senator Dubois, who is well known to have familiar knowledge of this subject:

"Mr. DUBOIS. * * * Various causes operated to cause the Mormons to abandon polygamy. There was a feeling among the younger members of the Mormon Church, and a very strong feeling, that polygamy should be done away with. So here was this pressure within the church against polygamy and the pressure by the Government from outside the church against polygamy.

"In 1891, I think it was, the president of the Mormon Church issued a manifesto declaring that thereafter there should be no polygamous marriages anywhere in the Mormon Church. The Mormons were then called together in one of their great conferences, where they meet by the thousands. This manifesto was issued to them by the first presidency, which is their authority, was submitted to them, and all the Mormon people ratified and agreed to this manifesto, doing away with polygamy thereafter.

"The Senator from Maine (Mr. Hale) will recall that I came here as a Senator from Idaho shortly after that, and the Senator from Connecticut (Mr. Platt) will recall how bitter and almost intemperate I was in my language before his committee and on the floor of the other House in the denunciation of these practices of the Mormon Church. But after that manifesto was issued, in common with all of the Gentiles of that section who had made this fight, we said:

"'They have admitted the right of our contention and say now, like children who have been unruly, we will obey our parents and those who have a right to guide us; we will do those things no more.' Therefore we could not maintain our position and continue punishing them unless it was afterwards demonstrated that they would not comply with their promise.

"After a few years in Idaho, where the fight was the hottest and the thickest, we wiped all of those laws from our statute books which aimed directly at the Mormon

people; and to-day the laws on the statute books of Idaho against polygamy and kindred crimes are less stringent than in almost any other State in the Union. I live among those people; and, so far as I know, in Idaho there has not been a polygamous marriage celebrated since that manifesto was issued, and I have yet to find a man in Idaho or anywhere else who will say that a polygamous marriage has been celebrated anywhere since the issuance of that manifesto.

"Mr. HALE. Then it must follow from that, as the years go by and as the older people disappear, polygamy as a practice will be practically removed.

"Mr. DUBOIS. There is no question about it; and I will say to the Senator, owing to the active part which we took in that fierce contest in Idaho, I with others who had made that fight thought we were justified in making this promise to the Mormon people. We had no authority of law, but we took it upon ourselves to assure them that those older men who were living in the polygamous relation, who had growing families which they had reared and were rearing before the manifesto was issued, and at a time when they thought they had a right under the Constitution to enter into polygamous relation—that those older men and women and their children should not be disturbed; that the polygamous man should be allowed to support his numerous wives and their children.

"The polygamous relations, of course, should not continue, but we would not compel a man to turn his families adrift. We promised that the older ones who had contracted those relations before the manifesto was issued would not be persecuted by the Gentile; that time would be given for them to pass away, but that the law would be strenuously enforced against any polygamous marriage which might be contracted in the future."

As further evidence of the same character, we call attention to the testimony of Judge Charles W. Morse, a member of the Methodist Church and one of the judges of the third judicial district of Utah. In May, 1903, by his direction, a special grand jury was convened at Salt Lake City for the purpose of investigating charges that new polygamous marriages were being celebrated. This grand jury was composed of Mormons and non-Mormons. Its report will be found on pages 867 to 870 of volume 3 of the testimony. In their report they say:

"We have investigated thoroughly all such cases brought to our attention by the district attorney and by citizens who have appeared before us, which were reported to have occurred within the jurisdiction of this court, and have not been able to secure evidence that a single case of polygamy has occurred in this district since Utah became a State. The rumors of the commission of this crime seem to have grown out of innocent circumstances, which in ordinary communities would have created no suspicion or scandal, but which here, probably owing to a feature of our territorial history, have been seized upon and the crime assumed without evidence, much to the chagrin and injury of innocent citizens, and greatly to the detriment of our State and its reputation throughout the Nation. Those who prize the fair name of our State and the rights of our neighbors should hereafter be more careful to secure facts and evidence before charging this crime."

Judge McCarty, whose testimony has already been referred to, testified as follows:

"Mr WORTHINGTON. I am coming down to that question next. What is your observation there as to whether, as a matter of fact, the number of people living in polygamy has decreased since 1890 in Utah?

"Mr. MCCARTY. Oh, the change has been phenomenal.

"Mr. WORTHINGTON, Phenomenal?

"Mr. MCCARTY. Yes; phenomenal. There are only a very few. In the little town in which I resided there for over 20 years there were a large number of polygamists. Oh, there must have been in the neighborhood of 20 of them, and I can not call to mind now but three of those old men who are living. They have all died or moved away. Two of them procured divorces, either a church divorce for a plural wife or a divorce in the courts for the legal wife.

"Mr. WORTHINGTON. What town is that to which you refer?

"Mr. MCCARTY. That is Monroe.

"Mr. WORTHINGTON. So that there polygamy is practically extinct?

"Mr. MCCARTY. Yes; and what can be said of Monroe can be said of most other towns in the State.

"Mr. WORTHINGTON. Most other towns in the State?

"Mr. MCCARTY. Yes." (Vol. 3, 8 8, 889.)

The Mormon Church and politics.

As to the charge that the Mormon Church interferes in and controls political affairs in Utah, we find the facts established by the evidence to be substantially as follows:

From the time the Mormons reached Utah, in the summer of 1847, until 1891 there were no political parties in that Territory in the sense in which that expression would be used in other parts of the United States. There grew up in the Territory of Utah during that time two parties, one known as the People's Party, which was comprised exclusively of members of the Mormon Church and was controlled by the leaders of that church, and the Liberal Party, which was composed of non-Mormons.

Owing to controversies concerning polygamy and other matters not in issue elsewhere in the United States, these two parties were not only composed, on the one hand of members of a religious sect and on the other hand of those opposing that sect, but the controversy between the two parties was extremely bitter. It seems not to be controverted that until the year 1891 the People's Party was not only dominated by the church, but practically was the church. But after the manifesto of 1890, hereinbefore referred to, which forbade further polygamous marriages, many members both of the Liberal Party and of the People's Party conceived it to be to the interests of the Territory that the people should divide on party lines as they were divided in other parts of the country, and that the Liberal Party and the People's Party should be disbanded.

In the course of a few months this purpose was carried into effect. The great majority of the voters of the Territory of Utah, Mormons and non-Mormons, became either Republicans or Democrats, and political controversies in the Territory till 1896 and after that time in the State have been waged, as a rule, on the lines of the national political parties.

While it is no doubt true that the habit which the church and the members of the church had followed for so many years prior to the breaking up of the old parties of voters receiving counsel from officials of the church in regard to the selection of candidates for office was not at once completely broken off, yet the evidence further establishes that the improvement in this regard has been very rapid and that of late years the Mormon voters of the State adhere more closely to party lines than the non-Mormons do. We think the evidence establishes the fact that since Reed Smoot became an apostle of the Mormon Church on the 6th day of April, 1900, the Mormon Church has not controlled or attempted to control elections in Utah.

It is claimed, however, that the church, by an instrument called the "Political Rule," has required of its members holding office in the church that before they shall become candidates for any political position they shall receive the consent of the church authorities; and that by this device the church has controlled the election of Senators of the United States.

This political rule will be found on pages 168 to 171, Volume I, of the printed report of the testimony before the committee. The meaning and effect of this instrument were very fully considered in the case of Moses Thatcher, who in 1896 was a candidate before the legislature of the State of Utah for election as Senator of the United States. Thatcher, at the time, was one of the twelve apostles of the church, and he did not seek or obtain the consent of the church authorities to this candidacy. For this offense he was tried before a high church tribunal. The decision of this tribunal, the acceptance thereof by Moses Thatcher, and the acquiescence by the church authorities in the terms upon which he accepted the conclusion of the tribunal, will be found upon pages 563 to 573 of the same volume. Mr. Thatcher was a witness before the committee, and his testimony on this subject will be found on pages 1038 to 1040 of that volume.

The upshot of it all is that the political rule, as construed by these proceedings, left Thatcher, to use his own words, absolutely free as an American citizen, to exercise his rights as such, and left all the officers of the church absolutely free. In his acceptance of the decision of the council Thatcher expressly stipulated that in accepting it he violated none of the engagements theretofore entered into by him, "under the requirements of party pledges respecting the political independence of the citizen who remains untrammeled, as contemplated in the guaranties of the State constitution."

Indeed, in the political rule itself, it is expressly stated that if any officer of the church wishes to become a candidate for a political office, or to enter into any other engagement which will interfere with the duties of his church office, he may do so without soliciting or obtaining the consent of the church or its authorities by resigning his ecclesiastical position. The whole purport and effect of the rule seems to be that high church officials, filling positions which require them to give their time to their ecclesiastical duties, shall not enter into any engagements of any kind, political or otherwise, which require them to abandon or neglect such ecclesiastical duties, without first obtaining the consent of the authorities of the church.

Thus construed, the rule seems to be a reasonable one; but whether reasonable or unreasonable it does not seem to us that it is within the province of the General Government to interfere with it or punish in any way the members of the church because of its promulgation.

The evidence in the case clearly establishes that Mr. Smoot, for some time before he became a candidate for the Senate and even before he became an apostle, was one of the leaders of the Republican Party in the State of Utah; that he had been frequently spoken of either as a candidate for the governorship of the State or the Senate of the United States; that when he became a candidate for the Senate he was, in the words of some of the witnesses, the logical candidate for that office, and that he was elected by the votes of the Republicans in the legislature, Mormons and non-Mormons, and was opposed by the Democrats in that body, Mormons and non-Mormons. He says, in his testimony, that before formally becoming a candidate he went to the first president of the church and obtained the consent of the church to his becoming a candidate.

As already intimated, if that consent had been refused, it meant no more than if he became a Senator he must give up his apostleship.

There has been no evidence offered tending to show that any member of the Mormon Church has ever asked consent to become a candidate for any office and been refused.

The endowment oath.

The only other charge made against the respondent which, in our opinion, merits attention was made in the protest signed by John L. Leilich, as follows:

"That the oath of office required of and taken by the said Reed Smoot as an apostle of the said church is of such a nature and character that he is thereby disqualified from taking the oath of office required of a United States Senator." (1; 28.)

This same charge was in effect made in the protest signed by W. M. Paden and 17 others in the following clause as a deduction from previous statements, rather than a specific charge in itself:

"We submit that however formal and regular may be Apostle Smoot's credentials or his qualifications by way of citizenship, whatever his protestations of patriotism and loyalty, it is clear that the obligations of any official oath which he may subscribe are and of necessity must be as threads of tow compared with the covenants which bind his intellect, his will, and his affections, and which hold him forever in accord with and subject to the will of a defiant and lawbreaking apostolate." (1; 25.)

In the sworn answer made by the respondent to these charges on this subject he says:

"As to the charge that the respondent is bound by some oath or obligation controlling his duty and his oath as a Senator, the respondent says that he has never taken any such oath or in any way assumed any such obligations. He holds himself bound to obey and uphold the Constitution and laws of the United States, including the condition in reference to polygamy upon which the State of Utah was admitted into the Union." (1; 31.)

During the examination of the first witness called by the protestants, Joseph F. Smith, a discussion arose in which Senator Hoar stated that he understood that the committee had reached a conclusion that there were two issues in the case—one whether Reed Smoot had practiced polygamy, which the Senator understood had been abandoned, and that the only other one was whether or not as an official of the Mormon Church the respondent took an oath or obligation that was superior, in his estimation and in its requirements upon him, to the oath or obligation which he must take to qualify him as a Senator.

Thereupon Senator Dubois stated that both these contentions were set aside entirely and that it was not contended that they would be attempted to be proved by the attorneys representing the protestants. (1; 114.) In the course of further discussion a member of the committee having stated that he never knew until Mr. Tayler had stated it that he had abandoned the idea of proving that the respondent had taken an obligation that interfered with the obligations of his oath, Mr. Tayler replied:

"I can not abandon that which I never occupied or possessed."

Senator Dubois added, "He never alleged it." (1; 115.)

On a subsequent day, Senator Beveridge, in order, as he stated, to correct what he thought was a mistake in the popular mind as to what were the charges against the respondent which the committee was considering, said that it had been charged that the respondent was a polygamist, which charge had been withdrawn, and that he had been charged with taking an oath inconsistent with his duty as a Senator, which Senator Beveridge understood Mr. Tayler to say was not a charge that had been withdrawn but was such a charge as had never been made, and that, therefore, the issue upon which the committee would proceed from that time on, so far as the protestants were concerned, was whether the respondent was a member of a conspiracy.

Thereupon Senator Dubois again stated that no charge had been made against Mr. Smoot of taking an oath inconsistent with his oath as Senator except the Leilich

charge, which had been abandoned and repudiated, and that the attorneys for the respondent "have been trying to force the protestants to issues which they themselves have never raised." (Vol. 1, p. 126.)

This was the state of the record when the testimony of Joseph F. Smith and several other witnesses had been taken, and the examination of Francis M. Lyman, one of the apostles, was progressing.

He was asked by the chairman to state what the "ceremony is in going through the endowment house." This being objected to by the counsel for respondent, the chairman said:

"One of the charges is that Mr. Smoot has taken an oath or obligation incompatible with his obligation as a Senator. The object of this question is to ascertain from this witness, who went through the endowment house—of course, I know nothing about it—whether any such obligation is taken."

Counsel for the respondent having thereupon stated that they understood that that charge had been expressly disclaimed by counsel for the protestants, the chairman replied:

"Counsel stated that they did not propose, as far as they were concerned, to offer any proof upon that question, but the chair did not understand that therefore the committee was precluded from showing it." (1; 436.)

A little later in the same session, Mr. Tayler, counsel for the protestants, again stated:

"It is in respect of those two things around which all of this case gathers—polygamy and the direction of the people by the apostolate—and if those two were eliminated this hearing would not be going on here." (1; 463.)

After the chairman of the committee had ruled as above stated that the witness Lyman was required to answer the question his examination on this subject proceeded as follows:

"The CHAIRMAN. Will you please state what the ceremony is in going through the endowment house?

"Mr. LYMAN. I could not do so.

"Mr. WORTHINGTON. I object to that, Mr. Chairman, on the ground that it is inquiring into a matter prior to 1890, and I understood, or we were informed, that the committee had decided that would not be done.

"The CHAIRMAN. One of the charges is that Mr. Smoot has taken an oath or obligation incompatible with his obligation as a Senator. The object of this question is to ascertain from this witness, who went through the endowment house—of course I know nothing about it—whether any such obligation is taken.

"Mr LYMAN. Is that the question you asked me, Mr. Chairman?

"The CHAIRMAN. No; that was not my question. It was a statement to counsel.

"Mr. WORTHINGTON. I had understood, Mr. Chairman, that that was expressly disclaimed by counsel here the other day.

"The CHAIRMAN. Counsel stated that they did not propose, as far as they were concerned, to offer any proof upon that question; but the chairman did not understand that therefore the committee was precluded from showing it. Is there any objection to the question?

"Mr. WORTHINGTON. I do object to it for the reasons already stated; and, further, because it does not follow at all that because the witness went through certain ceremonies or took certain obligations, if you please, Senator Smoot took them.

"The CHAIRMAN. That would not follow of itself. If nothing further than this can be shown, of course it will have no bearing upon Mr. Smoot at all. Read the question, Mr. Reporter.

"The reporter read as follows:

" 'The CHAIRMAN. Will you please state what the ceremony is in going through the endowment house?'

" 'Mr. LYMAN. I could not do so.'

"Mr. WORTHINGTON. I do insist upon my objection. I understood the chair to ask me whether I had any further objection.

"The CHAIRMAN. The Chair thinks it is permissible; and, as the Chair stated, if nothing appears beyond this to connect Mr. Smoot with it, of course it will have no bearing upon the case. Can you state what that ceremony was?

"Mr. LYMAN. I could not, Mr. Chairman; I could not do so if it was to save my life.

"The CHAIRMAN. You could not?

"Mr. LYMAN. No, sir.

"The CHAIRMAN. Can you state any portion of it?

"Mr. LYMAN. I might approximate something of it that I remember.

"The CHAIRMAN. As nearly as you can.

"Mr. LYMAN. I remember that I agreed to be an upright and moral man, pure in my life. I agreed to refrain from sexual commerce with any woman except my wife or wives, as were given to me in the priesthood. The law of purity I subscribed to will-

ingly, of my own choice, and to be true and good to all men. I took no oath nor obligation against any person or any country or government or kingdom or anything of that kind. I remember that distinctly.

"The CHAIRMAN. Of course the charge is made, and I want to know the facts. You would know about it, having gone through the endowment house?

"Mr. LYMAN. Yes.

"The CHAIRMAN. There was nothing of that kind?

"Mr. LYMAN. Nothing of that kind.

"The CHAIRMAN. No obligation or oath?

"Mr. LYMAN. Not at all; no, sir." (1; 436, 437.)

After this had occurred, Joseph F. Smith was recalled, and on this subject was further examined by counsel for the respondent, as follows:

"Mr. TAYLER. I wish to ask two questions. Mr. Smith, something has been said about an endowment oath. I do not want to go into that subject or to inquire of you what it is, but whatever oath or obligation has been taken by those who have been admitted to the church, at whatever stage it is taken, is the same now that it has been for years?

"Mr. SMITH. It is the same that it has always been.

"Mr. TAYLER. It is the same that it has always been?

"Mr. SMITH. Yes; so far as I know.

"Mr. TAYLER. No other oath is taken now than heretofore?

"Mr. SMITH. I should like to say that there is no oath taken; that we abjure oaths. We do not take oaths unless we are forced to take them.

"Mr. TAYLER. I unerstand. You understand what I mean—any obligation——

"Mr. SMITH. Covenant or agreement—we do that.

"Mr. TAYLER. Any obligation of loyalty to the church such as would be proper to be taken?

"Mr. SMITH. Certainly.

"Mr. TAYLER. That is the same now that it has always been?

"Mr. SMITH. Yes, sir; that it has always been, so far as I know. I can only say that they are the same as they were revealed to me.

"Mr. TAYLER. Exactly.

"Mr. SMITH. And as they were taught to me.

"Mr. TAYLER. You have known them for 40 years or more?

"Mr. SMITH. I have been more or less acquainted with them for a great many years." (1; 484.)

It will be seen that neither the witness Lyman nor the witness Joseph F. Smith declined to answer any question that was put to him with regard to this alleged covenant or obligation.

The next witness on the subject (who, like the two preceding witnesses, was summoned and examined on behalf of the protestants), was Brigham H. Roberts. After counsel for the protestants had examined this witness and announced that they had no further questions to ask him, the following occurred:

"The CHAIRMAN. Mr. Roberts, there is another subject upon which I want to ask you a question. It has been stated here that the endowment house was taken down in 1890.

"Mr. ROBERTS. I think earlier than that.

"The CHAIRMAN. Well, at some time it was taken down?

"Mr. ROBERTS. Yes.

"The CHAIRMAN. Did you ever go through the endowment house?

"Mr. ROBERTS. Yes, sir.

"The CHAIRMAN. When?

"Mr. ROBERTS. I think it was in 1877.

"The CHAIRMAN. Have you been present at times when others have passed through the endowment house?

"Mr. ROBERTS. Yes, sir.

"The CHAIRMAN. Frequently?

"Mr. ROBERTS. No, sir.

"The CHAIRMAN. Is the ceremony that used to be performed in what was called the endowment house performed now?

"Mr. ROBERTS. I think so.

"The CHAIRMAN. Where?

"Mr. ROBERTS. When?

"The CHAIRMAN. Where, I say?

"Mr. ROBERTS. In the temples, as I understand it.

"The CHAIRMAN. How many temples are there in Utah?

"Mr. ROBERTS. I believe there are four.

"The CHAIRMAN. And the ceremony that used to be performed in the endowment house is now performed in the temple?

"Mr. ROBERTS. Yes, sir.

"Mr. WORTHINGTON. He says he thinks it is. He does not know.

"The CHAIRMAN. Do you remember the ceremony?

"Mr. ROBERTS. No, sir; I do not remember the ceremonies distinctly.

"The CHAIRMAN. Do you remember any portion of it?

"Mr. ROBERTS. Only in a general way, Senator.

"The CHAIRMAN. Do you know, Mr. Roberts, of any change in the ceremony performed in the endowment house and as it is performed to-day in the temple?

"Mr. ROBERTS. No, sir.

"The CHAIRMAN. The ceremony is the same. Now, will you state to the committee what that ceremony was, or is, as nearly as you can?

"Mr. ROBERTS. Well, the ceremonies consist of what would be considered a series of ceremonies, I take it, of which I only have a general impression.

"The CHAIRMAN. You have something more than a general impression in your own case?

"Mr. ROBERTS. No; I think not.

"The CHAIRMAN. How many days did it take you to go through the Endowment House?

"Mr. ROBERTS. Well, part of one day.

"The CHAIRMAN. Who were present at the time? Do you remember?

"Mr. ROBERTS. I do not remember.

"The CHAIRMAN. Can you tell the committee any portion of that ceremony?

"Mr. ROBERTS. No, sir.

"The CHAIRMAN. Why not?

"Mr. ROBERTS. Well, for one reason, I do not feel at liberty to do so.

"The CHAIRMAN. Why not?

"Mr. ROBERTS. Because I consider myself in trust in relation to those matters, and I do not feel at liberty to make any disclosures in relation to them.

"The CHAIRMAN. It was, then, a secret?

"Mr. ROBERTS. Yes.

"The CHAIRMAN. Does this religious denomination have, as one of its ceremonies, secret obligations or covenants?

"Mr. ROBERTS. I think they could not be properly called secrets. Of course, they are common to all worthy members of the church, and generally known by them.

"The CHAIRMAN. Well, secret from the world?

"Mr. ROBERTS. Secret from the world.

"The CHAIRMAN. The obligations and covenants, whatever they are, then, you are not at liberty to disclose?

"Mr. ROBERTS. No, sir; I would be led to regard those obligations as similar to those who perhaps have passed through Masonic fraternities, or are members of Masonic fraternities.

"The CHAIRMAN. Then, your church organization in that particular is a sort of Masonic fraternity?

"Mr. ROBERTS. It is analogous, perhaps, in some of its features.

"The CHAIRMAN. You say you can remember, of course, what occurred, but you do not feel at liberty to disclose it, and for that reason you will not disclose it?

"Mr. ROBERTS. Not specifically. I do not wish, however, Senator, to be understood as being in any sense defiant in that matter.

"The CHAIRMAN. That is not so understood, Mr. Roberts, at all.

"Mr. ROBERTS. I do not wish to put myself in opposition or raise any issue here at all.

"The CHAIRMAN. The reason you have assigned is accepted. The obligation, whatever it is, taken in the Endowment House, is such that you do not feel at liberty to disclose it?

"Mr. ROBERTS. That is right.

"The CHAIRMAN. Should you do so, what would you expect as the result?

"Mr. ROBERTS. I would expect to lose caste with my people as betraying a trust.

"Senator OVERMAN. Do all members of the church have to go through that?

"Mr. ROBERTS. Not all members.

"Senator OVERMAN. What proportion of them, and how is it regulated?

"Mr. ROBERTS. It is governed chiefly by worthiness—moral worthiness.

"Senator BAILEY. And is it somewhat a matter of degrees, as it is in Masonry? I believe they have several degrees.

"The CHAIRMAN. Do you recall whether any penalty was imposed upon a person who should disclose the covenants?

"Mr. ROBERTS. No, sir.

"The CHAIRMAN. You do not remember?

"Mr. ROBERTS. Beyond the disfavor and distrust of his fellows.

"The CHAIRMAN. Have you ever been present at a marriage ceremony in the temple?

"Mr. ROBERTS. Yes, sir.

"The CHAIRMAN. Could you tell what that is?

"Mr. ROBERTS. I could not, only in a general way. The ceremony is of some length. I remember performing the ceremony in the case of my own daughter when she was married, and, not being familiar with the ceremony, a copy of it was placed in my hands, and I read the ceremony, but I could only remember the general terms of it.

"The CHAIRMAN. If the members who have gone through the Endowment House, then, keep faith with the church they will not disclose what occurred?

"Mr. ROBERTS. No, sir.

"Senator BAILEY. Do you feel at liberty, Mr. Roberts, to say whether or not there is anything in that ceremony that permits a man—I will adopt a different expression—that abridges a man's freedom of political action or action in any respect, except in a religious way?

"Mr. ROBERTS. No, sir.

"Senator BAILEY. I do not quite understand whether you mean by your answer to say that you do not feel free to answer that or that there is nothing.

"Mr. ROBERTS. I mean to say that there is nothing. (1; 740, 742.) * * *

"The CHAIRMAN. I want to ask Mr. Roberts one further question. What is there in these obligations—I will not use the term 'oaths'—that makes it necessary to keep them from the world?

"Mr. ROBERTS. I do not know of anything especially, except it be their general sacredness.

"The CHAIRMAN. Their general sacredness? Ought sacred things to be kept from the world?

"Mr. ROBERTS. I think some sacred things ought to be.

"The CHAIRMAN. Could you name one sacred thing in connection with this ceremony that should be kept from the world?

"Mr. ROBERTS. No, sir.

"The CHAIRMAN. Why? Because you can not remember?

"Mr. ROBERTS. Well, I could not say that. I would not say that, Senator.

"The CHAIRMAN. You do remember it, then—the sacred thing that you mean?

"Mr. ROBERTS. Some sacred things I do.

"The CHAIRMAN. But you can not state to the committee what they are?

"Mr. ROBERTS. I ask to be excused from stating them.

"The CHAIRMAN. But I can not understand exactly how the church organization has things that the world must not know of. I did not know but you could give some reason why.

"Mr. ROBERTS. I do not think I could throw any light upon that subject.

"The CHAIRMAN. All right; I will not press it. (1–743.)

* * * * * * *

"Mr. WORTHINGTON. I would like to ask, Mr. Roberts, whether this obligation or ceremony to which you refer in the Endowment House relates entirely to things spiritual or whether it relates to things temporal also?

"The CHAIRMAN. Would it not be better, Mr. Worthington, to let him state what the obligation is?

"Mr. WORTHINGTON. Yes, so far as I am concerned, I would very much prefer it, but I understand the suggestion by Senator Pettus was that he was interpreting that which he would state.

"Of course I do not know anything more about this than the members of the committee do, but I think it might very well be that a witness might be allowed to state, and might properly say, that he would answer here as to anything that related to any temporal affairs; but as to things which related to matters between him and his God, or which he conceived to be between him and his God, he would not answer here or anywhere else, and that would not be an interpretation, but would simply be taking the protection which I understand the law gives to every man—that as to things which do relate entirely to religious matters they are matters which he has a right to keep within his own breast.

"The CHAIRMAN. Your question was whether these obligations related to spiritual affairs or temporal affairs.

"Mr. WORTHINGTON. Yes; that was my question.

"The CHAIRMAN. The trouble is he interprets a thing which is unknown and unseeable to us, and which he considers spiritual.

"Mr. CARLISLE. What he considers spiritual we might consider temporal, if the matter itself was disclosed.

"The CHAIRMAN. It seems to me that the witness having refused to state what the ceremony is, or what the obligations demand, ought not to be questioned and permitted to state what he thinks it did not convey, or what obligation it imposed, or what it did not impose. The committee can judge of that.

"Mr. WORTHINGTON. Of course, we are here not representing the witness, but representing only Senator Smoot.

"The CHAIRMAN. Yes.

"Mr. WORTHINGTON. And it is the witness pleading a privilege and making the refusal, and not Senator Smoot or his counsel. We would like to have this question answered.

"The CHAIRMAN. What is the question?

"Mr. WORTHINGTON. The question is whether this obligation refers to things spiritual or things temporal.

"Senator BAILEY. I do not think it makes any difference to the committee in the end, or will affect its conclusions, whether that is answered or not. I am partly responsible for that line of questions, and I asked the first question myself because I really intended to insist, if it related in any way to the duties of a citizen, that the committee was entitled to know what that was, and if it did not, then I had no further interest in it.

"The CHAIRMAN. Let the witness answer that question.

"Mr. ROBERTS. May I have the question read?

"The CHAIRMAN. Certainly."

The reporter read as follows:

"Mr. WORTHINGTON. I would like to ask Mr. Roberts, whether this obligation or ceremony to which you refer in the endowment house relates entirely to things spiritual or whether it relates to things temporal also?

"Mr. ROBERTS. I regard them as relating to things spiritual, absolutely.

"Mr. TAYLER. If we were in a court of justice, and insisted upon it, I think that opens the door so wide that the whole oath would come in.

"The CHAIRMAN. I think so, too.

"Mr. TAYLER. But I do not care to do it." (1; 745, 746.)

The next witness called on behalf of the protestants was A. M. Cannon. After his examination by counsel for the protestants was concluded he was further examined by the chairman of the committee on this subject, and his testimony was as follows:

"The CHAIRMAN. Do you remember the covenant you took when you went through the endowment house?

"Mr. CANNON. Oh, yes.

"The CHAIRMAN. Could you state the ceremony?

"Mr. CANNON. I would not like to.

"The CHAIRMAN. Why not?

"Mr. CANNON. Because it is of a religious character, and it is simply an obligation that I enter into to be pure before my Maker and worthy of the attainment of my Redeemer and the fellowship and love of my children and their mothers, my departed ancestry, and my coming descendants.

"The CHAIRMAN. What objection is there to making that public?

"Mr. CANNON. Because it is sacred.

"The CHAIRMAN. How sacred?

"Mr. CANNON. It is simply a covenant that I enter into with my Maker in private.

The CHAIRMAN. All the tenets of your religion are sacred, are they not?

"Mr. CANNON. Sir?

"The CHAIRMAN. They are all sacred, are they not—the teachings?

"Mr. CANNON. All of those are sacred; yes, all of those things.

"The CHAIRMAN. I do not quite understand why you should keep them secret.

"Mr. CANNON. It is because it is necessary to keep them secret. If you will permit me, Mr. Chairman, we admit only the purest of our people to enter there.

"The CHAIRMAN. People like you and the president of the church? I suppose the president of the church is admitted?

"Mr. CANNON. The presidency of the church, if he continues in good standing, and our people whoever are in good standing and deemed worthy of the proper recommends are permitted to enter there.

"The CHAIRMAN. Do you enter into any obligation not to reveal these ceremonies?

"Mr. CANNON. I feel it would be very improper to reveal them.

"The CHAIRMAN. I say, do you enter into any obligation not to?

"Mr. CANNON. There are sacred obligations connected with all the higher ordinances of the church.

"The CHAIRMAN. In words, do you promise not to reveal?

"Mr. CANNON. I feel that that is the trust reposed in me, that I will not go and——

"The CHAIRMAN. I think you do not understand my question. Do you promise specifically not to reveal what occurs in the endowment house?

"Mr. CANNON. I would rather not tell what occurs there. I say this——

"The CHAIRMAN. I think, Mr. Cannon, you do not understand me. Do you promise not to reveal what occurs in the endowment house when you go through?

"Mr. CANNON. I feel that that is an obligation I take upon me when I do that.

"The CHAIRMAN. When you go through the endowment house do you take that obligation upon you in express terms?

"Mr. CANNON. I think I do.

"The CHAIRMAN. You know, do you not, whether you do or not? Why do you take that obligation not to reveal these things?

"Mr. CANNON. Because we are—I do not want to be disrespectful to this committee.

"The CHAIRMAN. I know you would not be.

"Mr. CANNON. The Lord gave us to understand that we should not make common the sacred things that He committed to His disciples. He told them they must not do that lest they trample them under their feet and rend them.

"The CHAIRMAN. Do you remember whether there was any penalty attached if they should reveal?

"Mr. CANNON. I do not remember that there is any penalty.

"The CHAIRMAN. None whatever?

"Mr. CANNON. I do not remember.

"The CHAIRMAN. Has there been any change in the ceremony of the endowment house since you went through, in 1859, up to the present time, that you are aware of?

"Mr. CANNON. No.

"The CHAIRMAN. No change in the ceremony or obligations?

"Mr. CANNON. No." (1; 791, 792.)

The next witness called by the protestant, was Moses Thatcher. After counsel for the protestants had finished their examination of Mr. Thatcher, the following occurred:

"The CHAIRMAN. One other question: The endowment house, I believe, has been taken down?

"Mr. THATCHER. That is as I understand it. It has been taken down.

"The CHAIRMAN. Has the ceremony of the endowment house been wiped out also, or is that performed now?

"Mr. THATCHER. I am just trying to think whether I have been through the temple, in the light in which I went through the endowment house, to give you a correct answer on that, but my impressions are that the ceremony has not been changed.

"The CHAIRMAN. You have seen the ceremony in the temple? You have witnessed it?

"Mr. THATCHER. I think I have heard it.

"The CHAIRMAN. And you think there is no change in it?

"Mr. THATCHER. No, sir.

"The CHAIRMAN. When did you go through the endowment house?

"Mr. THATCHER. My impressions are when I married the wife of my youth—in 1861.

"The CHAIRMAN. Will you state to the committee the ceremony in the endowment house? I do not mean the ceremony of marriage; but did you go through the endowment house when you became an apostle?

"Mr. THATCHER. No, sir; it was not necessary.

"The CHAIRMAN. You have been through the endowment house, then, but once?

"Mr. THATCHER. Yes, sir.

"The CHAIRMAN. Will you state to the committee the ceremony of the endowment house?

"Mr. THATCHER. I think, Mr. Chairman, that I might be excused on that.

"The CHAIRMAN. Why?

"Mr. THATCHER. For the reason that those were held to be sacred matters and only pertaining to religious vows.

"The CHAIRMAN. Are you obligated not to reveal them?

"Mr. THATCHER. Yes; I think I am.

"The CHAIRMAN. What would be the effect if you should disclose them? That is, is there any penalty attached?

"Mr. THATCHER. There would be no effect except upon my own conscience.

"The CHAIRMAN. That is all?

"Mr. THATCHER. That is all.

"The CHAIRMAN. But you are under obligation as a part of the ceremony not to reveal it?

"Mr. THATCHER. Yes, sir; I feel myself under such obligation." (1; 1048, 1049.)

This was all the testimony on the subject of the alleged oath or obligation taken during the sessions of the committee held in the spring of 1904. The last session when testimony was taken during that spring occurred on the 2d of May, 1904. When the taking of testimony was resumed in December, 1904, counsel for the protestants produced and examined certain witnesses on this subject, the substance of whose testimony will now be stated.

J. H. Wallis, sr., who had been a Mormon but who had formally notified the bishop of his ward, seven or eight months before he was examined, that he no longer considered himself a member of the church, testified that on several occasions he had taken his endowments in the temple at Salt Lake City. When first examined he said that he did not know whether he had it exactly right; but that the substance of the so-called "oath of vengeance" is that those who took it promised and vowed that they "will never cease to importune high Heaven to avenge the blood of the prophets on the nations of the earth or the inhabitants of the earth." He added that if his memory served him, he thought that was about right, and that a passage of scripture is quoted from the Revelations, sixth chapter, ninth verse. (2; 79.)

The next day Mr. Wallace was recalled and testified that in repeating the obligation he had made a mistake; and that he should have said "upon this nation" instead of "upon the inhabitants of the earth." (2; 148.)

Two witnesses were called on behalf of the respondent to impeach Wallis. One of them, Moroni Gillespie, who had been a member of the police force in Salt Lake City for 11 or 12 years, testified that he knew Wallis's general reputation for truth and veracity in the community in which he lived; that it was bad; and that he would not believe him under oath. Wallis had testified that he had never been arrested.

This witness testified that he was present in the police court on one occasion when Wallis was under arrest and plead guilty to the charge of drunkenness. Gillespie further testified that he had known Wallis for several years and that, in his opinion, he was not altogether of sound mind. (3; 317, 318.)

The other witness as to the veracity of Wallis was William Langton. (2; 1022; 3; 143, 144.) Neither his testimony nor that of Gillespie was contradicted or impaired in any way. His conclusion, from what he had seen of Wallis, was that the man was crazy. He further testified that, in his opinion, Wallis's general reputation for truth and veracity was such that he would not believe him on oath.

When Langton was asked by counsel for the respondent to give his reasons for thinking that Wallis was of unsound mind, objection was made by the counsel for the protestants and the objection was sustained. (3; 144.) But subsequently he was recalled and allowed to give his reasons, which he did at length. (3; 445.)

August W. Lundstrom, another witness for the protestants, testified that he had taken the endowment six times, and that the obligation in question was:

"We and each of us solemnly promise and covenant that we shall ask God to avenge the blood of Joseph Smith upon this nation." (2; 151–153.)

He subsequently slightly varies this statement by saying that the prayer was: "We ask God, the Eternal Father, to avenge the blood of Joseph Smith upon this nation." (2; 161.)

Three witnesses were called on behalf of the respondent to impeach Lundstrom. One of them, F. S. Fernstrom, testified that he had known Lundstrom for about 14 years, and Lundstrom's general reputation for truth in the community in which he lived was bad, and that he, witness, would not believe him under oath. On cross-examination by counsel for the protestants the fact was brought out that Lumdstrom had borrowed from his bishop part of a fund which the bishop had collected for the support of the poor, and that when asked by the bishop to return the money, Lundstrom refused to do it, saying that the church owed him a living (2; 1012.)

One of these witnesses, C. V. Anderson, testified that he knew Lundstrom's general reputation for veracity in Salt Lake City, where he lived; that it was bad; and that the witness did not think he would believe Lundstrom on oath. (2; 1013.)

J. H. Hayward was the third witness on this subject. He testified that he had known Lundstrom for many years, the latter having been at one time in his employ; that he knew Lundstrom's general reputation for truth and veracity in Salt Lake City, where he lived; that it was bad; and that from his reputation the witness would not believe him under oath.

This evidence as to Lundstrom's reputation for truth and veracity was not rebutted in any way.

The third and last witness called by the protestants, during the sessions of the committee held in December, 1904, on this subject of the alleged obligation was Mrs.

Annie Elliott, who testified that she had taken the endowments several times, and that during the ceremony "they told me to pray and never cease to pray to get revenge for the blood of the prophets on this nation, and also teach it to my children and children's children." (2; 189.)

On cross-examination this witness stated positively that she had never told anybody about this obligation; and that if Mr. Tayler was examining her from a memorandum informing him what her testimony would be she did not know where it came from or how Mr. Tayler came to get it. (2; 194.) On her direct examination Mrs. Elliott stated that she was married in Denmark and that her husband followed her to this country. Her examination by counsel for the protestants then proceeded as follows:

"Mr. TAYLER. Is he living now—that is, the husband whom you married in Denmark.

"Mrs. ELLIOTT. No, sir.

"Mr. TAYLER. You lived with him until he died, did you?

"Mrs. ELLIOTT. Yes, sir.

"Mr. TAYLER. Where did he die?

"Mrs. ELLIOTT. Why, in Elsinore.

"Mr. TAYLER. In Utah?

"Mrs. ELLIOTT. Yes, sir.

"Mr. TAYLER. When?

"Mrs. ELLIOTT. In 1897.

"Mr. TAYLER. Did you, after his death, marry?

"Mrs. ELLIOTT. Yes, sir; I married in 1899." (2; 184.)

On her cross-examination, after she had testified that she had left the church in 1897, the following occurred:

"Mr. WORTHINGTON. Was it before or after the death of your first husband?

"Mrs. ELLIOTT. Why, it was after.

"Mr. WORTHINGTON. What time in 1897 did he die?

"Mrs. ELLIOTT. He died in October." (2; 191.)

The value of the testimony of this witness may be judged by the fact that the husband who followed her to this country not only did not die in October, 1897, but was living at the time Mrs. Elliott gave the testimony in question; and was subsequently called as a witness on behalf of the respondent. (2; 1015.) He testified that she had obtained a divorce from him about six years before he gave his testimony, which was in January, 1905. His testimony showed clearly that she knew he was living when she said he was dead.

On behalf of the respondent a number of witnesses were examined on this subject. and the substance of their testimony is as follows:

Hugh M. Dougall, who is a farmer and cattle grower, and is postmaster at the town of Springville, in Utah, was expelled from the Mormon Church about 1874, and since then has not been in any way connected with it. He took his endowments when he was about 25 years old.

He testified that according to his recollection the obligation was, in substance, that those who took it importuned heaven to avenge the blood of the prophets and the martyrs on this generation, and that he did not remember the name of Joseph Smith being mentioned at all. (2; 759.)

Mr. Dougall was subsequently recalled, and asked by Senator Knox this question:

"Are you willing to say whether the vow obligated you to anything incompatible with your giving full and supreme allegiance to the United States or the State of Utah, or which obligated you to anything incompatible with your fully performing your duty as a citizen of the United States and that State?"

He answered: "Not one thing." (2; 781.)

Alonzo A. Noon left the Mormon Church voluntarily about 1870, when he was 32 years of age, having taken his endowments when he was 28 or 30 years old. He stated that there was nothing in the ceremony about promising or vowing to importune heaven to avenge the blood of the prophets on this nation, and that there was nothing in the ceremony which in any way imported hostility to the United States or to the Government thereof. That he was perfectly clear about that.

He also said he did not remember that the name of Joseph Smith was used in the ceremony. He did recollect that there was in the ceremony a quotation from the Scriptures, and upon hearing read verses 9 and 10, chapter 6, of the Revelations, he said that it was something like that; that that was about the intent.

One of these verses, it will be remembered, was referred to by the witness Wallis.

The two verses are as follows:

"Nine. And when he had opened the fifth seal, I saw under the altar the souls of them that were slain for the word of God, and for the testimony which they held.

"Ten. And they cried with a loud voice saying: How long, Oh Lord, holy and true, dost Thou not judge and avenge our blood on them that dwell on the earth." (774.)

Being asked whether there was anything in the obligation which indicated hostility to the Government, Mr. Noon said:

"The very reverse. I have never heard any people taught only loyalty to the Government of the United States." (2; 775.)

Mr. Noon was recalled and asked the same question that had been propounded by Senator Knox to Mr. Dougall, and he answered the question in the same way. (2; 781.)

William Hatfield, who was a Mormon until he was 23 years of age, after which he drifted away from that church, when he was not quite 21 years of age took his endowments as a preliminary to his marriage. (2; 785.)

He said that neither he nor any others in his hearing took the obligation which Wallis had testified to, and that he did not at that time take any obligation or enter into any covenant, vow, or agreement of any kind inconsistent with his duties as a citizen of the Territory of Utah or of the United States. He was not cross-examined. (2; 796.)

John P. Meakin, who was a Mormon until he was 23 or 24 years of age, left the church because he did not believe in polygamy. (2; 796.)

He went through the Endowment House when he was 18 years old. He stated that he had no recollection at all of any obligation of vengeance or retribution, and that nothing took place at the time with reference to promising or vowing to importune heaven to avenge the blood of the prophets on this nation, or to avenge the blood of Joseph Smith on anybody; that there was nothing took place which imported any obligation in opposition to his duty as a citizen either of the Territory of Utah or of the United States; that he was very clear about this. (799.)

He also said that there was nothing in the endowment ceremony about praying the Almighty to avenge the blood of the prophets on this generation. (2; 801.)

Elias A. Smith, cashier of the Deseret Savings Bank, in Salt Lake City, in answer to a question by the chairman, stated that he had conscientious scruples against divulging any part of the endowment ceremony (2; 854); but in answer to a question by Senator Foraker he said there was nothing in any obligation of the church which it imposed upon its members, in connection with marriage or at any other occasion, inconsistent with fidelity as citizens of the National Government or to the State Government. Mr. Smith persisted that while he had stated what was not in the obligation he did not feel at liberty to state what was in it. (2; 855).

Richard W. Young, who was a graduate of West Point and of the law school of Columbia College, New York City, and who had served in the Volunteer Army in the Spanish war, in the Philippines, and elsewhere, is a member of the Mormon Church, and is not a polygamist. (2; 950–952.) He was asked by the chairman if he had any objection to disclosing what took place during the endowment ceremony, and he replied that he considered himself under an obligation not to do so. (2; 969.)

He was asked later by counsel for the respondent if he had any objection to stating whether the ceremony included, in any form or shape, any invocation of vengeance or retribution against this nation. Senator McComas suggested that the witness should state the whole ceremony or nothing. Thereupon an extended argument was made, at the end of which the witness was asked by counsel for the respondent:

"In that ceremony is there anything which relates to your duties or obligations to your Government or to this nation?"

The chairman ruled that if the witness should answer this question he would be required to state the whole ceremony, and thereupon the witness declined to answer it. (2; 981–985.)

Reed Smoot testified positively that there is nothing in the endowment ceremony about avenging the blood of the prophets or avenging anything else on this nation or on this Government. (3; 183, 184.)

As already stated, the case was reopened during the present session of Congress for the purpose of allowing the introduction of further testimony on behalf of the protestants, and four additional witnesses were roduced with preference to the matter of the alleged obligation. No further testimony on the subject was taken on behalf of the respondent.

The four witnesses referred to were W. J. Thomas, J. P. Holmgren, H. W. Lawrence, and W. M. Wolfe.

The witness Thomas testified that he passed the endowment house in 1869. His examination on this subject was as follows:

"Mr. CARLISLE. I have asked you about whether any ceremonies took place before the oath or obligation took place? If so, state what it was.

"Mr. THOMAS. There were washings and anointings there.

"Mr. CARLISLE. Describe to the committee what you mean by anointing. Was your whole body anointed or your arm anointed; and, if so, was anything said when that was done?

"Mr. THOMAS. My head was anointed and my right arm. I do not remember anything else.

"Mr. CARLISLE. Was anything said by the person who conducted these ceremonies at the time he anointed your right arm? Were you told what it was for?

"Mr. THOMAS. Yes, sir; he spoke very quick and I couldn't catch it all, but I remember when he anointed my arm to make it strong, and the substance of it was that I would avenge the blood of the prophets—prophet or prophets. I believe it was the plural. (4; 69.)

* * * * * * *

"Senator KNOX. You took this vow in what year?

"Mr. THOMAS. In 1869.

"Senator KNOX. How long did you remain in the church after that?

"Mr. THOMAS. I remained in the church up until 1880.

"Senator KNOX. That was eleven years; and you vowed to avenge the blood of the martyrs upon this nation, did you?

"Mr. THOMAS. Yes, sir.

"Senator KNOX. And your right arm was anointed to give you strength that you might do so. Is that correct?

"Mr. THOMAS. That is the way I understood it.

Senator KNOX. What did you ever do in the line of keeping that vow? Did you ever avenge the blood of the martyrs upon this nation?

"Mr. THOMAS. No, sir. I have enlisted twice to try and defend the nation.

"Senator KNOX. Were you ever stirred up by the authorities of the church to get busy in that direction of avenging the blood of the martyrs upon this nation?

"Mr. THOMAS. No.

"Mr. WORTHINGTON. Do you know of any member of the church who did do anything in the way of using his right arm to avenge the blood of the prophets on this nation?

"Mr. THOMAS. No, sir." (4; 71, 72.)

The witness Holmgren on this subject testified that he passed through the endowment house in 1889. His further examination on this subject is as follows:

"Mr. CARLISLE. Do you remember the ceremonies that took place at that time?

"Mr. HOLMGREN. Part of it.

"Mr. CARLISLE. Are you willing to state the oath that was taken, or not? If you are not, I shall not press you.

"Mr. HOLMGREN. What I understood and heard of it—sure.

"Mr. CARLISLE. In the first place, what occurred?

"Mr. HOLMGREN. In the endowment house?

"Mr. CARLISLE. Yes.

"Mr. HOLMGREN. There were a number of oaths and performances that were insignificant, I would say, until we came to the anointing room, and in that anointing room there was some language used that I am sorry I ever heard.

"Mr. CARLISLE. Can you state what it was?

"Mr. HOLMGREN. In anointing my arms, the gentleman used this language: 'That your arms might be strong to avenge the blood of Joseph and Hyrum Smith.'" (4; 76, 77.)

The witness Lawrence, who was 70 years old at the time he testified, stated that he was a member of the Mormon church until 1869, and that he had taken or administered the alleged obligation in question a number of times. The following are the substantial parts of his testimony on this point:

"M. CARLISLE. Mr. Lawrence, would you object to stating whether there is any oath, commonly called here the oath of vengeance, taken in the endowment house, and what it is?

"Mr. LAWRENCE. Yes; there is.

"Mr. CARLISLE. Can you state it in terms or in substance?

"Mr. LAWRENCE. 'You covenant and agree before God and angels and these witnesses that you will avenge the blood of the prophets, the prophet Joseph Smith, Hyrum Smith, Parley P. Pratt, David Patton'—their names are mentioned.

"Mr. CARLISLE. Was that the case when you took the endowment?

"Mr. LAWRENCE. Yes, sir. I do not know whether they were all mentioned when I was there or not, but they have been mentioned when I have been there.

"Mr. CARLISLE. You have passed through the endowment a number of times?

"Mr. LAWRENCE. Yes; I have been there a number of times.

"Mr. CARLISLE. You mean these names have been mentioned some of the times when you passed through? That is what you mean?

"Mr. LAWRENCE. Yes, sir.

"Mr. CARLISLE. You do not know whether they were all mentioned at the same time or not?

"Mr. LAWRENCE. No, sir.

"Senator DILLINGHAM. Do I understand the witness has given the whole of the obligation?

"Mr. CARLISLE. I will ask him. Do you remember now whether there was anything said about vengeance upon the people or vengeance upon the nation, or what was said of that sort, if you remember?

"Mr. LAWRENCE. I say it has been stated. I can not state it only as I understand it. The word 'nation' was not mentioned where I was in regard to that vengeance, but the feeling has always been against the nation and the State for allowing that deed to be perpetrated. The word 'nation' was not mentioned. It is a little ambiguous in regard to that.

"Mr. WORTHINGTON. You say you are ambiguous or it was ambiguous?

"Mr. LAWRENCE. It was a little ambiguous there who it should be executed on. The supposition is it should be executed on the perpetrators of the deed.

"Mr. CARLISLE. Mr. Lawrence, I will get you to state, if you can, whether this covenant, or oath, or whatever it may be called, is always administered by the same person and in the same terms, or whether it is administered at different times by different persons, and whether it is in writing or merely oral.

"Mr. LAWRENCE. It is administered orally by different persons at different times.

"Mr. CARLISLE. It may be, then, that there is a different form of the oath?

"Mr. LAWRENCE. It may be administered a little different. Of course the substance is about the same, but there may be some men who administer it a little different from others. I have no doubt that it is, from what I have heard.

"Mr. CARLISLE. You may take the witness.

"Senator KNOX. Was this vengeance to be executed by the person taking the oath, or vow, or were you to implore the Almighty to avenge the blood of the prophets?

"Mr. LAWRENCE. As I say, it was a little ambiguous in regard to that. Of course you take an oath to avenge the blood of the prophets and teach the principle to your children and children's children.

"Senator KNOX. I think you do not understand me. You stated a moment ago that there was some ambiguity in the oath as to whom the vengeance is directed against.

"Mr. LAWRENCE. Yes.

"Senator KNOX. Now, I am asking you who was to execute the vengeance. Was the person taking the vow or oath to execute it or were they to implore by prayer that God should take this vengeance?

"Mr. LAWRENCE. Well, that was not inserted in it for the Lord to do it. They simply took upon themselves the oath to do it; but I say it is almost impossible for them to wreak vengeance, because those men that committed the deed have probably gone years ago.

"Senator KNOX. My question was based on the exact language used by Prof. Wolfe yesterday. He said that he heard the oath taken very recently, and that they vowed or promised that they would pray to Almighty God to avenge the blood of the prophets. I think it is quite material, and I want to know what your recollection is about it.

"Mr. LAWRENCE. That was not inserted in my day—that is, in regard to asking God to wreak this vengeance. (4; 108, 109.)

* * * * * * *

"Mr. WORTHINGTON. Tell us about how many times you were present when this oath was administered.

"Mr. LAWRENCE. I could not say. It would go into the hundreds, probably.

"Mr. WORTHINGTON. Several hundred times?

"Mr. LAWRENCE. Yes; or dozens. I would say from one to three years, probably.

"Mr. WORTHINGTON. And on each occasion to a great many people, I suppose.

"Mr. LAWRENCE. Yes, sir.

"Mr. WORTHINGTON. On all the occasions when you heard it administered to others, or when it was administered to you, did you ever hear any reference to the nation of the United States as the object of vengeance?

"Mr. LAWRENCE. During my administration the word 'nation' was not used.

"Mr. WORTHINGTON. Do you mean you administered the oath?

"Mr. LAWRENCE. No, sir; yes, sir. I mean I officiated there with the rest of them.

"Mr. WORTHINGTON. Then you both administered the covenent and you heard others administer it?

"Mr. LAWRENCE. Yes, sir.

"Mr. WORTHINGTON. You administered it hundreds of times and you heard it administered hundreds of times; is that right?

"Mr. LAWRENCE. I was there off and on for one or two years.

"Mr. WORTHINGTON. Did you administer it hundreds of times?

"Mr. LAWRENCE. I will say yes. (4; 110, 111.)

* * * * * * *

"Mr. WORTHINGTON. Now, I come back. During all the time you administered the oath, or heard it administered by others, did you ever hear the 'nation' or the 'United States,' or the 'Government of the United States' referred to in any way as the object of vengeance that was the subject of that covenant?

"Mr. LAWRENCE. I will say that at that time it was not connected with the obligation. I will say this, that the Government has always been blamed for allowing that deed to be perpetrated.

"Mr. WORTHINGTON. Don't let us depart from the ceremony. I want to find out what took place at the ceremony when you administered the covenant. Did you administer it always in the same language?

"Mr. LAWRENCE. I tried to, sir.

"Mr. WORTHINGTON. Where did you learn it?

"Mr. LAWRENCE. I learned it from the church ritual, I suppose. It was what was given to me.

"Mr. WORTHINGTON. Was it something that was in writing or was it in print?

"Mr. LAWRENCE. No, sir; not in writing.

"Mr. WORTHINGTON. It was communicated to you orally and you committed it to memory, did you?

"Mr. LAWRENCE. Yes, sir.

"Mr. WORTHINGTON. You do not remember who gave it to you?

"Mr. LAWRENCE. I do not remember just now.

"Mr. WORTHINGTON. It was given to you as the traditional oath of the temple, was it not?

"Mr. LAWRENCE. It was given to me to use.

"Mr. WORTHINGTON. You have said to Mr. Carlisle that there is no doubt that the language of the covenant was varied from time to time. Did you ever hear it given in any other form than that you have told us about?

"Mr. LAWRENCE. Yes. I will explain that. I have said that there were different parties that officiated at different times, and from what I had heard they had changed it a little. Inasmuch as it was orally given, one man would administer it a little different from others.

"Mr. WORTHINGTON. You know that by hearsay?

"Mr. LAWRENCE. I know that by hearsay only. (4; 111, 112.)

* * * * * * *

"Mr. WORTHINGTON. Referring to this ceremony, and the covenant of vengeance, as it is called, do you remember in that connection whether there was any passage in the Book of Revelations of the Bible?

"Mr. LAWRENCE. Yes, sir.

"Mr. WORTHINGTON. What is that?

"Mr. LAWRENCE. That is used in connection with this as a justification for it.

"Mr. WORTHINGTON. Can you give us the verse and chapter of Revelations?

"Mr. LAWRENCE. I think it is a chapter from Revelations. It is probably chapter six. It is taken from Revelations. It is simply referred to. I will answer that that quotation is referred to.

"Mr. WORTHINGTON. Was it not a part of the teaching of the church, when you were connected with it, that the Constitution of the United States is an inspired document?

"Mr. LAWRENCE. Yes, sir. Do you want an answer to that?

"Mr. WORTHINGTON. I have all the answer I care to have, sir. If there is anything you wish to add to take away from the effect of your testimony, you have that privilege, provided it is not a speech. Let me read the ninth and tenth verses of the sixth chapter of Revelations, and see if those——

"Mr. LAWRENCE. 'How long, Oh Lord?' It is just a quotation.

"Mr. WORTHINGTON. I will read the two, and see if those two verses, or either of them, are the ones to which you refer:

" 'And when he had opened the fifth seal I saw under the altar the souls of them that were slain by the Word of God, and by the testimony which they held.

"'And they cried with a loud voice, saying, How long, Oh Lord, Holy and true, dost thou not judge and avenge our blood on them that dwell on the earth?'

"Mr. LAWRENCE. That is part of it in connection with this?

"Mr. WORTHINGTON. We would like to have the whole of it. Just show us all that was referred to in your ceremony there.

"Mr. LAWRENCE. 'How long, Oh Lord, Holy and true.'

"Mr. WORTHINGTON. 'Dost thou not judge and avenge our blood on them that dwell on the earth?'

"Mr. LAWRENCE. I think that was the part connected with it—just that part.

"Mr. WORTHINGTON. You say that was used as a justification of the covenant, in connection with it?

"Mr. LAWRENCE. That was used as a justification of the obligation.

"The CHAIRMAN. He did not say as a justification of the covenant.

"Mr. LAWRENCE. I said that was used as a justification of the obligation." (4; 116, 117.)

It will be seen that all three of these witnesses flatly contradicted what seems to be the theory of the protestants, that the obligation in question involved a promise on the part of the party going through the ceremony hostile to the United States or an appeal to the Almighty to inflict punishment on the nation.

The other witness on the point now under consideration is W. M. Wolfe. He testified that he had passed through the endowment house no less than 12 times, the first time being in May, 1894, and the last time in October, 1902. His examination on this subject then proceeded as follows:

"Mr. CARLISLE. Will you state to the committee whether there is, as part of the ceremonies in the temple, any oath administered?

"Mr. WOLFE. There are several oaths administered.

"Mr. CARLISLE. Can you state what they are?

"Mr. WOLFE. There is an oath of chastity, or, I might say, a covenant or law—a law of sacrifice and a law of vengeance.

"Mr. CARLISLE. When you say a law of vengeance, what do you mean? Do you mean that there is any promise or pledge to avenge a wrong, or do you mean simply that there is some law read to you, or some rule read to you?

"Mr. WOLFE. There is no covenant or agreement on the part of any individual to avenge anything.

"Mr. CARLISLE. Just state to the committee what it is.

"Mr. WOLFE. The law of vengeance is this: 'You and each of you do covenant and promise that you will pray, and never cease to pray, Almighty God to avenge the blood of the prophets upon this nation, and that you will teach the same to your children and your children's children unto the third and fourth generations.' At the conclusion the speaker says: 'All bow your heads and say' "Yes."

"Mr. CARLISLE. Was that done?

"Mr. WOLFE. It was done.

"Senator OVERMAN. Was that done every time, or just one time?

"Mr. WOLFE. It was done every time I went through." (4; 7.)

Mr. Wolfe, for several years, and up to January last, was one of the professors in the Brigham Young College, at Logan, a Mormon institution. When asked on cross-examination whether charges of drunkenness had not been preferred against him in the institution, he said that no such charges had been made, to his knowledge, but that such charges might have been preferred against him. Upon being asked what he meant by saying that such charges might have been preferred against him, he answered that he meant that he had made himself liable to such charges for a period of possibly 20 years. (4; 24.)

He admitted that certain officers of the institution had had conversations with him in regard to his habit of drinking (4—25). He admitted that he had been required to resign his position in January last; but claimed that this was done because about that time he had given notice that he would no longer pay tithing. He admitted that officers of the institution had made objection to his habits of drinking, but said that they had never suggested his removal, or the desirability of his resignation until he had refused to pay tithes. (4; 26.)

As to Wolfe's testimony, the respondent offered considerable testimony in rebuttal. One of the witnesses on this subject was James H. Linford, the president of Brigham Young College. He testified fully as to Wolfe's habit of drinking for a considerable period prior to the time he was compelled to resign; and testified, in substance, that Wolfe's resignation was not demanded on account of his refusing to pay tithes, but because his habits of drinking had grown on him so that it was no longer possible to allow him to retain his position. (4; 261, 271.)

There was also filed on behalf of the respondent the affidavit of Joseph E. Cardon, the bishop of the ward at Logan, in which Wolfe lived. This affidavit was admitted as evidence by consent of counsel for the protestants and by leave of the committee. In this affidavit the witness contradicts what Wolfe stated in his testimony with reference to a conversation with the witness on the subject of tithing.

Wolfe was also contradicted, in a very material part of his evidence, by four witnesses. He had preferred charges against one Benjamin Kluff, in connection with a certain expedition that had been made to Mexico, of which expedition Kluff was in charge, and Wolfe was a member. Wolfe testified that on that expedition he had seen Kluff living in marital relations with one Florence Reynolds, who is alleged to have been Kluff's plural wife, taken since the manifesto. Wolfe testified that, at the hearing of these charges before a church council, he had stated that he had seen Kluff and Florence Reynolds living in that relation.

By consent of counsel for the protestants, and by leave of the committee, there were filed the affidavit of the stenographer who took down Wolfe's statement, and the joint affidavit of the three members of the committee before whom he made his statement, all of them saying that he had not in any way referred to the fact that he had seen Kluff and Florence Reynolds living together, and that he did not in any way refer to the relations between those two people. (4; 302, 408, 409.)

Taking all of the testimony on this subject together, the overwhelming weight of it is against the contention that the respondent ever took any obligation of hostility to the United States. Seven witnesses have in an indefinite way testified that the obligation included some kind of a promise or prayer indicating hostility to the Nation, while 13 witnesses, about one-half of whom were called on behalf of the protestants, have testified positively and unqualifiedly to the contrary. All of the witnesses who have testified that the word "nation" was used in the obligation have been impeached as to their credibility, and no evidence has been introduced tending to sustain the veracity of any one of them. (Cong. Rec., vol. 40, pp. 8218–8238.)

MONDAY, JUNE 11, 1906.

Mr. Bailey made a statement to the effect that while he concurred in the conclusion of the majority that Senator Smoot was not entitled to continue as a Member of the Senate, it was his opinion that he could not be deprived of his seat, under the Constitution, except by expulsion. (Cong. Rec., vol. 40, p. 3238.)

[Fifty-ninth Congress, second session.]

The resolution submitted to the Senate by the Committee on Privileges and Elections relative to the right of Mr. Smoot to a seat in the Senate as a Senator from the State of Utah was debated in the Senate December 11, 1906 (Cong. Rec., vol. 41, pp. 241–255); December 13, 1906 (ibid., pp. 248–330); January 11, 1907 (ibid., pp. 933–945); January 22, 1907 (ibid., pp. 1486–1501); January 30, 1907 (ibid., pp. 1933–1934); February 11, 1907 (ibid., pp. 2681–2688); February 14, 1907 (ibid., pp. 2934–2939); February 19, 1907 (ibid., pp. 3268–3281); February 20, 1907 (ibid., pp. 3404–3428).

Speeches and statements favoring resolution: That Reed Smoot is not entitled to a seat in the Senate as a Senator from the State of Utah: Mr. Burrows (Cong. Rec., vol. 41, pp. 241–255, 3418–3428); Mr. Dubois (ibid., pp. 330–348, 3404–3408); Mr. Berry (ibid., pp. 2681–2688); Mr. Hansbrough (ibid., pp. 3413–3414); Mr. Bacon (ibid., pp. 3416–3417); Mr. Newlands (ibid., p. 3428).

Speeches and statements against resolution: Mr. Hopkins (ibid., pp. 933–945); Mr. Sutherland (ibid., pp. 1486–1501); Mr. Knox (ibid., pp. 2934–2939); Mr. Dillingham (ibid., pp. 3270–3281); Mr. Beveridge (ibid., 3408–3413); Mr. Foraker (ibid., pp. 3414–3416); Mr. Dolliver (ibid., pp. 3417–3418).

Mr. Smoot made a statement in the Senate on February 19, 1907 (ibid., pp. 3268–3270).

WEDNESDAY, FEBRUARY 20, 1907.

The Senate resumed the consideration of the following resolution reported by Mr. Burrows from the Committee on Privileges and Elections on June 2, 1906:

"*Resolved*, That Reed Smoot is not entitled to a seat in the Senate as a Senator from the State of Utah."

After debate,

On motion of Mr. Hopkins to amend the resolution by inserting after the word "Resolved" the following words: "Two-thirds of the Senators present concurring therein."

It was determined in the affirmative—yeas, 49; nays, 22

On motion by Mr. Carmack to amend the resolution as amended by inserting in lieu thereof the following:

"*Resolved*, That Reed Smoot, a Senator from Utah, be expelled from the Senate of the United States."

It was determined in the negative by the following vote:

Yeas.—Messrs. Bacon, Berry, Burrows, Carmack, Clapp, Clarke of Arkansas, Clay, Culberson, Dubois, Frazier, Hale, Hansbrough, Hemenway, Kittredge, La Follette, Latimer, McCreary, McLaurin, Money, Newlands, Overman, Pettus, Rayner, Simmons, Smith, Stone, and Tillman—27.

Nays.—Messrs. Aldrich, Allee, Ankeny, Beveridge, Blackburn, Brandegee, Bulkeley, Burkett, Burnham, Clark of Montana, Clark of Wyoming, Crane, Curtis, Daniel, Depew, Dick, Dillingham, Dolliver, Du Pont, Flint, Foraker, Frye, Fulton, Gallinger, Gamble, Heyburn, Hopkins, Kean, Knox, Lodge, Long, McCumber, Millard, Mulkey, Nelson, Nixon, Penrose, Perkins, Piles, Spooner, Sutherland, Warner, and Warren—43.

On the question of agreeing to the resolution as amended, it was determined in the negative by the following vote:

Yeas.—Messrs. Bacon, Berry, Burrows, Carmack, Clapp, Clarke of Arkansas, Clay, Culberson, Dubois, DuPont, Frazier, Hale, Hansbrough, Hemenway, Kittredge, La Follette, Latimer, McCreary, McLaurin, Money, Newlands, Overman, Pettus, Rayner, Simmons, Smith, Stone, and Tillman.—28.

Nays.—Messrs. Aldrich, Allee, Ankeny, Beveridge, Blackburn, Brandegee, Bulkeley, Burkett, Burnham, Clark of Montana, Clark of Wyoming, Crane, Curtis, Daniel, Depew, Dick, Dillingham, Dolliver, Flint, Foraker, Frye, Fulton, Gallinger, Gamble, Heyburn, Hopkins, Kean, Knox, Lodge, Long, McCumber, Millard, Mulkey, Nelson, Nixon, Penrose, Perkins, Piles, Spooner, Sutherland, Warner, and Warren—42. (Cong. Rec., vol. 41, pp. 3428–3430.)

THURSDAY, FEBRUARY 28, 1907.

Mr. Sutherland submitted an amendment proposing to appropriate $15,000 to reimburse Reed Smoot for expenses incurred by him in the matter of the protest against his right to retain his seat in the Senate, intended to be proposed by him to the general deficiency appropriation bill; which was referred to the Committee on Appropriations, and ordered to be printed. (Cong. Rec., vol. 41, p. 4222.)

SATURDAY, MARCH 2, 1907.

(Amendment to the general deficiency bill.)

To reimburse the Hon. Reed Smoot for expenses incurred in the matter of the protest against his right to retain his seat in the Senate of the United States, $15,000.

Mr. McLaurin (of Mississippi) offered an amendment as follows:

"*Provided*, That the same amount shall be appropriated to defray the expenses of those who prosecuted the protest."

Mr. Hale moved to lay the amendment of the Senator from Mississippi on the table and it was agreed to.

Mr. McLaurin offered another amendment as follows:

"*Provided*, That $7,500 be appropriated to defray the expenses of those who prosecuted the protest."

Mr. Hale made a motion to lay the amendment of the Senator from Mississippi on the table and it was agreed to. (Cong. Rec., vol. 41, pp. 4448–4452.)

[Fifty-eighth Congress Second Session.]

CHARLES H. DIETRICH,

of Nebraska.

On March 28, 1901, Charles H. Dietrich was elected by the Legislature of the State of Nebraska a Senator of the United States from that State. December 2, 1901, at the beginning of the first session of the Fifty-seventh Congress, he was sworn in as a Senator and took his seat.

On February 1, 1904, Mr. Dietrich rose to a question of personal privilege and submitted a resolution directing an investigtion by a special committee of the Senate of the facts connected with the appointment of Jacob Fisher as postmaster at Hastings Nebr., the leasing of the post-office building in that town, and the action of Mr. Dietrich in connection with such appointment and leasing. Mr. Dietrich had been indicted by a Federal grand jury for alleged violation of the laws of the United States but had been discharged by the judge upon a trial of the indictments without the cause being heard on its merits, it having been admitted by the prosecuting attorney that the date of the offenses charged against Mr. Dietrich as a Senator was prior to the taking of the oath of office by the said Dietrich.

After a short discussion of the question as to whether the case properly belonged to the Committee on Privileges and Elections or to a special committee, the resolution was adopted as introduced, and a committee of five Senators was subsequently appointed.

On April 14, 1904, the committee submitted its report to the Senate, in which the opinion was expressed that Senator Dietrich had not been guilty of any violation of the Statutes or of any corrupt or unworthy conduct relating either to the appointment of the postmaster in question or the leasing of the building for a post office. No charges were ever made on the Senate floor against Senator Dietrich's conduct, and, following the submission of the report, no further action was taken in the case. The report sets out in full the nature of the charges made against Senator Dietrich in the indictments and the statutes upon which they were based.

The record of the case here presented consists of a statement of the proceedings in the Senate, as published in the Congressional Record, and the report of the special committee.

[Fifty-seventh Congress, first session.]

MONDAY, DECEMBER 2, 1901.

Mr. Allison presented the credentials of Charles H. Dietrich, chosen by the Legislature of the State of Nebraska a Senator from that State, to fill the vacancy in the term ending March 3, 1905; which were read and ordered to be filed.

On the same day the oath prescribed by law was administered.

(Cong. Rec., vol. 35, p. 41.)

[Fifty-eighth Congress, second session.]

MONDAY, FEBRUARY 1, 1904.

Mr. Dietrich rose to a question of personal privilege and, after a brief statement, submitted the following resolution; which was considered by unanimous consent and agreed to:

"*Resolved*, That the President pro tempore shall appoint a committee of five to investigate and report to the Senate all the facts connected with the appointment of Jacob Fisher as postmaster at Hastings, Nebraska, and the leasing of the building used at this time for a post office in that city, and particularly to investigate and report as to the action of Charles H. Dietrich, a Senator from Nebraska, in connection with such appointment and leasing."

The President pro tempore appointed, in pursuance of the foregoing resolution, Mr. Hoar, Mr. Platt of Connecticut, Mr. Spooner, Mr. Cockrell, and Mr. Pettus members of the committee. Mr. Hoar submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the special committee appointed to inquire into certain charges affecting the Hon. Charles H. Dietrich, a Senator from the State of Nebraska, be authorized to employ a clerk and stenographer and, by themselves or any subcommittee of their number, to sit during the sessions of the Senate, to send for persons and papers, and to administer oaths."

(Cong. Rec., vol. 38, pp. 1447, 1468.)

TUESDAY, FEBRUARY 2, 1904.

Mr. Kean, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted the day before by Mr. Hoar, reported it without amendment; and it was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 38, p. 1499.)

FRIDAY, FEBRUARY 5, 1904.

Mr. Hoar submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the expenses to be incurred by the special committee appointed to investigate and report to the Senate all the facts connected with the appointment

of Jacob Fisher as postmaster at Hastings, Nebr., and the leasing of the building used at this time for a post office in that city, and particularly to investigate and report as to the action of Charles H. Dietrich, a Senator from Nebraska, in connection with such appointment and leasing, be paid from the contingent fund of the Senate upon vouchers signed by the chairman of said committee."

(Cong. Rec., vol. 38, p. 1652.)

WEDNESDAY, FEBRUARY 10, 1904.

Mr. Kean, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution submitted by Mr. Hoar on the 5th instant, to defray the expenses of the special committee appointed to investigate the action of Charles H. Dietrich, a Senator from Nebraska, in connection with the appointment of Jacob Fisher as postmaster at Hastings, Nebr., and the leasing of the post-office building thereat, reported it without amendment. It was considered by unanimous consent and agreed to.

(Cong. Rec., vol. 38, p. 1821.)

REPORT OF THE COMMITTEE.

THURSDAY, APRIL 14, 1904.

Mr. Platt of Connecticut, from the special committee appointed to investigate certain charges preferred against Senator Dietrich, submitted the following report (No. 2152), to accompany Senate resolution 117:

The special committee appointed under the following resolution, viz,

"*Resolved*, That the President pro tempore shall appoint a committee of five to investigate and report to the Senate all the facts connected with the appointment of Jacob Fisher as postmaster at Hastings, Nebraska, and the leasing of the building used at this time for a post office in that city, and particularly to investigate and report as to the action of Charles H. Dietrich, a Senator from Nebraska, in connection with such appointment and leasing,"

having made the investigation required by such resolution, report herewith all the facts regarding which they were directed to make inquiry, and as to the action of Senator Charles H. Dietrich in connection therewith:

Senator Dietrich was elected a Senator from the State of Nebraska on the 28th day of March, 1901. He took the oath of office on the 2d day of December, 1901, at the opening of the regular session of the Senate. At the time of his election to the Senate he was governor of the State of Nebraska, having been elected at the November election in the year 1900. He took the oath of office as governor on the 3d day of January, 1901, and resigned on the 1st day of May of the same year.

While governor, and on or about March 4, 1901, he called upon the Postmaster General, at Washington, and made to him a proposition to lease to the Government, for the term of 10 years, a room for a post office in a building he was then constructing in the city of Hastings, Nebr., at a rental of $1,800 per annum, the fixtures, heat, light, and water to be furnished by him, he to keep the same in repair and to furnish all additional fixtures deemed necessary during the term of the lease. This proposition was accepted by the department, and on March 12, 1901, Senator Dietrich signed a lease for the same, forwarded it to Washington, and on March 21 the proposition was formally accepted by the First Assistant Postmaster General.

At this time the post office was and had for some years been kept in a building owned by a Grand Army post about 40 feet from the building which was being erected by Senator Dietrich. The postmaster was notified by the department of the lease of the new premises, immediately after which numerous protests against the proposed change of location of the office were sent to the department at Washington. These protests seem to have emanated from two sources—one the Grand Army post in whose building the post office was then situated and the other from a different locality in the city, between which and the locality where the new building was being erected there had been for years an intense rivalry. These protests were of a character which induced the Postmaster General to notify Senator Dietrich that he thought it inadvisable to carry out the arrangement for leasing quarters from him unless he could secure more favorable terms. As a result of this notice Senator Dietrich, about April 23, 1901, and while still acting as governor of the State of Nebraska, called upon the Postmaster General in Washington, and, after discussion of the matter, made a verbal proposition to lease the room in question as a post office for the sum of $1,300 per annum, with the understanding that the Government would provide, at its own expense, fixtures, heat, light, water, and make all other necessary expenditures.

On April 24, 1901, a written notice was sent to Senator Dietrich, signed by the First Assistant Postmaster General, accepting this proposition "for a term of 10 years from July 1, 1901, at a rental of $1,300 per annum, with the understanding that the present equipment in the post office at Hastings will be used in the new room and the department is to defray the expense of removing the equipment and placing the same in position in the new quarters."

While the first contract for leasing the premises, which required Senator Dietrich to fit the same up at his own expense, was in force he made an agreement with the officers of the Grand Army post to purchase from said post all the furniture and fixtures belonging to the same and used for the post office in their building for the sum of $500 to be paid whenever Senator Dietrich took possession of the same or the post office was removed to the Dietrich building. The date of this agreement was April 9, 1901.

On June 9, 1901, Mr. Jacob Fisher was, upon the recommendation of Senator Dietrich, appointed postmaster at Hastings, and took possession of the office soon after, in the building of the Grand Army post where it was then located. The office was removed to the room in the Dietrich building on the 21st day of July, 1901, and the fixtures were then removed from the old to the new post-office room.

Senator Dietrich owned the land upon which the building was erected where the new post office was located. He began the construction of the building in the summer of 1900, and before making the proposition to the Postmaster General to lease a room in it for the post office.

In October, 1900, Gertrude Dietrich, the Senator's daughter and only child, inherited from her grandfather the sum of $3,300. Senator Dietrich was the president of the German National Bank at Hastings, and his brother-in-law, Mr. John Slaker, was cashier. When his daughter inherited the money referred to, Senator Dietrich consulted with her uncle, Mr. Slaker, as to how it should be invested, and decided, with the consent of the daughter, who was at the time, by the laws of Nebraska, of age to make contracts, that the money should be used in the erection of the building which had been commenced by Senator Dietrich, who stated at the time to his daughter, to Slaker, and to others, that when the building should be completed he intended to convey the land and building to his daughter as her own absolute property. Accordingly, this sum of $3,300 was used and expended in the construction of the building referred to. The property is valued at about $9,000, including the cost of the building and the land upon which it is located.

Senator Deitrich went with his daughter to the Philippine Islands, starting about the middle of June, 1901, and returning about the 1st of October that year. During his absence, as before stated, about the 21st of July, 1901, the Government took possession of the post office in the Dietrich Building and removed the fixtures from the Grand Army Post Building thereto at its own expense. Mr. Slaker had been directed by Senator Dietrich, before his departure, to collect the rent and to deposit it to the credit of Gertrude Dietrich in the bank, and this was done from the date of the Government occupation.

Senator Dietrich instructed Mr. Slaker to prepare a deed conveying the property to his daughter Gertrude, and the deed was prepared by Mr. Slaker according to directions, but its execution was overlooked for some time, and when that fact was discovered by Mr. Slaker he forwarded the deed to Senator Dietrich, who was then in Washington, where the same was executed and returned by him and then it was placed on record.

All rents for the building were, from the beginning, as they accrued, collected by Mr. Slaker and deposited in the bank to the credit of Gertrude Dietrich, and checked against by her for her own personal use.

Senator Dietrich is a widower, a man of independent fortune, and quite able to present to his daughter his interest in the property in question, and the committee finds in the record no reason to doubt that the transfer to the daughter was in pursuance of his intention, announced when he invested her money in the building, and was in perfect good faith, and not in the slightest degree colorable.

After the building was occupied as a post office the premises were inspected by an inspector of the Post Office Department, who suggested to Mr. Fisher, the postmaster, that the room was too large for post-office purposes, and that its heating would be too expensive, and further suggested that a room be partitioned off from the rear. When Senator Deitrich returned from the Philippines in October, he visited Washington and arranged with the Post Office Department to put up a partition at his own expense, the department agreeing that it would relinquish the portion of room so to be partitioned off, which proposition was accepted by the department.

When this arrangement had been made, the postmaster, Mr. Fisher, proposed to Senator Dietrich that he would rent said room, intending at first to start a restaurant

in the same, to be conducted by his son, and it was agreed between Senator Dietrich and Mr. Fisher that he (Fisher) should take the room and pay rent for it, commencing August 1, 1901, at the rate of $200 per annum. This arrangement was made some time in November, 1901. Senator Dietrich soon after came to Washington and did not return to Hastings until the latter part of March, 1902, when he found that the restaurant had not been started and that the room was vacant. He was told by Mr. Fisher that as the Burlington depot had not been completed as soon as he supposed it would be he had given up the idea of establishing a restaurant in the room; that he had negotiated with the Western Union Telegraph Co. to put an office therein, but that that plan had not materialized. Thereupon Senator Dietrich told Mr. Fisher that he was willing to take the room off his hands and repay the rent which Fisher had paid for same from August 1, which he did, and soon thereafter Senator Dietrich leased the room for $300 per year to another party, which lease still continues. The money paid by Mr. Fisher for the rent of the room was paid to Mr. Slaker and deposited to the credit of Gertrude Dietrich, and the subsequent rents have been so collected and deposited. The entire amount paid by Mr. Fisher for the room was $83.30.

Soon after making the arrangenent to lease the same, it was agreed between Mr. Fisher and his deputy postmaster, Edwin A. Francis, that they should be jointly interested in the lease of the room, each paying one-half, and sharing equally in any rents that might be derived therefrom. Francis paid to Fisher one-half of the rent while the arrangement lasted, which was repaid by Fisher when Senator Dietrich took the room off his hands.

APPOINTMENT OF JACOB FISHER AS POSTMASTER.

Fisher was a director in the bank of which Senator Dietrich was president, and his friends had made application to Senator Dietrich while he was governor to appoint Fisher to the office of oil inspector of the State. Mr. Fisher, in company with Mr. John D. Mines, visited the city of Lincoln, where the legislature was in session, in February, 1901, and Mr. Mines asked Mr. Dietrich to appoint Mr. Fisher to such position, but the governor informed Mr. Mines, in the presence of Mr. Fisher, that he did not see his way clear to make such appointment; that if he should appoint him Fisher would have to live at the capital, and that the expense of doing so would be so great that he would not receive much benefit from the office, but that he would use his influence to have Fisher appointed postmaster at Hastings.

After the election of Mr. Dietrich as Senator Messrs. Fisher and Mines again visited him, and Senator Dietrich assured them that he would recommend Fisher as postmaster. Soon after his election as Senator, Mr. Dietrich took a trip to the Big Horn Mountains, and when he returned therefrom to Hastings he sent for Mr. Fisher, who went to see him, and was told by Senator Dietrich that he would soon recommend him for postmaster. A conversation thereupon took place with regard to the fixtures in the old post office, which Senator Dietrich had, as before stated, agreed to pay for when he should take possession of the same, or when the post office should be removed to the Dietrich Building. Senator Dietrich asked Fisher if he did not think that he could raise among the people who were interested in property in that section of the city the $500 necessary to purchase the fixtures. Fisher replied that he did not think he could, as the property owners there had recently contributed the sum of $3,000 to secure the location of the Burlington depot in that vicinity, and that he would rather buy the fixtures himself than go around with a subscription list to raise the money necessary; that other postmasters, when appointed, had purchased fixtures, and that he was willing to do the same. Soon after this Mr. Fisher was recommended by Senator Dietrich, and on June 8, 1901, received notice that his appointment as postmaster had been made.

Senator Dietrich and Mr. Fisher both testify positively and unequivocally that the purchase of the fixtures was in no way made a condition of the appointment of Fisher as postmaster, and that the transaction was only such as had been customary upon the appointment of former postmasters, and the committee is satisfied from the evidence that such is the fact.

When the post office was about to be removed into the Dietrich Building, Mr. Fisher paid to the agent of the Grand Army post the sum of $500 for the fixtures, and they were removed and installed in the new building.

THE PROSECUTION OF SENATOR DIETRICH.

Senator Dietrich was indicted in the district court of Nebraska in five different cases, afterwards remitted to the circuit court, the record in two of which is printed with the testimony taken by the committee in this case, which record, as the com-

mittee thinks, fairly presents all the charges against him, so that the printing of the record in the other three cases is unnecessary.

In the first of the cases, the record of which is printed, Senator Dietrich is charged in effect that while a Senator in Congress from the State of Nebraska he took, received, and agreed to receive a bribe from Jacob Fisher for procuring and aiding to procure for said Fisher the office of postmaster at Hastings, Nebr. To this indictment Mr. Dietrich pleaded not guilty, and a jury was impaneled to try the case. After the opening statement of the United States district attorney, in which he admitted that the date of the offenses charged was prior to the taking of the oath of office of Senator by Mr. Dietrich, a verdict of acquittal was directed by Circuit Judge Van Devanter, who held that the statute in question did not apply to a Senator-elect, and a verdict of acquittal was accordingly rendered.

In the second case, the record of which is printed, it is charged that Mr. Dietrich, while a Senator in Congress from the State of Nebraska, did hold and enjoy a contract theretofore entered into between himself and the United States for the use and occupation, for the purposes of a United States post office at Hastings, Nebr., of a lot and building owned by the defendant. In this case a demurrer was entered, argued, and overruled, but subsequently, on the motion of the district attorney, a nolle prosequi was entered, and Senator Dietrich was discharged.

One of the other cases against Senator Dietrich differs from the first, the record of which is printed, only in the manner of charging the same offenses alleged in the first case, and in this case a nolle prosequi was also entered, upon the motion of the district attorney, and Senator Dietrich was discharged.

In the other two cases Senator Dietrich and Mr. Fisher were indicted jointly for a conspiracy to violate section 1781 of the Revised Statutes, the ground of such conspiracy being the alleged agreement between Messrs. Dietrich and Fisher, which was set up as a separate offense in the first case referred to. In these two cases demurrers were entered and sustained, upon the ground that the indictment did not charge a conspiracy, but only separate offenses against Dietrich and Fisher.

So that, eliminating technicalities, the offenses charged against Senator Dietrich were:

"First. That as Senator he received from Fisher either the sum of $1,300 or $500, or the equivalent of the same in property, for procuring for said Fisher the office of postmaster at Hastings; and

"Second. That as Senator he held and enjoyed a contract with the Government."

The statute which Senator Dietrich was alleged to have violated in the first case referred to is section 1781 of the Revised Statutes, as follows:

"Every Member of Congress, or any officer or agent of the Government who, directly or indirectly, takes, receives, or agrees to receive from any person for procuring, or aiding to procure, any contract, office, or place from the Government or any department thereof, or from any officer of the United States, for any person whatever, or for giving any such contract, office, or place to any person whomsoever, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years and fined not more than ten thousand dollars. * * * And any Member of Congress or officer convicted of a violation of this section shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States."

The statute which he was alleged to have violated in the second case is section 3739 of the Revised Statutes, which is here quoted, together with the pertinent sections, 3740 and 3741.

"SEC. 3739. No Member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use of benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States in consideration of any such contract or agreement it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced.

"SEC. 3740. Nothing contained in the preceding section shall extend, or be construed to extend, to any contract or agreement made or entered into or accepted by any incorporated company where such contract or agreement is made for the general benefit of such incorporation or company, nor to the purchase or sale of bills of exchange

or other property by any Member of (or Delegate to) Congress where the same are ready for delivery and payment thereof is made at the time of making or entering into the contract or agreement.

"SEC. 3741. In every such contract or agreement to be made or entered into or accepted by or on behalf of the United States there shall be inserted an express condition that no Member of (or Delegate to) Congress shall be admitted to any share or part of such contract or agreement or to any benefit to arise thereupon."

The committee, desiring to make the fullest possible investigation of all the matters embraced in the resolution, through the Attorney General of the United States called upon the district attorney of Nebraska for the complete court record in all of the cases against Senator Dietrich and Mr. Fisher, and also a list of all witnesses by whom the district attorney expected to prove the allegations in the several indictments, together with a summary of what he expected to prove by each witness. Receiving such list and summary, all of the witnesses whose names were furnished by the district attorney, and other witnesses whose names were brought by the district attorney to the attention of the committee pending the investigation, were summoned, and all appeared before the committee except two, one of whom is dead and the other of whom was so ill as to be unable to appear. Affidavits of each of these witnesses, both separate and joint, had been secured and are printed in the testimony.

In all of the indictments the prosecution relied upon the same facts to prove the offenses charged.

The committee, with the consent of Senator Dietrich, in order that no possible fact bearing upon the matter might be overlooked, received the statements of all of the witnesses in full, not regarding strictly the rules of eivdence in that respect.

It will appear that the committee, with such consent of Senator Dietrich, admitted not only such evidence against him as would have been competent in a court of justice, but also a good deal of hearsay testimony—being all that was brought to their attention—as a possible clue to further information. The committee did not determine how far this proceeding would have been justified for any reason without such consent, even if they had carefully refrained from attaching any weight to it in their final decision. But it, in fact, did not in the least tend to shake or affect the conviction they have reached.

The committee submits herewith the testimony taken, but deems it unnecessary to set forth in full a summary of the same. Many of the witnesses examined, by whom the district attorney apparently expected to prove the charges against Senator Dietrich testified only to matters which, in the opinion of the committee, could not have been accepted in court as legal evidence, relating principally to statements alleged to have been made by Fisher and others, in the absence of Senator Dietrich, to the effect that Fisher had been required to pay a sum of money in order to secure the appointment of postmaster at Hastings.

The statements of the witnesses thus testifying are positively and unequivocally denied by the parties with whom it is alleged such conversations were had, and an examination of the testimony will, the committee thinks, lead to the conclusion that such alleged conversations are improbable, and never took place.

Upon full consideration of all of the evidence, the committee is of opinion that Senator Dietrich has not been guilty of any violation of the statutes of the United States or of any corrupt or unworthy conduct relating either to the appointment of Jacob Fisher as postmaster at Hastings, Nebr., or the leasing of the building in question to the United States for the purposes of a post office.

GEO. F. HOAR.
O. H. PLATT.
JOHN C. SPOONER.
F. M. COCKRELL.
E. W. PETTUS.

(Cong. Rec., vol. 38, pp. 4800–4801.)

[Fifty-eighth Congress, third session.]

JAMES A. HEMENWAY,

of Indiana.

In February, 1905, the credentials of James A. Hemenway were presented in the Senate, certifying to his election by the Legislature of Indiana in the month of January, 1905, as a Senator of the United States from that State to fill the vacancy occasioned by the resignation of Hon. Charles W. Fairbanks, the latter having been elected Vice President of the United States for the term commencing March 4, 1905. The question as to the right of a legislature to fill a vacancy upon a resignation to take effect at a future date was discussed in the Senate, following which the credentials were placed on file. Subsequently at the organization of the next Congress, Mr. Hemenway was sworn and took his seat. The history of the case here presented consists of a statement of the proceedings in the Senate, as published in the Congressional Record, and extracts from the remarks of several Senators.

[Fifty-eighth Congress, third session.]

TUESDAY, FEBRUARY 21, 1905.

Mr. Beveridge presented the credentials of James A. Hemenway, chosen by the Legislature of Indiana a Senator from that State for the unexpired term of six years from the 4th day of March, 1903.

The credentials were read, as follows:

In the name and by the authority of the State of Indiana. Executive department.

To all who shall see these presents, greeting:

This is to certify that on the 17th day of January, 1905, James A. Hemenway was duly chosen by the Legislature of the State of Indiana a Senator to represent said State in the Senate of the United States for the unexpired portion of the term of six years from the 4th day of March, 1903, and to fill the vacancy occasioned therein by the resignation of the Hon. Charles W. Fairbanks.

Witness his excellency our governor, J. Frank Hanly, and our seal hereto affixed at the city of Indianapolis, Ind., this 18th day of February, A. D. 1905.

By the governor:

J. FRANK HANLY,
Governor.

[SEAL.]

DANIEL E. STORMS,
Secretary of State.

[Extract from the remarks of Mr. Bailey.]

Mr. PRESIDENT: Before the credentials are placed on file, I want to call the attention of the Senate to what I think is a fatal objection to this certificate of election and to the election itself.

The certificate shows that that election occurred in the Legislature of Indiana during the month of January and that Mr. Hemenway was chosen to fill a vacancy occasioned by the resignation of Senator Fairbanks, to take effect on the 4th of March. Thus the Legislature of Indiana has asserted its right to fill a vacancy not only when no vacancy exists, but when it was possible under the law that no vacancy ever would exist. The courts have more than once held—and no court has held it more distinctly than the Supreme Court of Indiana—that a resignation to take effect at a future day is not a resignation at all, but simply a notice of an intention to resign, such resignation becoming effective if it remains with the officer authorized to receive it up to the time it was to take effect. But all the courts that have discussed the matter—possibly that is too broad—I will say a large majority of the courts that have discussed the matter hold that until the date indicated in the resignation the officer may withdraw it, and may thus prevent a vacancy.

Of course, nobody believes that the distinguished Senator from Indiana [Mr. Fairbanks] will withdraw his resignation in order to remain amongst us instead of accepting

the call to preside over us, but the probability or the improbability of the withdrawal of a resignation does not affect the law of the case.

I do not, however, intend to insist upon any reference of this particular credential, because the Senate seems to have considered and decided the very question in the Chilton case. There a Senator from my own State was appointed in April to fill a vacancy which, by the terms of the resignation, was to occur in June. His credentials were referred to the Committee on Privileges and Elections and that committee reported unanimously that he was entitled to his seat. But the remarkable thing is that, although that report was prepared and presented by so great and so accurate a lawyer as the late Senator from Massachusetts, Mr. Hoar, it does not appear to have taken into consideration at all the very vital question in the case. The report devotes itself almost entirely to a line of reasoning upon the right of executives and legislatures to fill a vacancy which is certain to occur, in advance of its occurrence. But the report in no part of it as I now recall—it has been some time since I examined it; I did examine it closely at the time, and I remember distinctly to have believed, although I had no interest in it, that the Senate was wrong—the report, so far as I can now recall, does not consider the question as to whether a resignation may be withdrawn or not, and yet the courts have held over and over again that it may be.

I venture to say that the records of Congress will verify my statement that Senators have telegraphed their resignations to the governors of their States and afterwards withdrawn them. But recognizing that—although it did not seem to consider the vital point in the case—the report and the action of the Senate in the Chilton case are on all fours with the present case, I am not going to ask that the credentials be referred to the Committee on Privileges and Elections, but content myself with simply saying that if it were a question that might effect the political complexion of the Senate, I should not want it to be understood as concluded by the action of the Senate here.

[Extract from remarks of Mr. Burrows.]

Mr. PRESIDENT: As the Senator from Texas [Mr. Bailey] has well said, this very question raised by the Senator has been repeatedly presented to the Senate and repeatedly decided, notably in the case of Henry Clay, of Kentucky, who resigned his seat in the Senate to take effect at a future date. The legislature, in anticipation of such vacancy, and before the vacancy actually occurred, proceeded to elect a Senator to fill the prospective vacancy. Archibald Dixon was chosen by the legislature to fill such vacancy, and his right to take his seat under and by virtue of such election having been questioned upon the ground that the legislature could not fill a prospective vacancy, the Senate, after full debate, decided that the action of the legislature was regular, and that Dixon was duly elected and was entitled to the seat.

I know of no case in the history of the Senate that will bear out the contention of the Senator from Texas. But be that as it may, the question before the Senate now is simply upon receiving and placing on file the credentials of the Senator-elect from Indiana. If, at the opening of the next session, objection is made to the holder of the certificate taking the oath of office under it, then it would be the appropriate time to consider such objection.

[Extract from remarks of Mr. Teller.]

Mr. PRESIDENT: I was chairman of the committee when the report (the Chilton case) was made. This matter was referred more particularly to Senator Hoar, who made the report. I was somewhat embarrassed at the time by the question from the fact that in 1882 I had resigned my seat in the Senate to take another place, and I had resigned to take effect when my successor should be elected or appointed. I had remained in the Senate until the governor of the State had appointed and sent here my successor to be sworn in, and then I took the other place.

When the question came before the Committee on Privileges and Elections it was a new question to me, although I knew that some Senators had raised the question, but not until after I had gone out of the Senate, and I did not take any part in that discussion or in the report except pro forma.

The credentials were placed on file.

(Cong. Rec., vol. 39, pp. 2971–2972.)

[Fifty-ninth Congress, special session.]

SATURDAY, MARCH 4, 1905.

Mr. Hemenway having been sworn, took his seat.

(Cong. Rec., vol. 40, p. 2.)

[Fifty-ninth Congress, first session.]

JOSEPH R. BURTON,

of Kansas.

The credentials of Joseph R. Burton, certifying to his election by the Legislature of Kansas as a Senator from that State for the term beginning March 4, 1901, were submitted to the Senate on January 25, 1901. He took his seat in the Senate on March 4, 1901. On May 22, 1906, a resolution directing the Committee on Privileges and Elections to examine into the legal effect of the decision of the Supreme Court in the case of Joseph R. Burton was adopted in the Senate. (For decision see 202 U. S., 344). Subsequently, on June 5, 1906, a telegram from the governor of Kansas, was laid before the Senate notifying the Senate of the resignation of Mr. Burton. No report was ever made to the Senate on the resolution above referred to.

[Fifty-sixth Congress, second session.]

TUESDAY, JANUARY 25, 1901.

Mr. Baker presented the credentials of Joseph Ralph Burton, chosen by the Legislature of the State of Kansas a Senator from that State for the term beginning March 4, 1901; which were read, and ordered to be filed. (Cong. Rec., vol. 35, p. 1591.)

[Fifty-seventh Congress, special session.]

MONDAY, MARCH 4, 1901.

Swearing in of Senators:

In the list, Joseph R. Burton of the State of Kansas. (Cong. Rec., vol. 35, p. 1.)

[Fifty-ninth Congress, first session.]

TUESDAY, MAY 22, 1906.

Mr. HALE. Mr. President, I offer the following resolve. I had intended to ask the Senator from Michigan [Mr. Burrows], the chairman of the Committee on Privileges and Elections, to present the resolve. As he is not here, I send it now to the desk.

The resolution was read, as follows:

"*Resolved*, That the Committee on Privileges and Elections be, and are hereby, directed to examine into the legal effect of the late decision of the Supreme Court in the case of Joseph R. Burton, a Senator from the State of Kansas, and, as soon as may be, to report their recommendation as to what action, if any, shall be taken by the Senate."

The VICE PRESIDENT. Does the Senator from Maine desire the present consideration of the resolution just read?

Mr. HALE. It is simply directing the committee to investigate. There is no objection, I suppose, to the resolution.

The resolution was considered by unanimous consent, and agreed to. (Cong. Rec., vol. 40, p. 7211.)

TUESDAY, JUNE 5, 1906.

The Vice President laid before the Senate the following telegram; which was read, and ordered to lie on the table:

[Telegram.]

TOPEKA, KANS., *June 4, 1906.*

Hon. CHARLES W. FAIRBANKS,
Vice President of the United States, Washington, D. C.:

Hon. J. R. Burton has this day tendered his resignation as United States Senator from Kansas, and I have accepted the same.

E. W. HOCH, *Governor of Kansas.*

(Cong. Rec., vol. 40, p. 7821.)

[Sixtieth Congress, first session.]

JOHN W. SMITH,

of Maryland.

On Thursday, March 26, 1908, the credentials of John Walter Smith were presented to the Senate, certifying to the election by the Legislature of Maryland, on the 25th day of March, of the said John Walter Smith as a Senator from that State to fill the vacancy caused by the death of William P. Whyte.

After the reading of the credentials, a motion was made that he be sworn. Objection was made to the oath of office being administered to Mr. Smith upon the expression of opinion that the election was not according to the Constitution and laws of the United States. There was no contest in this case, the ground taken for this objection being that the credentials showed that Mr. Smith was elected on March 25 and the records of the Senate showed that Mr. Whyte died the previous Tuesday, March 17, which, it was contended, was in violation of the Federal act of 1866 providing that in case of a vacancy occurring during a session of the legislature the proceedings to fill such vacancy "shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy." The second Tuesday in this case, it was contended, would have been March 31.

On the other hand, it was contended that the credentials were regular and that the regular custom should be observed and Mr. Smith be allowed to take the oath on the face of his credentials, without regard for what the records of the Senate showed with reference to the date of Mr. Whyte's death, that being a question for consideration by the Committee of Privileges and Elections after the oath had been administered and the credentials had been ordered referred to that committee. An extended debate followed on the question of the interpretation of the section of the Federal act above referred to, as to whether "the second Tuesday" applied to the date after organization of the legislature when an election could be had or to the date after notice of vacancy when an election should be proceeded with.

A substitute resolution, to refer the credentials to the Committee on Privileges and Elections, was offered for the motion that the oath be administered to Mr. Smith. This substitute failed of adoption by a vote of 28 to 34. The original motion was then adopted, and Mr. Smith, having been sworn, took his seat. No further action was taken in the case.

The history of this case as here presented includes portions of the remarks of certain Senators as presented in the Record, an extract from the debate in the same volume, and the vote on the resolution to refer the credentials to the Committee on Privileges and Elections.

THURSDAY, MARCH 26, 1908.

Mr. Rayner presented the credentials of John Walter Smith, elected a Senator by the Legislature of the State of Maryland to fill the vacancy occasioned by the death of Hon. William Pinkney Whyte; which were read and placed on file.

Mr. Kean raised a question as to the presence of a quorum,

Whereupon,

The Vice President directed the roll to be called,

When,

Fifty-six Senators answered to their names,

A quorum being present.

The Secretary read as follows:

THE STATE OF MARYLAND,
EXECUTIVE DEPARTMENT.

To the President of the Senate of the United States:

This is to certify that on the 25th day of March, 1908, John Walter Smith was, in accordance with law, duly chosen by the Legislature of the State of Maryland a Senator from said State to represent said State in the Senate of the United States for the unexpired portion of the term of six years, beginning on the 4th day of March, 1903, to fill the vacancy caused by the decease of Hon. William Pinkney Whyte.

Witness his excellency our governor and our seal hereto affixed at Annapolis this 25th day of March, in year of our Lord 1908.

AUSTIN L. CROTHERS.

By the Governor:
[SEAL.]

N. WINSLOW WILLIAMS,
Secretary of State.

Mr. Rayner made a motion that the oath prescribed by law be administered to Mr. Smith. (Cong. Rec., vol. 42, p. 3938.)

[Extracts from remarks of Mr. Burrows, of Michigan, in objection to the oath of office being administered. Found in the proceedings of March 26, 1908, in the Congressional Record, vol. 42, pp. 3938 3 39, 3946, 3947, 3948.]

Mr. President, it will be observed that this act (act of 1866) prescribes the method of procedure for the election of a Senator under three different conditions: First, at the beginning of a full term; second, for filling a vacancy which happens during a

recess of the legislature; and, third, for filling a vacancy happening when the legislature is in session.

The case now before the Senate arises under section 17 of this act, which is as follows:

"SEC. 17. Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy."

The Senate will observe that the proceedings for the election of a Senator at the beginning of a term are as follows:

"The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress."

Section 17 modifies the general course of procedure only in providing that the legislature shall proceed on the second Tuesday after the legislature has organized and has notice of such vacancy.

It appears from the certificate presented and the records of the Senate that this election on the 25th day of March was not the second Tuesday after the organization of the legislature and notification of the vacancy.

* * * * * * *

It is conceded that Senator Whyte died on the 17th day of March, and that Mr. Smith's election took place on the 25th. It is admitted that the vacancy happened on Tuesday, March 17. The second Tuesday thereafter would be March 31. The Legislature of Maryland proceeded to the election of a Senator on Tuesday, March 24, and consummated it in joint assembly March 25.

* * * * * * *

Mr. President, as to the credentials presented in this case, I think there can be no question but that they are in due form and are not subject, on their face, to criticism. But, in determining the right of Mr. Smith under these credentilas to a seat in the Senate, the Senate will take cognizance of its own records and its journal entries. The credentials presented showing that Mr. Smith was elected on Wednesday, the 25th of March, and the journal of the Senate disclosing that the vacancy occurred on Tuesday, the 17th of March, the Senate has knowledge of these facts, and it seems to me that the validity of his title is thereby impeached, and that instead of a prima facie case being established in favor of the party holding such credentials, a prima facie case is made out against such right.

I think it will throw some light upon this question by alluding to the history of this legislation. The occasion for the enactment of the statute of 1866 every Senator will recall. Congress exercised its power under that provision of the Constitution referred to first in 1842 by directing the manner in which the Members of the House of Representatives should be elected. Previous to that time the whole membership of the House was elected upon a general ticket, so that whatever divisions there might have been in a State politically the dominant party in the State carried the the entire representation. So, in 1842, Congress passed an act under this right to regulate the method of electing Representatives in Congress, declaring that the State should be divided into districts. Then subsequently another act was passed requiring that the election of Members of the House should occur on the same day throughout the United States, so that the practice of colonizing from one State into another on election day should be prevented.

Then came 1866, when this provision was made as to the manner of electing Senators. Previous to that time the legislatures had failed to elect Senators in many instances. One house would act and then the other, and there was no system and no method by which the election could be certainly secured. So Congress sought to regulate the manner of the election of Senators by this provision.

If we turn back to the history of this legislation it throws a flood of light upon the meaning of its provisions, and I think disposes of the contention of Senators on the other side that it was unnecessary to have two weeks elapse after notification before proceeding to fill the vacancy. The act was reported from the Committee on the Judiciary in 1866, a committee composed of Lyman Trumbull, of Illinois; Ira Harris, of New York; Daniel Clark, of New Hampshire; Luke Poland, of Vermont; William M. Stewart, of Nevada; Thomas A. Hendricks, of Indiana; and Reverdy Johnson, of Maryland. That list of names should carry with it the conviction that the act was very carefully framed.

The report of the committee was made on the 9th of July, 1866, and so far as the first and second sections are concerned they were adopted substantially as reported and as they stand to-day. But coming to the section in controversy, providing for filling a vacancy occurring when the legislature is in session, the committee reported as follows:

"*And be it further enacted*, That whenever, on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the Senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement of its session, to elect a person to fill such vacancy, in the manner hereinbefore provided for the election of a Senator for a full term——"

Now I come to the provision under which this contention has arisen—"and if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have notice thereof."

* * * * * * *

Now, Mr. President, as this bill was reported from the Committee on the Judiciary the provision over which this controversy has arisen read as follows:

"And if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have notice thereof."

Can anyone misunderstand that language? They could not elect until the second Tuesday after notice. Now, the Senator from Texas [Mr. Culberson] suggests that it was changed. I know that, and I am going to show the Senate how it was changed and for what reason. But, mark you, there was no change in the bill as to the time of electing on the second Tuesday after notice. Let me read the debate. Mr. Clark in his discussion in the Senate said:

"I move further to amend the bill in the fifth line of the second section by inserting the words 'and organization' after the word 'commencement.' "

That is all, "and organization," leaving the balance just as it read, "the second Tuesday after notice."

"Mr. JOHNSON"—

Reverdy Johnson—

"How will it read then?

"Mr. CLARK"—

Quoting—

"And if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized and shall have notice of the vacancy."

That was the only change, and that is the law as it reads to-day. The only change made by the Senate when the bill was before the Senate declaring that the election should take place on the second Tuesday after notice was to insert the words "and organization," so as to read "organization and notice," for the reason that they could not proceed, of course, until after the legislature was organized.

"Mr. TRUMBULL. I suggest to the Senator from New Hampshire that that can hardly be necessary. This provision is, 'If a vacancy shall happen during the session of the legislature.' Is it a 'session' of the legislature until it is organized?

"Mr. CLARK. It may be. The legislature may be together and sitting, but not organized. I want to avoid that difficulty.

"Mr. TRUMBULL. I have no objection to it.

"Mr. CLARK. I think it would make it a little more specific to insert those words."

That, Mr. President, is the history of this enactment. That is how the amendment "organization" came in, and thus it conforms to the provision of the other sections. Is it contended that because the word "organization" was inserted before the word notice it changed the whole meaning of the section? That can not be possible. The second Tuesday after organization and notice of the vacancy applies with equal force to "notice" as to organization. My contention therefore is that the legislature of Maryland, in proceeding to the election of a Senator on the 25th day of March to fill the vacancy occasioned by the death of Senator Whyte, which occurred on the 17th day of the same month, acted prematurely and in violation of the statute of 1866.

Mr. President, I have taken occasion to look over the precedents of the Senate since 1866, when this measure was enacted. There have been 14 deaths in the Senate at a time when the legislature of the State in which the vacancy happened was in session and in not one single instance has any State presumed to defy or ignore this statute and elect until the second Tuesday after they were notified of the vacancy.

The cases are all like the one now pending before the Senate—a death during the session, an election by the legislature after the legislature had been notified and the second Tuesday after such notification—and in no single instance has a Senator been permitted to take his seat who has not conformed to that statute.

In the case of George Hearst, of California, who died February 28, 1891, and his successor was elected March 19, 1891, the second Tuesday.

Orville H. Platt, of Connecticut, died April 21, 1905, and his successor was elected May 10, 1905.

Benjamin H. Hill, of Georgia, died August 16, 1882, and his successor was elected November 15, 1882.

John A. Logan, of Illinois, died December 26, 1886, and his successor was elected January 19, 1887.

James B. Beck, of Kentucky, died May 3, 1890, and his successor was elected May 17, 1890.

Charles Sumner, of Massachusetts, died March 11, 1874, and his successor was elected April 17, 1874.

Russell A. Alger, of Michigan, died January 24, 1907, and his successor was elected February 6, 1907.

William J. Sewell, of New Jersey, died December 27, 1901, and his successor was elected January 29, 1902.

Marcus A. Hanna, of Ohio, died February 15, 1994, and his successor was elected March 2, 1904.

Ambrose E. Burnside died September 13, 1881, and his successor was elected October 5, 1881.

William B. Bate, of Tennessee, died March 9, 1905, and his successor was elected March 21, 1905, and the election on the second Tuesday.

John E. Kenna, of West Virginia, died January 11, 1893, and his successor was elected January 25, 1893.

Matthew H. Carpenter, of Wisconsin, died February 24, 1881, and his successor was elected March 10, 1881.

Asbury C. Latimer died February 20, 1908, and his successor was elected March 6, 1908.

So in all the cases in every other State where a vacancy has occurred in the representation in the Senate from such State during the session of the legislature that legislature has conformed to the statute and waited before filling the vacancy until the second Tuesday after notice of the vacancy.

Now, I submit, Mr. President, to admit the gentleman holding these credentials to a seat in this body is not only in violation of the Constitution and laws of the United States, but he has not even a prima facie case which would entitle him to admission. I insist, therefore, to admit Mr. Smith under these circumstances will be to reverse the judgment of the Senate for 40 years, overthrow all precedents, and receive into the membership of this body a person under circumstances which can not for one moment, in my judgment, be justified.

[Extracts from remarks of Mr. Rayner, of Maryland, in favor of the oath being administered. Found in the proceedings of March 26, 1908, Congressional Record, vol. 42, pp. 3940, 3942, 3944.]

Mr. President, * * * I shall be very much mistaken if I can not convince the Senate within a very short time that the Senator from Michigan has fallen into an error upon the question under discussion. I shall do this principally by precedents that I have that I think conclusively settle the matter.

I wish to state, in the first place, that there is no contestant here at all. There is no protest whatever against the seating of the Senator-elect. Gov. Whyte died last Tuesday a week at 7 o'clock. The general assembly of Maryland, then in session, had immediate notice of his death. The law does not speak of any official notice, and does not require any.

On the following Tuesday—that is to say, Tuesday of this week—the two Houses nitiated their proceedings for the election of a Senator to fill the unexpired term of Senator Whyte. They met on Tuesday for that purpose, and yesterday, Wednesday, met in joint convention. The Senator-elect who is present was declared in accordance with the law to have received the majority of votes and to be the duly elected Senator. The legislature of Maryland adjourns next Monday by constitutional limitation. If the Senator is right in what he states, Maryland will be without its proper representation upon this floor.

* * * * * * *

Now, Mr. President, what does this section mean? I want Senators to look at it to see whether I am not right in having all the other sections taken with it. You must construe the whole act of 1866 together. You can not take just one provision of an act and give it a construction without looking at the whole of the act. It means this—and the Senate will come to the conclusion that it means it, and if it comes to any other conclusion it is treading on dangerous ground—that an election for United

States Senator shall not take place in any event until the second Tuesday after the organization, and it does not mean anything else.

It can not mean anything else without rendering the section absolutely absurd. All those three sections taken together simply mean that an election for United States Senator shall not in any event be held until the second Tuesday after the legislature has organized; and the question of notice has nothing to do with it. After the legislature has organized and there is a vacancy I submit the legislature has a pefect right, if the second Tuesday has expired, to proceed immediately to the election of a United States Senator, no matter upon what date it took place and no matter when the notice may have been given.

I appeal to every lawyer upon this floor whether there is any other possible construction to be given to this section unless you render it absolutely nugatory in its terms. I want to call attention to this because this is a matter of great importance. The sixteenth section provides for the election of a Senator in regular form, and it has these words in it:

"Shall proceed on the second Tuesday after the meeting and organization."

Now, omitting one section, which merely refers to the proceedings, the next section provides that:

"Where a vacancy occurs at the assembling of the legislature the legislature shall again proceed upon the second Tuesday after the meeting."

In this section when the vacancy occurs during the session of the legislature it says, "similar proceedings to fill such vacancy shall be had on the second Tuesday."

It is ridiculous, because there may be no vacancy, as I have shown, and was not in this case until the second Tuesday had expired. Every statute must receive a sensible construction. The Senate will give the construction to this statute that it would receive in any judicial forum. You must take these three sections together and the purport of them is what I have said now frequently.

* * * * * * *

Even if this Tuesday was not the second Tuesday, if the construction of the Senator from Michigan is a correct construction, if this statute is mandatory and not directoory, if the verdict of the Maryland Legislature can be set aside by the Senate of the United States, then I contend that upon an unbroken line of authority, the credentials being in proper form, the Senator has the right to be sworn in, and the question must go, if at all, to the Committee on Privileges and Elections after he takes his oath and is seated in this body. I will give the cases on that point, and I think there is no question about it. I ask the Senator from Michigan to give me a single case where a Senator was ever denied the right to be sworn in when his credentials were proper and were right or where they were collaterally impeached, and he was prevented from taking the oath of office. In all these contested-election cases that went to the Committee on Privileges and Elections, where they were controverted and disputed, some of them taking weeks and months for their adjudication, the Senator was sworn in, and the controversy took place after he took his seat. In none of them did the Senate do what the Senator from Michigan now asks the Senate to do, and that is, to send it to the committee, where, perhaps, we can not get a decision until after our legislature adjourns next Monday.

* * * * * * *

Mr. President, I have finished what I wish to say, and I rest upon these four propositions: First, that the section is not entitled to the interpretation the Senator from Michigan puts upon it; second, that the section is only directory, not mandatory; third, the State of Maryland has decided it; and fourth, if I am all wrong in everything else I have said, the Senator elect is now entitled to be sworn in, and this question should go to the committee, as has been done in every other case, for further examination. I ask, therefore, that the Senator be sworn in.

[Extract from debate as found in Congressional Record, vol. 42, p. 3349.]

Mr. BEVERIDGE. I ought to have asked the question earlier. The Senator asked, What is the use of delay; why refer anything to a committee? When a demurrer to a complaint is filed, and as a matter of fact the court knows the facts and everybody else knows the facts, but the case has not been tried, the question could be asked, What is the use of referring this case to a jury to try the facts or to the court to hear it? We know it all now.

Mr. KNOX. I think, Mr. President, that the Senator is most unfortunate in his reference to a proceeding in court. The Senate is the absolute, uncontrolled judge of this matter. No other authority or no other power on earth can intervene between us

and the decision of the question of the qualification of anyone who presents himself here for admission to this body.

Mr. BEVERIDGE. Mr. President, may I ask the Senator this question?

The VICE PRESIDENT. Does the Senator from Pennsylvania yield further to the Senator from Indiana?

Mr. KNOX. Certainly.

Mr. BEVERIDGE. Of course, everybody concedes that that is so under the clause of the Constitution that the Senate is the judge, and so forth, but if every question is to be determined by the Senate the moment anybody raises it, what is the use of having a standing Committee on Privileges and Elections at all, and if we should investigate the facts in one case in a regular manner, why not in another case in a regular manner, even though we all know what they may be in one instance and do not in another?

Mr. KNOX. Mr. President, I will come in just a moment to reply to the question suggested by the Senator from Indiana. It is perfectly foolish for the Senate to stop and consider a thing that is openly admitted upon the floor of the Senate to be the fact if it raises a question that we must ultimately deal with. We have, upon the face of the credentials presented, the statement that Senator Smith was elected to fill the vacancy caused by the death of Senator Whyte. We have it upon the face of the record that Senator Whyte died upon a particular day, and we certainly can take notice of the flight of time between the date of the death of Senator Whyte and the date specified upon the credentials as the date when Mr. Smith was elected. So that I say, Mr. President, that every single fact that bears upon this question is in full possession of the Senate.

I only want to say one word as to the section of the Revised Statutes that has been referred to. It was made perfectly clear by the distinguished chairman of the committee that as that bill was originally reported to the Senate it only provided for one thing, namely, that when a vacancy shall occur during the session of the legislature the legislature shall proceed on the second Tuesday after notice of the vacancy to elect a successor. When the bill with that provision in it was reported to the Senate, the Senate said, "Nay; there is one thing yet that we must provide, and that is that the legislature under such circumstances must have been organized." So an amendment was inserted, and the law as it stands now provides that two things must concur—first, that the legislature must be duly organized and, second, that its action must follow not earlier than the second Tuesday after notice of the fact of death.

The full debate on this case will be found in the Congressional Record, volume 42, pages 3938–3955.

VOTE ON THE CASE.

Mr. Burrows submitted the following resolution as a substitute for the motion of Mr. Rayner:

"*Resolved*, That the credentials of John Walter Smith, claiming a seat in the Senate from the State of Maryland, be taken from the files of the Senate and referred to the Committee on Privileges and Elections."

On the question to agree to the resolution,

It was determined in the negative, by the following vote:

Yeas.—Messrs. Aldrich, Ankeny, Brandegee, Bulkeley, Burnham, Burrows, Crane, Curtis, Depew, Dick, Dillingham, Dixon, Dolliver, du Pont, Elkins, Flint, Foraker, Gallinger, Gamble, Hopkins, Kean, Knox, Lodge, Long, Nelson, Smith, Sutherland, and Wetmore—28.

Nays.—Messrs. Bankhead, Beveridge, Borah, Bourne, Brown, Burkett, Clay, Culberson, Foster, Frazier, Frye, Gary, Gore, Guggenheim, Heyburn, Johnston, La Follette, McCreary, McCumber, McEnery, McLaurin, Owen, Overman, Paynter, Perkins, Piles, Platt, Rayner, Richardson, Smoot, Stephenson, Taylor, Teller, and Warren—34.

So the resolution was not agreed to.

The question recurring on the motion of Mr. Rayner that the oath prescribed by law be administered to Mr. Smith,

The motion was agreed to.

Whereupon,

Mr. Smith appeared, and the oath prescribed by law having been administered to him by the Vice President, he took his seat in the Senate. (Cong. Rec., vol. 42, pp. 3954–3955.)

[Sixty-first Congress, second and third session.]

WILLIAM LORIMER,

Of Illinois.

FIRST INVESTIGATION.

Mr. Lorimer took his seat in the United States Senate on June 18, 1909, as a Senator from the State of Illinois, having been elected by the Forty-sixth General Assembly of Illinois on the ninety-fifth joint ballot, May 26, 1909. Over a year later, May 28, 1910, he made a speech in the Senate in the form of an answer to the charges contained in an article printed in the Chicago Tribune of April 30, 1910, bearing the signature of one Charles A. White, a member of the Forty-sixth General Assembly of Illinois, asserting that he (White) had been paid $1,000 to vote for Mr. Lorimer. At the conclusion of his speech Mr. Lorimer introduced a resolution demanding an investigation of this charge by the Senate. June 7, 1910, Clifford W. Barnes, president of the Legislative Voters' League of the State of Illinois, filed charges in the Senate against Mr. Lorimer, alleging on information and belief that three members of the legislature who voted for Mr. Lorimer for United States Senator had been bribed to do so. These charges were referred to the Committee on Privileges and Elections.

On June 20, 1910, the Senate of the United States passed a resolution authorizing and directing the Committee on Privileges and Elections, or a subcommittee thereof, to investigate "certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator from the State of Illinois, there were used or employed corrupt methods or practices."

December 21, 1910, the Committee on Privileges and Elections presented its report to the Senate of the United States. The report exonerated Mr. Lorimer and found:

"In our opinion the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices."

The report held that Mr. Lorimer himself could not in the remotest degree be implicated in any personal act of bribery or corrupt practices of any nature; that while four members of the General Assembly which elected Mr. Lorimer testified to receiving money as a consideration for their votes, circumstances tended to render the testimony of each and all the witnesses of doubtful value; that the majority for Mr. Lorimer in the joint assembly of the two houses of the general assembly was 14 and unless a sufficient number of those votes were obtained by corrupt means to deprive him of this majority, Mr. Lorimer had a good title to his seat; that even if it were admitted that the four members who voted for Mr. Lorimer were bribed to do so, he still had a majority of the votes cast in the assembly, and his election was valid, for there were no facts or circumstances from which it could be found or legally inferred that any other member or members of the said general assembly were bribed to vote for Mr. Lorimer. The report further held that no warrant could be found in the testimony for believing that any of the legislators who were accused of bribe giving had been moved to vote for Mr. Lorimer by corrupt influences so their votes should in no way be excluded, and that if there was money in the legislature and distributed by these men it was from a fund which was neither raised nor expended to promote the election of Mr. Lorimer as a Senator nor to reward those who voted for him for that office.

Two members of the Committee on Privileges and Elections submitted their views to the Senate dissenting from the report of the majority of the committee, and one of them, Mr. Beveridge, on January 9, 1911, submitted a resolution declaring that Mr. Lorimer was not duly and legally elected to a seat in the Senate of the United States.

The report of the Committee on Privileges and Elections and the resolution of Mr. Beveridge were discussed and debated on the floor of the Senate at various times until March 1, 1911, when the resolution was determined in the negative by a vote of 46 to 40.

The history of the first case here given consists of a statement of the proceedings of the Senate bearing on the case, as published in the Congressional Record, the report of the Committee on Privileges and Elections, with the views of the minority of the committee, a statement of the days on which the question was debated in the Senate, references to the prepared speeches and statements for and against the committee report as found in the Congressional Record, and a record of the vote taken on Mr. Beveridge's resolution.

PROCEEDINGS IN THE SENATE.

[Sixty-first Congress, first session.]

FRIDAY, JUNE 18, 1909.

Mr. Cullom presented the credentials of William Lorimer, chosen by the Legislature of the State of Illinois a Senator from that State for the term beginning March 4, 1909, which were read and filed. The oath prescribed by law having been administered to Mr. Lorimer, he took his seat in the Senate. (Cong. Rec., vol. 44, p. 3437.)

[Sixty-first Congress, second session.]

SATURDAY, MAY 28, 1910.

Mr. Lorimer of Illinois rose to a question of personal privilege and made a speech demanding an investigation of the charges made by the Chicago Tribune (Chicago,

Ill.), under date of April 30, 1910, that his seat in the United States Senate was secured by bribery and corruption. At the conclusion of which he introduced the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate (S. Res., 247):

"*Resolved*, That the Committee on Privileges and Elections be directed to examine the allegations recently made in the public press, charging that bribery and corruption were practiced in the election of William Lorimer to a seat in the United States Senate, and to ascertain the facts in connection with these charges, and report as early as possible; and for that purpose the committee shall have authority to send for persons and papers, to employ a stenographer and such other additional help as it shall deem necessary; and the committee is authorized to act through a subcommittee; and its expense shall be paid from the contingent fund of the Senate." (Cong. Rec., vol. 45, pp. 7019–7070.)

WEDNESDAY, JUNE 1, 1910.

Mr. Kean, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution (S. Res., 247) submitted by Mr. Lorimer May 28, reported it favorably without amendment, and moved that it be referred to the Committee on Privileges and Elections, which was agreed to. (Cong. Rec., vol. 45, p. 7190.)

TUESDAY, JUNE 7, 1910.

Mr. Cullom of Illinois presented a memorial from Clifford W. Barnes, as president of the Legislative Voters' League of the State of Illinois, alleging in substance that the election of William Lorimer, a Senator from the State of Illinois, was secured by bribery. This statement was referred to the Committee on Privileges and Elections and ordered to be printed. (Cong. Rec., vol. 45, pp. 7528–7537.)

SATURDAY, JUNE 18, 1910.

Mr. Burrows, from the Committee on Privileges and Elections, reported the following resolution, which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate (S. Res. 264):

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator of the United States from said State of Illinois there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the sessions of the Senate, and during any recess of the Senate or of Congress, to hold its sessions at such place or places as it shall seem most convenient for the purposes of the investigation, to employ a stenographer, to send for persons and papers, and to administer oaths, and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee." (Cong. Rec., vol. 45, p. 8452.)

MONDAY, JUNE 20, 1910.

Mr. Kean, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution (S. Res. 264), reported from the Committee on Privileges and Elections by Mr. Burrows on the 18th instant, reported it with amendment; and it was agreed to by the Senate. (Cong. Rec., vol. 45, p. 8501.)

[Sixty-first Congress, third session.]

WEDNESDAY, DECEMBER 21, 1910.

Mr. Burrows, from the Committee on Privileges and Elections, to which was referred Senate resolution 264, directing an investigation into certain charges made against William Lorimer, a Senator from the State of Illinois, submitted the following report (No. 942), together with the testimony taken before the subcommittee, and asked that it be printed and laid on the table:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Burrows (chairman), Depew, Beveridge, Dillingham, Gamble, Heyburn, Bulkeley, Bailey, Frazier, Paynter, Johnston, and Fletcher.]

IN THE SENATE OF THE UNITED STATES.
DECEMBER 21, 1910.—Ordered to be printed.

The Committee on Privileges and Elections, to whom was referred certain charges relating to the election of William Lorimer, a Senator from the State of Illinois, by the

legislature of that State, have had the same under consideration, and submit the following report:

On the 7th day of June, 1910, there was referred to the Committee on Privileges and Elections a memorial signed by one Clifford W. Barnes, as president of the Legislative Voters' League, of Chicago, Ill., alleging in substance that the election of William Lorimer, a Senator from the State of Illinois, was secured by bribery. These charges are set forth at length in the proceedings of the Senate for June 7, 1910.

On the 20th day of June, 1910, the Senate adopted a resolution authorizing and directing said committee, or any subcommittee thereof, to investigate said charges. In pursuance of the authority conferred and direction given by the Senate in said resolution, a subcommittee was appointed, consisting of Mr. Burrows, chairman, Mr. Gamble, Mr. Heyburn, Mr. Bulkeley, Mr. Frazier, Mr. Paynter, and Mr Johnston.

It was thought by the subcommittee to be advisable to make this investigation at the city of Chicago, in the State of Illinois. Accordingly the subcommittee met in that city on the 20th of September, 1910, and proceeded to execute the order of the Senate.

A large number of witnesses were examined and all the available information which, in the judgment of the subcommittee would be of any value in the investigation, was obtained and considered.

It appears from the evidence that Mr. Lorimer was elected a Senator from the State of Illinois on the 26th day of May, 1909, by a joint assembly of the two houses of the General Assembly of the State of Illinois, receiving 108 votes out of 202 that were cast for the several candidates for that office, as follows:

Albert J. Hopkins	70
William Lorimer	108
Lawrence B. Stringer	24

Votes required to elect.

The question is raised by counsel whether the language of the statute regulating the election of United States Senators requires that in order to elect a Senator the person elected must receive a majority of the votes of all the members elected to each house of the legislature, or whether it is sufficient if one person receives a majority of all the votes cast in the joint assembly, "a majority of all the members elected to both houses being present and voting." This question seems to have been decided by the Senate in the case of Lapham and Miller (Senate Election Cases, 697). In that case it was held that a majority of a quorum of each house is sufficient to elect, and in that decision the committee concur.

Bribery.

In a number of cases that have been before the Senate of the United States it has been held that to invalidate the election of a Senator on account of bribery it must be made to appear either—

(1) That the person elected participated in one or more acts of bribery or attempted bribery, or sanctioned or encouraged the same; or

(2) That by bribery or corrupt practices enough votes were obtained for him to change the result of the election.

At what was practically the outset of the investigation, counsel for the Chicago Tribune (who conducted the inquiry against Senator Lorimer) announced that he did not expect to connect Senator Lorimer with any acts of bribery, and upon this point the following took place (Record, p. 66):

"Senator HEYBURN. I would suggest it might be well for you here to state what you expect to prove, in order that we may apply the law as to such proof.

"Mr. AUSTRIAN. I expect to prove——

"Senator BULKELEY. Do you expect to connect Mr. Lorimer with this?

"Mr. AUSTRIAN. No, sir; not in that way at all.

"Judge HANECY. That is, you do not intend to connect Senator Lorimer?

"Mr. AUSTRIAN. I personally do not intend to connect Senator Lorimer. The statement made here by the witnesses that they had some talk with Mr. Lorimer, the committee will please understand, of course, these witnesses, I have never talked with—never talked with but two of the witnesses who will be called upon the witness stand.

"Judge HANECY. You do not claim that any witness will say that he ever talked with Senator Lorimer about money?

"Mr. AUSTRIAN. I know of no one.

"Judge HANECY. You say, in that connection, you said that they would show that they had some conversation with Senator Lorimer?

"Mr. AUSTRIAN. Oh, they had, but what that conversation was I do not know.

"Judge HANECY. But not in relation to the payment of money or any corrupt practice, you do not mean?

"Mr. AUSTRIAN. I should say not."

And that he did not contend that "he (Senator Lorimer) had anything to do with it." (Record, p. 80.)

It will be remembered that on the 28th of May, 1910, shortly after the charges appeared in the public press, Senator Lorimer in the open Senate denied any act of bribery on his part in connection with his election in the most emphatic terms, and demanded an investigation by presenting the following resolution (Cong. Record, vol. 45, pt. 7, p. 7020):

"In the Senate of the United States.

"May 28, 1910.

"Mr. Lorimer submitted the following resolution; which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"'*Resolved*, That the Committee on Privileges and Elections be directed to examine the allegations recently made in the public press, charging that bribery and corruption were practiced in the election of William Lorimer to a seat in the United States Senate, and to ascertain the facts in connection with these charges, and report as early as possible; and for that purpose the committee shall have authority to send for persons and papers, to employ a stenographer and such other additional help as it shall deem necessary; and the committee is authorized to act through a subcommittee; and its expense shall be paid from the contingent fund of the Senate.'"

It should further be stated that there was no testimony offered during the investigation which would tend in the remotest degree to implicate Senator Lorimer in any personal act of bribery or attempted bribery or corrupt practices of any nature.

It is claimed, however, that several members of the legislature were, in fact, bribed to vote for Mr. Lorimer, and if established it remains to inquire whether a sufficient number of members of the General Assembly of the State of Illinois were bribed to vote for Senator Lorimer to render his election to that office invalid.

It was to this question that the evidence taken on the investigation was chiefly directed, and the subcommittee who made the investigation not only heard the testimony but observed the witnesses while on the stand, their demeanor while testifying, their apparent candor or want of candor in giving their testimony, and other indicia of the truth or falsity of the story they were telling.

Four members of the general assembly which elected Mr. Lorimer testified to receiving money as a consideration for their votes. The members who thus confessed their own infamy were Charles A. White, Michael Link, H. J. C. Beckemeyer, and Daniel W. Holstlaw.

Charles A. White.

The chief of these self-accusers and the one on whose testimony the whole fabric of the accusation largely depends was Charles A. White, a member of the lower house of the Illinois General Assembly. White seems to have developed early in his legislative career an insatiable desire to secure a pecuniary compensation for his official acts, and he also appears to have suspected his fellow members of the general assembly of being as corrupt as himself. He endeavored to induce the chairman of an important committee to defer reporting a bill in order to extort money from those who were interested in its passage. After Mr. Lorimer had been elected to the Senate, White tried to obtain information from another member of the house whether money had not been used to promote Senator Lorimer's election. This inquiry not only shows his corrupt character, but also casts suspicion upon the truth of his story that he had been bribed to vote for the successful candidate for Senator.

After wasting his salary and other means in riotous living, White appears to have conceived the plan of claiming to have been bribed in connection with the senatorial election as a basis for extorting money from Senator Lorimer. This purpose he reveals to two of his friends and then attempts to put it into execution. In this he signally fails, as appears from the following correspondence:

O'FALLON, ILL., *December 4, 1909.*

HON. WM. H. LORIMER,
Washington, D. C.

MY DEAR SIR: I am preparing to place before the people of this country an article I have written giving my true experience as a member of the Illinois legislature. The

article will appear either in book form or will be published in one of the largest magazines in the United States.

I have just completed the manuscript, which contains about 30,000 words, giving in detail my absolutely true experiences as a member of the forty-sixth general assembly. As yet I have not closed a deal with any publishing house, but when my terms are acceptable will dispose of it.

I have been offered a sum sufficient to value the manuscript at about $2.50 per word.

Believing that you would be more than deeply interested in the works and actions of the members of the last session of the Illinois legislature, owing to the fact that possibly your experience with that general assembly will be one of the questions freely discussed, and assuring you that I have severed all connections with the party leaders, as I am to be independent in the future in all my political dealings,

I am, respectfully, yours, CHAS. A. WHITE.

(Record, p. 125.)

To this communication Senator Lorimer replied as follows:

Hon. CHARLES A. WHITE, *O'Fallon, Ill.*

MY DEAR SIR: I am in receipt of your letter of December 4 in which you advise me that you have manuscript ready to place with publishers treating of your experience as a member of the Illinois Legislature.

I would be very glad indeed to know of your success as an author.

With kindest personal regards, I am,

Very truly, yours, WILLIAM LORIMER.

(Record, p. 164.)

Questioned by the committee as to his purpose in writing Senator Lorimer, Mr. White testified:

"Senator PAYNTER. If I understood you, Mr. White, correctly, that you hoped to get a letter from Senator Lorimer that you could use in connection with this publication?—A. Yes, sir.

"Q. Well, by that I suppose that you expected a letter from Senator Lorimer that might aid to support your charges. Is that the hope you had in the matter?—A. Yes, sir; I had no evidence against Senator Lorimer directly, and had no dealings with him.

"Q. The letter recites in substance, I do not remember the exact language, that you had been made an offer or some inducement had been held out that indicated that the manuscript was worth $2.25 a word—or $2.50 a word, I mean. That is the language of it. 'I have been offered a sum sufficient to value the manuscript at about $2.50 per word.' Suppose that Senator Lorimer had placed the same value upon the manuscript that you did, and had offered you $75,000, would you have taken it?—A. I would have let him have the manuscript.

Q. For $75,000. Would you have accepted $75,000 if he had offered it to you?—A. I don't think I would; if I had I might have turned it over to somebody else.

"Q. You would have turned the money over to some one else?—A. I might have done that." (Record, p. 126.)

Thereafter, Mr. White attempted to sell his story to eastern publications and subsequently did contract to sell it to the Chicago Tribune for the sum of $3,500, a part of White's agreement being that he would assist in substantiating the correctness of his story. This agreement was reduced to writing and is as follows:

[Exhibit 5.]

THE CHICAGO TRIBUNE, OFFICE OF PUBLISHER,
Chicago, Ill., April 29, 1910.

TO CHARLES A. WHITE:

You offered to sell to us for publication a story written by you, which story gives your experiences while a member of the House of Representatives of Illinois during 1909-10, and giving also certain information as to what transpired by reason of your voting for certain measures, etc., while a member of such house.

We refused to pay you for that story or to print the same unless such story was verified and corroborated by persons selected by the Tribune.

For more than four weeks we, with your cooperation, through different agencies, have caused your story to be fully investigated.

For the sole and exclusive right hereby granted by you to the Tribune Co. to publish this story or a revision thereof or excerpts therefrom in the Chicago Tribune and copyright it either in your name or in that of the Tribune Co., but in which shall be at our election, and also in full compensation for the time already spent by you in assisting us in obtaining corroborative evidence of the facts contained in this story, and in full payment for all your time, which shall be devoted by you to further substantiate this

story at any time, which time you hereby agree to devote to that purpose as and when called upon so to do, the Tribune Co. hereby agrees to pay you $3,250, of which said sum $1,250 shall be paid upon the printing of the said story or the first installment thereof, $1,000 thirty days after said first payment, and $1,000 sixty days thereafter.

You reserve to yourself all book or other rights to the story other than the exclusive newspaper rights hereinbefore referred to, which belong under the terms hereof to the Tribune Co.

J. KEELEY,
Vice President Tribune Co.

CHICAGO, ILL., *April —, 1910.*

TO THE CHICAGO TRIBUNE AND THE TRIBUNE CO.

GENTLEMEN: I have read the above and foregoing and agree to the terms thereof, and to accept the sums of money as therein set forth, and I further agree to devote my time and services to substantiate the story referred to as and when requested by you so to do and in such manner as you may direct.

CHAS. A. WHITE.

(Record, p. 104.)

White's account of the alleged bribery of himself is given circumstantially and in detail, but in this he has been shown to have falsified in several important particulars concerning which he could not have been mistaken had his narrative been true. Among other things he stated that Browne came to his room shortly before the election of Senator Lorimer and that two men named Yarborough were then in the room. But it was proved by two reputable and creditable witnesses that on the evening in question one of these men was in Chicago.

Without further reference to the details of White's testimony, it may be said that after seeing, observing, and hearing this witness it was the opinion of a majority of the subcommittee that no credence ought to be given to any part of his testimony tending to establish the fact of bribery. And after carefully reading the testimony given by White in the investigation, a majority of the committee concur in the opinion of the subcommittee in that regard.

Michael Link.

According to the testimony of this witness, he was paid the sum of $1,000 by Lee O'Neil Browne some time after Mr. Lorimer had been elected to the Senate. He further testified that no money was paid or promised him before he voted for Mr. Lorimer; that he made up his mind as early as in the month of March, 1909, to vote for Mr. Lorimer if an opportunity for so doing should occur, and promised Mr. Lorimer his vote some time in advance of the election of a Senator. When accused of having received money for voting for Mr. Lorimer he denied it. When summoned before a grand jury he stated under oath that he had not received any money as a consideration for his vote for Senator. Following this statement he was compelled, by means fully set forth in his testimony, to retract his former statement and testify to having received money for his vote for Mr. Lorimer, as shown by the following:

Cross-examination by Judge HANECY:

Q. You are a farmer, I believe, are you?—A. Yes, sir.

Q. And have been all your manhood life?—A. All my life; born on a farm.

Q. You have lived in Madison County for how long?—A. Twenty-three years.

Q. You live out some distance from——A. (Interrupting.) A mile from Mitchell, a little station.

Q. When were you first elected to the legislature?—A. In November, 1906.

Q. Is it not a fact that everybody from the southern part of Illinois, Republicans and Democrats, who desire to meet each other at any place generally go to St. Louis?—A. Yes, sir; from time to time men for years have met members of the legislature there.

Q. Was it very much easier to go to St. Louis than to any other town that has any hotel accommodations south of the central part of Illinois?—A. Yes, sir.

Q. It is very much easier to go there than from any other part of southern or central Illinois than it is to go to Chicago, isn't it—very much easier to go to St. Louis?—A. Yes, sir.

Q. It is practically a uniform practice, is it not?—A. Yes, sir.

Q. When anybody, for political or other reasons, want two or three to get together for any purpose, they meet at St. Louis?—A. Yes, sir.

Q. That has been the case for a great many years?—A. Yes, sir.

Q. Did Tierney and White talk with you or come down there more than once?—A. Not White; Tierney was there the second time, and I pretty nearly forgot the incident,

when I met him somewhere about Mitchell, about the station. I went in for my mail, or, perhaps, to buy something.

Q. Did he try to get some information from you or try to get some admissions from you?—A. He certainly did.

Q. Did he tell you that he was a detective connected with the Maguire and White Detective Agency, detectives for the Chicago Tribune?—A. No; he said he represented Gov. Deneen.

Q. You were then summoned or told to come up here?—A. Yes, sir; by subpœna.

Q. And you did come up?—A. I certainly came up.

Q. When you came up where did you go?—A. I went to the Morrison Hotel.

Q. Then did you go to the State's attorney's office?—A. Yes, sir.

Q. When you went to the State's attorney's office did you see Mr. Wayman, the State's attorney, or Mr. Arnold, or Mr. Marshall?—A. Mr. Arnold and Mr. Marshall, I think; I did not see Mr. Wayman.

Q. Which one did you see?—A. I think it was Mr. Marshall, I am not positive; I rather think it was.

Q. It was one of the assistant State's attorneys?—A. Yes, sir; one of the assistant state's attorneys.

Q. Tell the conversation, the language used by each as nearly as possible, and if you can not do that, give the substance as nearly as you can.—A. Well, I had a conversation with Mr. Marshall something like this: He says to me, "If I were you I would not be here telling damned lies before this grand jury; I would tell the truth." Then I told him he would not tell me that outside very well or we might mix.

Q. Had you been before the grand jury then?—A. I think I had; yes, sir.

Q. What I want to do is to commence before—just before you were taken to the grand-jury room, and I would like to have you——A. (Interrupting.) I didn't have any particular conversation to my recollection with anyone of the assistant State's attorneys.

Q. You went there, you don't remember how, and was taken before the grand jury?—A. Yes, sir; when my turn came.

Q. They asked you there in relation to your voting for Senator Lorimer for United States Senator?—A. I was in the grand-jury room; yes, sir.

Q. That is what I wanted to know.—A. Yes, sir.

Q. You were examined by whom?—A. By Mr. Wayman.

Q. By Mr. Wayman himself?—A. By Mr. Wayman himself; yes, sir.

Q. What did he ask in relation to that subject? I don't care about anything else.—A. He asked me if I voted for Senator Lorimer, and I told him yes. According to my recollection I told him, "Certainly, I voted for Senator Lorimer and was proud of it; no excuses to make."

Q. What took place then? Did he ask you if you had been paid anything for voting for Senator Lorimer?—A. Yes, sir.

Q. What did you tell him?—A. I absolutely denied it.

Q. You didn't tell this to Mr. Wayman individually, but in answering his question to the whole grand jury?—A. Yes, sir.

Q. All the conversation you had with Mr. Wayman in the grand-jury room was public conversation before the grand jury?—A. That is all at that time. I had some conversation—at that time—yes, sir—at that time.

Senator BURROWS. State what you said before the grand jury.—A. Well, I answered questions, but I disremember what all the questions he asked me were.

Senator BURROWS. State those you can remember and your replies.—A. I denied receiving any money for voting for Senator Lorimer.

By Judge HANECY:

Q. Then did you leave the grand-jury room?—A. Yes, sir.

Q. After those different questions were asked you?—A. Yes, sir; at that time I did.

Q. Do you remember what day of the week or day of the month that was you first went before the grand jury?—A. That was the 5th or 7th of May; it was right along there, the early days of May.

Q. May of this year?—A. Yes, sir; May of this year.

Q. When you left the grand jury-room were you put in the custody of an officer?—A. I certainly was.

Q. Were you indicted at that time or was there any complaint or charge made against you at any place?—A. No, sir.

Q. Who put you in charge of an officer?—A. Well, I presume Mr. Wayman did. To my knowledge I was in charge directly of an officer.

Q. Who was the officer?—A. Well, there were two or three different officers.

Q. The first one?—A. I disremember his name. Mr. O'Keefe was with me most of the time.

Q. Was it Oake?—A. I think that is his name.
Q. He was the first officer?—A. Yes, sir.
Q. He was a police officer, a detective appointed to the State's attorney's office at that time?—A. Yes; I understood so.
Q. Did he take charge of you at that time?—A. Certainly.
Q. How long did you remain in his custody?—A. I disremember.
Q. About?—A. The first night I think I went to dinner with him—the first night, I believe; that would be on Wednesday night of the week; and I remained in his custody and he kept his eye on me like a was a criminal. Oake would not allow me to telephone to friends, and was keeping his eye on me, and I was not allowed to discuss any matters at all.
Q. Was he armed at the time, and did he take out his revolver and his billie and put them on the table in the hotel, so you could see them?—A. He did not, but other detectives did; I suppose he was armed, but I don't know to my knowledge.
Q. Other officers did?—A. Other officers did.
Q. Were you continuously in the charge of some officer of the State's attorney's office, after that time?—A. I certainly was.
Q. Up to what time?—A. Until I was permitted to go home on Saturday morning.
Q. What day?—A. It was the week I was here; I disremember—it was from the 5th, 6th, 7th, 8th, or 9th, or something of that kind, of May.
Senator BURROWS. It was Saturday morning of that week?—A. Yes, sir.
Q. You came up here what day of the week?—A. I came here Tuesday evening.

By Judge HANECY:

Q. You went before the State's attorney—went before the grand jury Wednesday morning, did you?—A. I believe so.
Q. When you went back home again, did an officer go with you?—A. Not at that time.
Q. Did an officer from the State's attorney's office come down and get you afterwards?—A. Yes, sir.
Q. When, after that Saturday morning that you went home?—A. That was the—well—I wish to correct that. I got a subpœna served to me to go to Springfield on my return home Saturday evening of this week. I went to Springfield from this subpœna and acknowledged it, and a detective went home with me from Springfield and stayed with me.
Q. That was a subpœna to appear before the grand jury at Springfield?—A. Yes, sir.
Q. When was that?—A. That was the week following I was here.
Q. Was it the first of the week or the middle of the week or the last?—A. Well, I think it was on Monday following the Saturday I left Chicago.
Q. When did you leave Springfield to go home?—You got there Monday?—A. That evening.
Q. Monday evening?—A. Yes, sir.
Q. Did an officer from the State's attorney's office of Cook County go with you back home from Springfield on Monday evening?—A. Yes, sir.
Q. Did he take you into custody?—A. Well, I was not arrested.
Q. Did he stay with you there all the time?—A. He went to my house, but went to St. Louis, I believe, one day while at my house in the country; but he went home with me and stayed with me, but, of course, he went to St. Louis during one day.
Q. He was with you wherever you went?—A. Yes, sir.
Senator PAYNTER. Was that officer from Chicago or Springfield?—A. Chicago.
Senator GAMBLE. How long was he with you?—A. Four days.
Q. At your home?—A. Until I insisted upon having him called off.
Q. Did he stay at your home?—A. Yes, sir.

By Judge HANECY:

Q. All the time?—A. Yes, sir.
Q. Except when you went out, and then he went with you?—A. He went to St. Louis during that time by himself.
Q. How far are you from St. Louis, about?—A. About 15 miles.
Q. You can go there by electric line?—A. Yes, sir; and get back in two or three hours, at any time.
Q. Then did another officer—I will withdraw that—did the State's attorney of Sangamon County, Springfield, send any officer with you after you had been examined there before the grand jury?—A. No, sir.
Q. He never had you in custody?—A. No, sir; they don't use those methods.
Q. When the officer left Springfield—the officer from the State's attorney's office in Cook County left with you to go to your home from Springfield—did he have any warrant against you?—A. No, sir.

Senator GAMBLE. Was there any warrant for your arrest?—A. No, sir.

Senator GAMBLE. Or a subpœna served on you?—A. A subpœna to appear at Springfield.

By Judge HANECY:

Q. After you left Springfield and went back home was there any supbœna or warrant against you?—A. No, sir.

Q. What was that officer's name?—A. That was O'Keefe that called for me.

Senator JOHNSTON. What did the officer say he accompanied you from Springfield for?—A. He claimed it was for my own protection. I told him positively that I needed no protection; that I could protect myself.

Q. Did he insist upon staying at your house?—A. He was under orders from a gentleman in Chicago.

Q. Who was the next officer who had charge of you?—A. Well, I think after that time I was under the direction of O'Keefe until I read what is called the "riot act" to Wayman.

Q. When was that?—A. That was about a week before the first Browne trial, when I told Wayman no more detectives for me. "If you have got a warrant, arrest me; if I am guilty of anything arrest me; but no more detectives; I shall not submit to detectives any longer." That was my conversation.

Q. Did O'Keefe then go to Chicago with you and stay with you at the different hotels or wherever you were kept?—A. He did until a week before the Browne trial; then no more detectives after that for me.

Q. He did stay here until that time?—A. Yes, sir.

Q. The first trial of Browne commenced about the 7th to the 10th of June; that is right, isn't it?—A. Yes, sir; I think so.

Q. Now, after you were before this grand jury, the first grand jury, and told Mr. Wayman, the State's attorney, and the grand jury that you never got any money from anybody, Browne or anybody else, for voting for Lorimer for United States Senator, were you indicted?—A. I was indicted for perjury either the second or third day I was here—I am not positive which—after my denial.

Q. Was it the second or third day after you first went before the grand jury?—A. It was either the second or third day, I guess the second. I am not positive whether the second or third day.

Q. You were indicted for peujrry?—A. Yes, sir.

Q. By the same grand jury you had been before?—A. Yes, sir.

Q. After you were indicted for perjury were you taken by the State's attorney or any of his assistants and talked with about your testimony and about your indictment?—A. I guess I was.

Q. Now, what was the first thing that was done after you were indicted for perjury by him?—A. They kept flaunting the indictment for perjury against me.

Q. Doing what?—A. Putting it in front of my face, showing it to me and speaking to me.

Senator GAMBLE. Who did that?—A. The asistant State's attorney and the State's attorney himself.

Q. Tell the names of the assistant State's attorneys.—A. Mr. Marshall.

Q. Did State's Attorney Wayman do that, too?—A. He didn't throw it in my face; he would show it to me and talk to me about losing my home, putting my home on one side and the penitentiary on the other.

Q. State to this honorable committee what State's Attorney Wayman told you about the indictment for perjury.—A. He told me if I would go before the grand jury and state that I had received some money from Browne and Robert E. Wilson that I would be cleared and go home a free man. That is what he told me.

Senator BURROWS. Anything else said?—A. Well, I told him that I had told him all I knew, and he denied that I had. We kept up the conversation, and he said he was a farmer himself in his early days South. I told him I was a farmer, and he told me, he says: "You come up here"—the conversation drifted along this line—"and let these Chicago lawyers get a hold of you and they will take your farm away from you." That was the line of talk; and he told me to rest over that night—that was Friday evening—and to come in by 10 o'clock on Saturday morning and make a confession, and he would have the perjury charge expunged from the record, and I would go home a free man. That was the sum and substance of the conversation.

Q. They had more than an hour to talk to you about that?—A. Yes, sir; something of that kind.

Q. What time of day was that conversation; what time did it end?—A. It was somewhere between 5.20 and 6.30; it was 6.30 when I left the Criminal Court Building that evening.

Q. Then were you put in the custody of an officer when you left the State's attorney?—A. Yes, sir.

Q. Who was that officer?—A. That was Mr. O'Keefe.

Q. What did he do with you?—A. He took me back to the Morrison Hotel.

Q. Did he stay there with you?—A. Yes, sir.

Q. All the time?—A. Yes, sir.

Q. Was it he that took his revolver, billie out and put it on the table in your presence?—A. Yes, sir.

Q. Did he talk with you about what the State's attorney talked to you about—about your going back and telling what the State's attorney wanted you to tell?—A. Yes, sir.

Q. What did Detective O'Keefe from the State's attorney's office say to you in that respect?—A. He said: "Link, I wouldnot stand by the other fellows, I would stand by Wayman, he is the man to stand by in this matter; make a confession. I don't like to see you get into trouble and you are going to get into trouble."

Q. Mr. Link, how long during this conversation between you and O'Keefe, how long did O'Keefe talk to you?—A. Off and on, but I disremember the number of times; it was not continuous, of course, but off and on during the time he was with me.

Q. Off and on between the times you and the State's attorney had the talk and he took you back there?—A. Prior to that night, too.

Q. All the time you were in his custody?—A. Yes, sir.

Q. Now, did Officer O'Keefe take you back to the State's attorney's office the next morning?—A. Yes, sir.

Q. That would be Saturday morning?—A. Yes, sir.

Q. Did you talk with, or did Thomas Maguire, of the Maguire & White Detective Agency, talk with you?—A. Yes, sir; he was present nearly every time I met Wayman, and Wayman and myself were in Wayman's room.

Q. What did Maguire say to you?—A. He tried to put words in my mouth several times.

Q. Words about what?—A. He said I should not be friendly to the Browne side, and the Lorimer side, and so forth; "It doesn't look well, Link; that don't look well." I told him it was none of his business; I would take up for my friends wherever I saw fit to take them.

Q. Did Thomas Maguire, the detective, say this to you—that you had better tell what you knew or you would go to the penitentiary; did Maguire say that to you?—A. I rather think one of the assistant State's attorneys told me that; I don't know whether Maguire said that to me or not, but his conversation ran on that line. I think that was Arnold; 20 minutes before 5 o'clock that evening of that week.

Q. What was that conversation you had with Assistant State's Attorney Arnold in which he said that to you?—A. Mr. Arnold came to me and says, "Link, you have got just 20 minutes to save your life." I says, "What do you mean?" He says, "You have got just 20 minutes to go in and tell all you know to save your life." I says, "I have told all I know." He says, "All right, Link, it is your funeral; it is not mine." He goes into the grand jury room and an indictment was returned that evening. I told him I had told all I knew.

Senator PAYNTER. An indictment against you?—A. Yes, sir; for perjury.

Q. Arnold said that you——A. He said I had 20 minutes to save my life.

Q. That was just before——A. (Interrupting.) Twenty minutes before the grand jury adjourned at 5 o'clock, Friday afternoon or evening.

Q. Were you told that night that you were in the custody of an officer of the State's attorney and that you had been indicted for perjury?—A. Yes, sir.

Q. Who told you that? Was it a detective or one of the assistant State's attorneys?—A. It was, I think, Mr. Wayman himself that told me that.

Q. Mr. Wayman himself told you that?—A. I think so.

Q. Did Mr. Arnold say to you in that conversation that you have been referring to, just before you were indicted for perjury, that if you didn't tell what they wanted you to that they would send you to the penitentiary?—A. That it was my funeral; yes, sir.

Q. Did he use the word "penitentiary"—that he would send you to the penitentiary?—A. I am not quite certain; I am not positive; but he used that kind of terms to me.

Q. Did he lay special stress upon the word "penitentiary" in talking to you?—A. Mr. Wayman laid more stress on that than any of his assistants.

Q. That is, that he would send you to the penitentiary?—A. He pictured it very, very strenuously between the penitentiary and my home.

Senator BURROWS. Will you state what he said?—A. He said "It will be much better for you to be here with your family than to go to the penitentiary and lose your home." He pictured what the penitentiary was, and so forth.

Senator BURROWS. What did he say?—A. That I might lose my home, and he put a great deal of stress on the penitentiary and my home—I being a farmer away from my home and my family.

Q. Did Mr. Wayman say anything in picturing the penitentiary on one side and your home on the other about your wife?—A. Why, certainly.

Q. Tell the committee what he said.—A. Well, that I would lose my home, and that meant that I would lose my wife, too.

Q. Did he say what would be done if you would go before the grand jury and tell what he wanted you to?—A. That I could go home a free man and not a perjurer in any manner, shape, or form.

Senator BURROWS: If what?—A. If I went before the grand jury and made an acknowledgement.

Senator BURROWS. An acknowledgement of what?—A. If I had received $1,000 from Browne.

Senator FRAZIER. Was that true that you had received $1,000?—A. I shall not deny it; it is true.

Q. Did not the State's attorney say to you that if you would go on and say that you had received $1,000 from Browne for voting for William Lorimer for United States Senator that you could go home?—A. Yes, sir.

Q. That was not true?—A. That was not true; no, sir.

Q. Did Mr. Wayman tell you that you had been indicted and that he would take you before the criminal court for trial on that indictment if you didn't go before the grand jury and tell that body what Mr. Wayman wanted you to tell?—A. Why, certainly; he said I would have to give a bond, and it was a $15,000 bond, and they made it $5,000, I think.

Q. Did Mr. Wayman tell you what he would do if you would go before the grand jury and tell them what he wanted you to tell them? Did he tell you what he would do with the indictment?—A. Nolle pros it and have it expunged from the record, so in future years it would not be on the record.

Q. Did you say to Mr. Wayman, "Well, I will go before the grand jury and lie if I have to; but I don't want to;" did you say that or that in substance?—A. That in substance.

Q. What did you tell the grand jury, then?—A. I told the grand jury that I had received $1,000 from Browne and that I had received $900 through Robert Wilson; that is what I told the grand jury.

Q. Did you tell the grand jury that you had received that money or any part of it for voting for Senator Lorimer for United States Senator?—A. Positively no.

Q. Just before you went before the grand jury that last time did Mr. Wayman tell you that if you would go and tell the grand jury what he wanted you to you would keep out of trouble and keep from disgracing your family?—A. Yes, sir.

Q. After you went before the grand jury with Mr. Wayman the last time and told the grand jury what Mr. Wayman asked you to, what, if anything, did Mr. Wayman or his office do in relation to the indictment against you for perjury?—A. Well, he took me before Judge McSurely, I think it was, and said: "Mr. Link has made a clean breast of the whole affair." I didn't know what he called a "clean breast," but those were his words. I denied making a clean breast of anything except the truth.

Q. Did Mr. Wayman have the indictment against you quashed?—A. Yes, sir.

Q. He took you before Judge McSurely and asked to have it done, and Judge McSurely did it?—A. Yes, sir.

Q. Did you still continue in the custody of the officer?—A. No, sir; he allowed me to go home.

Q. Did he put you in the custody of an officer after that time?—A. Certainly.

Q. When?—A. The following week.

Q. That was Saturday that he dismissed the indictment against you?—A. Yes, sir.

Q. When, the next week, were you put in the custody of another officer?—A. Monday night or Tuesday night—I think it was Monday night of the following week. A subpœna was served on me to go to Springfield, and immediately on my return home on that Saturday evening—I returned home about 6.30; that is my home town; I didn't get home quite that early.

Q. Did that officer or some other officer from the State's attorney's office keep you in custody all the time—until about the time of the first Browne trial?—A. I wrote a letter to Mr. Wayman that I would not submit to it and told him personally when I came to Chicago no more detectives for me; that I would not play hide and go seek any longer; that I was not a criminal, and that I would not stand for it. I wrote him such a letter from my home, and told him to recall Mr. O'Keefe, which he did.

Q. When was that?—A. After he was with me; I think about four days there.

Q. Do you remember what day of the month that was, or what month?—A. No, sir; it was during the month of May.

Q. When was it with respect to the commencement of the first Browne trial?—A. It was some little time before the commencement of the trial.

Q. About how long?—A. About three or four weeks; perhaps three weeks or something; I don't know. I told him positively that I would not submit to it, and when I saw Mr. Wayman, a week before the first Browne trial, I told him that personally.

Q. What I want to know is, if you were put into the custody of an officer from the State's attorney's office after you were indicted for perjury and that indictment for perjury had been dismissed?—A. Yes, sir.

Q. You were still kept in the custody of an officer?—A. Yes, sir.

Q. Was there any charge against you of any kind that you know of?—A. None whatever.

Q. After that indictment for perjury had been dismissed?—A. Well, by Mr. Wayman's advice I refused to answer questions at Springfield. I had to go to Springfield two or three times, and at his advice refused to answer the questions.

Q. Were you summoned before the grand jury in Springfield as a witness?—A. Yes, sir.

Q. Did Mr. Wayman know that you had been summoned as a witness there?—A. Yes, sir.

Q. Did he talk with you about whether you should go before the grand jury in response to the subpœna of the court?—A. Not as to whether I should go, but as to whether I should answer certain questions or not.

Q. Did he tell you whether or not you should answer questions that might be asked you?—A. Yes, sir.

Q. By the grand jury or the State's attorney of Sangamon County?—A. Yes, sir.

Q. What did he tell you?—A. He told me not to answer, but to stand on the ground that I might incriminate myself by answering any questions before the grand jury.

Q. Did you tell Mr. Wayman that you were not afraid of incriminating yourself?—A. Certainly; I told him I wanted to answer the questions my way that were put to me there.

Q. What did he say to you?—A. "Don't do it, Link; don't do it."

Q. Did he know that the State's attorney and the grand jury of Sagamon County had summoned you before the grand jury to testify in relation to these matters?—A. Yes, sir.

Q. What did he tell you as to the subject matter? Did he tell you not to answer the questions of the State's attorney or the grand jury of Sangamon County?—A. If the senatorial committee please, the question all hinged upon one answer, "No" or "Yes," to one certain question, and that question was, "Did you receive or were you offered or do you know of anybody being offered any money in Springfield for voting on any question?" That was the question, and when I finally got permission from Mr. Wayman, which I answered positively, right straight out, "No." I answered "No." That is all there was about that. He wouldn't let me answer the question at all.

Q. Did you have a conversation in the criminal court building about a week prior to the trial of Lee O'Neill Browne with H. J. C. Beckemeyer, in the criminal court building about a week before the first Browne trial began?—A. Yes, sir; it was just about a week before—a week prior.

Q. Did Beckemeyer say to you, "Our testimony will be alike, word for word?" And did you say, "No, Beck, I have got the best of you; I promised to vote for Lorimer 8 or 10 days before Browne spoke to me about it"—A. That conversation took place.

Q. As I read it?—A. Yes, sir.

Q. Did Beckemeyer say to you, "Yes; you have the best of me in that"? Then did you say to Beckemeyer: "Beck, I don't believe that Lorimer ever put up a dollar for his election, or that anybody else ever put up a dollar for him"? And did Beckemeyer say, "I don't believe he did, either"?—A. That was the conversation, word for word, as near as I can remember it.

Q. Did you ever receive any money or any other thing of value from anybody—Browne, Wilson, or anybody else—on condition, or on the promise or agreement or understanding, directly or indirectly, that you were to vote for William Lorimer for United States Senator?—A. I certainly did not.

Senator GAMBLE. Or after he had voted for Lorimer.

Q. Did you ever receive any money from Lee O'Neill Browne, Bob Wilson, or R. E. Wilson, whatever his name is, or anybody else, or from any source whatever, or did you receive any other thing of value at any time from anybody because you had voted for William Lorimer for United States Senator?—A. No, sir.

Q. Was there ever any consideration moving to you, or to anybody for you, or for your benefit, in any place, from any source whatever, with the understanding that

you were to vote for William Lorimer for United States Senator, or if you had voted for William Lorimer for United States Senator, any consideration of any kind?—A. None whatever.

Q. Did you vote for William Lorimer for United States Senator for any other reason than that you liked him, and that you favored and that your people favored the things he favored in relation to the deep waterway from the Lakes to the Gulf?—A. That is why I voted for him.

H. J. Beckemeyer.

This witness also testified before the subcommittee that he had received money from Lee O'Neil Browne as a reward for his vote for Senator Lorimer, but he also testifies that no money or other compensation was promised him before he voted for Mr. Lorimer. His experience before the grand jury was similar to that of the witness Michael Link, and as against his declaration last made before the grand jury and repeated to the subcommittee we have his statement to Michael Link denying the use of money in the senatorial election, and also to Robert E. Wilson that he did not get any money for voting for Mr. Lorimer, and if anyone said so he was a liar.

D. W. Holstlaw.

This witness testified that in a conversation with Senator Broderick he told Broderick that he intended to vote for Mr. Lorimer for Senator, to which Broderick replied, "Well, there is $2,500 for you," and that sometime afterwards Broderick paid him $2,500. This witness was also driven to making this statement by certain proceedings taken before a grand jury of Sangamon County, Ill., and in many respects the story told by this witness seemed to the subcommittee to be a highly improbable one.

The circumstances before referred to and many others which might be instanced, tended to render the testimony of each and all the witnesses who have been named, of doubtful value. And in each case in which it was claimed that some member of the Illinois General Assembly had been bribed to vote for Mr. Lorimer, the accusation was positively denied by the person accused of committing the alleged act of bribery. And after a careful examination and consideration of all the evidence submitted, the committee are of the opinion that even if it should be conceded that the four members of the Illinois General Assembly before referred to received money in consideration for their votes for Mr. Lorimer, there are no facts or circumstances from which it could be found or legally inferred that any other member or members of the said general assembly were bribed to vote for Mr. Lorimer.

The majority for Senator Lorimer in the joint assembly of the two houses of the General Assembly of the State of Illinois was 14. Unless, therefore, a sufficient number of these votes were obtained by corrupt means to deprive him of this majority, Mr. Lorimer has a good title to the seat he occupies in the Senate. If it were admitted that four of the members of the general assembly who voted for Mr. Lorimer were bribed to do so, he still had a majority of the votes cast in the general assembly, and his election was valid.

Case of Browne, Broderick, and Wilson.

It is, however, declared that if the four witnesses before named were bribed to vote for Mr. Lorimer, those who bribed them were equally guilty and that the votes of Browne, Broderick, and Wilson should also be excluded. But the committee can find no warrant in the testimony for believing that either one of said legislators was moved by any corrupt influence. Browne's reasons for voting as he did are clearly set forth in his testimony. He was the leader of a faction of the minority of the house, and for certain political reasons he thought it good policy to aid in the election of some member of the majority party other than those who had received a considerable number of votes in the general assembly.

The suggestion that his vote and the votes of others whom he might be able to influence should be given to Mr. Lorimer was first made to him by the speaker of the Illinois House of Representatives, and there is no suggestion in the testimony that Mr. Shurtleff, in thus attempting to bring about Mr. Lorimer's election, was actuated by any improper motive. And the fact that many members of the minority party in the Illinois General Assembly voted for Mr. Lorimer creates no well-grounded suspicion that they were bribed to do so. It is not the first instance in the history of this country in which the members of the minority party of the legislature of a State have joined a few of the members of the party in the majority in electing a Senator from the ranks of the majority party. As to Senator Broderick, there is no testimony that

he was bribed to vote for Mr. Lorimer. He not only emphatically denies that he received any money for his vote, but gives his reasons for voting as he did.

Nor is there any evidence in the record from which a legal inference could be drawn that Representative Wilson was bribed to vote for Senator Lorimer. As is hereinafter stated, if Wilson was guilty of any act of bribery, it was not in connection with the senatorial election. There is, therefore, no good ground for deducting his vote from those received by Mr. Lorimer.

Much of the testimony taken upon the investigation related to the alleged payment of money to members of the General Assembly of Illinois by one Robert E. Wilson. This was denied by Wilson and by others, and after considering all the evidence on that subject, the committee are not prepared to find that the fact is established. But whether the sums of money claimed to have been paid were or were not paid, that fact has no relevancy to the matter which the committee was appointed to investigate. If any money was disbursed by Wilson, it is evident that it was from a fund which was neither raised nor expended to promote the election of Mr. Lorimer as a Senator nor to reward those who voted for him for that office. It was therefore no part of the duty of the subcommittee to inquire into either the origin of the fund or the purpose for which it was used. That matter was and is one for the proper officials of the State of Illinois to take cognizance of and one with which the Senate of the United States has no concern.

The committee submit to the Senate the testimony taken in the investigation, with their report that, in their opinion, the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices, and request that they be discharged from further consideration of Senate resolution No. 264.

J. C. Burrows.	Morgan G. Bulkeley.
Chauncey M. Depew.	Joseph W. Bailey.
W. P. Dillingham.	Thomas H. Paynter.
Robert J. Gamble.	Joseph F. Johnston.
W. B. Heyburn.	Duncan U. Fletcher.

The undersigned, while fully concurring in the foregoing report of the Committee on Privileges and Elections, desires to state herewith his personal reasons therefor:

There was a vacancy in the Senate from Illinois to be filled by the legislature in the constitutional manner.

The record of the Legislature of Illinois consisted of 202 votes on joint ballot, and at a lawful time, May 26, 1909, the vote for Senator was taken which resulted in 108 votes being cast for Mr. Lorimer, which result was duly certified to the Senate and Mr. Lorimer was seated.

No other person has claimed the right to hold the office or to have been elected thereto.

No claim has been made by or on behalf of the State of Illinois that the election of Mr. Lorimer was not in accordance with law or that any other person is entitled to the office.

On June 7, 1910, more than one year after Mr. Lorimer had been elected and taken his oath of office as a Senator, one Clifford W. Barnes, claiming to act on behalf of "The Legislative Voters' League of Illinois," presented charges in the senate, alleging on information and belief that three members of the legislature who voted for Mr. Lorimer had been bribed to do so by one Lee O'Neil Browne, who was a Democrat and who is shown to have been indicted for such act and acquitted by a jury of the State of Illinois upon the trial under such indictment.

When the committee was organized at Chicago to hear the parties who had made the charges, Clifford W. Barnes was called and appeared before the committee. Upon being inquired of as to whether he was prepared to proceed to sustain the charges which he had made he informed the committee he was not prepared to offer anything in support of such charges and did not desire to appear for that purpose, or any other, before the committee. He, however, requested that the Chicago Tribune, a newspaper published in Chicago, should be permitted, through its representatives, to introduce testimony before the committee respecting the charges and to appear by counsel.

The committee granted this request and a large amount of testimony was introduced, much of which was outside the legitimate scope of the inquiry and some of which consisted of the testimony of members of the legislature establishing the unreliability, and even infamy, of such witnesses. Men swore without any apparent embarrassment that they had sworn falsely on other occasions; had committed perjury; had violated the laws of their State, the laws of morality, and the laws of decency. While it is true the truth may be told by bad men and should not be disregarded

altogether because of the moral character of the party testifying, yet in this case the moral obliquity of some of the witnesses called to establish the charges was such as to make it highly improper to accept such testimony as the basis upon which any man's character or right to an office should depend.

It is not claimed nor was any attempt made to show that Mr. Lorimer was in any way connected with the alleged bribery or that he knew of any bribery or corrupt practice in connection with his election.

The committee is not charged with the investigation of the personal character of the members of the Illinois Legislature, nor should it report upon the same.

The right to investigate the character of the legislative body of a State or any member thereof belongs exclusively to the State and the people thereof.

In the Senate every presumption is in favor of the integrity of the State as certified to it by the chief executive of the State, and no presumption can be indulged that the State acted corruptly in the election of a Senator.

When a question as to the right of an incumbent to sit arises in the Senate which is based upon charges made by persons acting in their individual capacity, the burden of sustaining such charges rests on the charging party, and such party should be held to strict proof of the charges made, and such charges may not be made the basis of a dragnet investigation into the personal conduct or morals of the members of the legislature who participated in the election. The State must stand responsible for the character of its officers, and that responsibility is to its own people and not to any branch of the General Government.

The Senate may inquire into the personal fitness of a man elected by a State to sit as a Senator and may determine such question within the exercise of its exclusive powers, but in doing so it may not inquire into the personal character of the officers through whom the State acts. That question belongs to the people of the State exclusively.

The Senate may, however, inquire into the manner of the election of a member of its body to the end and for the purpose of ascertaining whether such election was an honest one, representing the will of the members of the legislative body which certifies his election to the Senate, and in doing this we may inquire whether the votes cast by members of the legislature were procured by bribery of such members, by the person for whom they voted or by anyone on behalf of such person with the knowledge or consent of such person, and in case we should find that such bribery existed we should find that his election was procured in violation of the law, and the person so selected should not be permitted to hold the office of Senator.

In this case Mr. Lorimer is neither charged nor shown to have bribed or corrupted any member of the legislature who voted for him, or to have furnished any money to any person for such purpose, neither has it been shown that he had any knowledge of any bribery or corrupt practice in connection with his election. We do not have to weigh testimony to arrive at this conclusion, for there was no attempt to establish such conduct or knowledge on the part of Senator Lorimer.

That a sufficient number of Democrats had agreed among themselves to join those Republicans who forced Mr. Lorimer's election is clearly shown by the testimony, a majority of the faction of the Democratic party from which such votes came was acting under the leadership of Mr. Lee O'Neil Browne, who was a member of the house.

Much testimony and much scandal has been brought to the attention of the committee in connection with Mr. Browne's methods of dealing with the Democrats who voted for Mr. Lorimer under his leadership. Men have been charged with corrupt practice, bribery, and perjury. The powers of the courts of Illinois have been invoked to punish the men charged with these offenses, and trials have been had, but no one has been convicted. Another election for the election of members of the Illinois Legislature has been held and most of the men charged with crime and corruption have been reelected to office by the people of Illinois. Can it be urged that the Senate, in determining the truth of the charges affecting the election of Mr. Lorimer, should disregard the verdict of the courts and of the people before whom the charges were urged and considered and unseat a member upon testimony held insufficient by the people of the State of Illinois?

W. B. HEYBURN.

(Cong. Rec., vol. 46, pp. 547–552.)

MONDAY, JANUARY 9, 1911.

Mr. Beveridge, a member of the Committee on Privileges and Elections, submitted his views dissenting from the report of the committee (No. 942, Pt. 3), at the conclusion of which he offered the following resolution:

"*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois." (S. Res. 315.)

VIEWS OF MR. BEVERIDGE.

I can not concur with the report of the majority of the committee.

To my mind the testimony is conclusive that far more than enough bribery was practiced in this election to invalidate the same, even under the Senate precedents upon which the majority rely.

The facts.

The majority report itself declares that "four members of the general assembly testified to receiving money as a consideration for their votes." Each of these men did so testify repeatedly.

Senator Holstlaw testified that he received his money from his fellow senator, Broderick, at two different times, the first installment being $2,500, and the second amount being $700.

Representatives Beckemeyer, White, and Link testified to having received their money from their fellow representative and factional leader, Browne, and from Leader Browne's lieutenant, their fellow representative, Wilson.

Like Senator Holstlaw, these three representatives received their money also in two installments, the first being $1,000 and the second $900.

It is of corroborative importance that the dates when Senator Holstlaw received his two installments from his fellow senator, Broderick, are practically the same dates on which the house members received their two installments from their fellow representatives, Browne and Wilson.

Now comes an undisputed fact of conclusive force, although the majority report ignores it. These confessed bribe takers were shown to have had in their possession, in bills of large denominations, unusual sums of money soon after the dates when they swore to having received the same.

This fact is proved by the uncontradicted testimony of impartial and disinterested witnesses.

For example, on the very day that confessing bribe-taking Senator Holstlaw received his first installment of $2,500 in currency of large denominations from his fellow senator, Broderick, in Chicago, he personally deposited that very amount in the State Bank of Chicago in currency of large denominations. This is proved by Mr. Newton, the cashier of the State Bank of Chicago, who personally received this $2,500 from Holstlaw in currency of large denominations. It is proved by the bank's regular deposit slip formally showing this transaction.

Again, Representative White, under the same circumstances, was seen in possession of unusual sums of money in bills of large denominations. This is proved by the uncontradicted testimony of Miss Vandeveer, White's bookkeeper; Mr. Dennis, a business associate; and Mr. Kirkpatrick, an employee of the store where White deposited several hundred dollars. These three impartial witnesses saw the money and swear that it was in bills of large denominations.

Representative Beckemeyer, under the same circumstances, deposited $500 in a bank at Belle Isle, Ill., although he did not live at Belle Isle and had to be identified at the bank. This is proved by the uncontradicted testimony of James Gray, a business man of Belle Isle, who identified Representative Beckemeyer at the bank at the latter's request.

Mr. Gray saw the money and swears that it was in bills of large denominations, twice mentioning a $100 bill. The size of the bill, and indeed, the whole transaction, seems to have impressed Mr. Gray, for he asked Representative Beckemeyer where he got it.

The subcommittee refused to permit Mr. Gray to tell Mr. Beckemeyer's answer. It appears that two other gentlemen—Mr. Ford and Mr. Murray—would have testified to the same facts to which the committee would not permit Mr. Gray to testify, but under this ruling of the committee both Mr. Ford and Mr. Murray were abandoned as witnesses.

Of the four men who repeatedly testified to having received this bribe money, only Link was not shown to have been seen with the cash. But Link repeatedly testified under oath at various times that he did receive the same amounts of money under the same circumstances and at the same times and places where his fellow members received theirs. And this repeated testimony of Link's is corroborated as to circumstances by the testimony of the others.

The majority attack the confession under oath of these bribe takers upon various grounds. For example, the majority report says, or at least strongly implies, that three of them were "compelled" or "driven" to make these sworn confessions because of their treatment by the officers of justice of Cook County and Sangamon County, Ill., who were investigating this and other transactions before the grand juries of those counties.

The majority lay great stress upon the testimony of bribe-taker Link as to his treatment by State's Attorney Wayman and his assistants, State's Attorneys Arnold and Marshall, and the officers in charge of Link in connection with the grand-jury proceedings in Cook County, before which grand jury Link finally made his full confession under oath. The language of the majority suggests sympathy for bribe-taker Link under this treatment and condemnation for the officers of justice whom Link says subjected him to it.

But Link's theatrical account of what he calls the "third degree" to which he was subjected is explained by the testimony of State's Attorney Wayman. For example, in the matter of being placed in the custody of an officer in Chicago and to and at hishome afterwards, it actually appears that Link was very glad to have the officer with him for protection, if indeed, Link himself did not ask that an officer be sent with him.

The men of whom Link most bitterly complains are Assistant State's Attorneys Arnold and Marshal, particularly the former. Yet the committee did not subpœna these officers of justice to give their account of Link's story, although they were residents of Chicago, in which the hearing was held.

The majority seem to think that the remarkable so-called third-degree story told by Link actually "compelled" him to testify to a falsehood in confessing his bribery both before the grand jury and before the subcommittee. If so, it was important that Arnold and Marshall should give their account. Yet they were not called. If not—if Link testified to the truth when he swore before the subcommittee, as well as before the grand jury, that he received this bribe money—why is the majority so concerned about Link's third-degree melodrama?

The majority report ignores one reason that Link repeatedly gave for denying that he met Browne and Wilson and got the bribe money from them. Link swears that he made this denial because he did not wish to get his "friends in trouble." Who were these friends whom Link was so afraid of "getting in trouble," that, to protect them as well as himself, he at first committed perjury by denying having met Browne and Wilson and getting money from them?

But after all, this phase of the case upon which the majority lays such emphatic emphasis is not material unless the Senate believes these confessed bribe takers did not tell the truth in their repeated statements under oath that they actually did receive this bribe money, but, on the contrary, that they were "compelled" or "driven," as the majority say, to this repeated perjury by the conduct of the State's attorney and his assistants.

What the Senate must determine is whether it believes, as a matter of fact, that these men actually did receive the money which they testified to having received, and large amounts of which were found in their possession in bills of large denominations about the time they testified to having received it. This is the question before us—not the conduct of the officers of justice.

Upon this point the testimony convinces me that "four members of the general assembly which elected Mr. Lorimer" who "testified to receiving money as a consideration for their votes," actually did receive such money.

If they actually did receive such money, from whom did they receive it? They testify that they received it from their fellow representative and factional leader, Browne, and his lieutenant; their fellow representative, Wilson; and from Broderick, the fellow senator of Holstlaw.

If they did receive it from these men, these three bribe givers are as guilty as the four bribe takers. In law bribery includes the giving as well as the receiving of bribes, and the bribers are equally culpable with the bribed. In morals these bribe givers are even more culpable than the bribe takers, because they were men of greater influence, intelligence, and force of character.

The majority report exonerates these three accused bribe givers upon the ground, chiefly, that they denied the accusation. What else did the majority expect these accused bribe givers to do except to deny that they gave the bribe? What else could they have done unless they, too, confessed?

Did the majority expect everybody concerned with these corrupt proceedings to confess?

Is bribe giving to be proved only by the sworn confession of the bribe givers? Is not the law settled, clear, and conclusive that bribery may be and often must be proved by circumstantial evidence?

It would be a rare case where any culprit could be convicted before a jury of bribery or conspiracy to bribe if the courts should take the view of the law taken by the majority of the committee.

Why did Browne take the long journey to St. Louis to meet his fellow members, who testified that they received their bribe money from Browne at St. Louis?

Browne lived at the other end of the State. His excuse that he went to St. Louis to talk politics to these men is absurd. It had been hardly three weeks since he had seen them at the legislature in Springfield, where he had been in constant communication with them for months.

The campaign about which he says he went to see them did not occur for more than a year in the future. And having taken this long and disagreeable journey to meet these men in St. Louis about the campaign a year in the future, he remained there only between trains, arriving about 8 or 9 in the morning and leaving at noon.

The explanations of Wilson are fully as bad or worse. And Broderick had no explanation at all as to why Holstlaw, who never before had visited Broderick's saloon at Chicago, should come from his home in the country town of Iuka and go a mile and a half from the railroad station in Chicago to Broderick's saloon, which is across the bridge on the West Side.

According to bribe-giver Broderick, bribe-taker Holstlaw merely came to Broderick's saloon in Chicago just to visit, without any reason whatever. Yet he had never done such a thing before. He never frequented saloons. On important points Broderick refused to testify on the ground that he might incriminate himself.

And note this: Both times that Holstlaw made these visits to the saloon of his fellow senator, Broderick, in Chicago, were about the same times that his fellow bribe takers were receiving bribe money from their fellow representatives, Browne and Wilson, in St. Louis.

The failure of these three witnesses, Browne, Wilson, and Broderick, to appear before the subcommittee at the time they were subpœnaed; the successful efforts made by his counsel to delay the testimony of Broderick; the explanation of Wilson and Browne as to their nonappearance are significant.

They are almost as unreasonable as are Browne and Wilson's grotesque excuses for their meeting the three bribe-taking representatives in St. Louis, or as Broderick's novel account of the bribe-taking Senator Holstlaw coming from his village home out in the State and unexpectedly visiting his saloon on the West Side without any reason whatever.

In short, the testimony is overwhelming and conclusive, not only that four members of the general assembly who participated in this election were bribed, but that three of their fellow members of the general assembly paid them their money.

I am not able to follow the mental processes which can concede that these four bribe takers got their bribe money, and yet they did not receive it from their three fellow members whom the four bribe takers testified had paid it to them and whom it is conceded that the four bribe takers met under circumstances not reasonably explained.

If the confessed bribe takers did receive this bribe money, from whom did they receive it if not from their fellow members who admit having met the bribe takers when and where the latter testify that they did receive the bribe money from these accused bribe givers?

So the evidence convinces me that at least 7 tainted votes were cast in this election.

But these 7 votes, which under the statute and the precedents are enough to invalidate this election, were not all of the tainted votes cast in this putrid transaction. The testimony shows that at least 3 additional corrupt votes were cast—those of Clark, Shephard, and Luke.

While Shephard and Clark did not confess, and Luke, who is dead, could not confess, the evidence convicts them of having shared the plunder at the same times and places—from the same hands and for the same consideration as their fellow members who repeatedly testified to having received it, and who were afterwards shown to be in possession of it.

It is conceded that these three members, Clark, Shephard, and Luke, belonged to the faction and were the followers of their fellow representative and factional leader, Browne. It is conceded that all of them met Browne and his lieutenant, Wilson, by appointment in St. Louis at the same hotel and at the same time that the confessed bribe takers are conceded to have met Browne and Wilson.

Lukes's wife testified that along about this time Luke came home and showed her $950 in bills of large denominations, without saying where he got it. The committee declined to permit testimony as to Luke's statement concerning this money and his visit to St. Louis.

I think this ruling was in direct conflict with the ruling on the same point in the Clark case. Still, without this excluded testimony, the evidence, taken all together, shows that Luke got the money in the same amounts and from the same sources and in the same places at the same time that the confessed bribe takers got theirs.

Representative Shephard met his fellow representative and factional leader, Browne, and his fellow representative, Browne's lieutenant, Wilson, at St. Louis, at the same time, in the same room of the same hotel where his three fellow representatives who repeatedly confessed to having received this money from Browne and Wilson at those times and places.

The testimony shows that Wilson paid at least some of this bribe money to the bribe takers in the bathroom of his hotel room. White swears that he, himself, was called into the bathroom by Wilson, and was there paid his second installment of $900. White swears that he heard Wilson call Shephard into the same bathroom, from which they shortly emerged.

Shephard himself admits that he was there and that Wilson called him into the bathroom, but only to ask him the name of a lady Shephard dined with in Springfield almost two months before. Shephard admits having visited a safety deposit box which he had rented in St. Louis the very same forenoon that he met Wilson at the hotel, and was called by Wilson into the bathroom.

Shephard's only excuse for visiting St. Louis on this interesting occasion was that he made the journey to get some packing for his automobile. This was a remarkable excursion for a banker and business man. We are asked to believe that Shephard's meeting with fellow representative, Wilson, at St. Louis at this lucrative conference was a pure accident, a mere coincidence.

Apparently the majority of the committee do so believe.

If we credit Shephard's testimony our indignant sympathy is aroused for this victim of one of these malign tangles of circumstances and events which sometimes entrap the most virtuous of men.

But regardless of whether or not Shephard got any money for his vote he was bribed to vote for Lorimer by the promise of influence concerning an office. This bribery was arranged and consummated between Shephard and Lorimer himself. Shephard himself declares that, "rock-ribbed Democrat" as he was, the promise of Lorimer's influence concerning a post office was "the consideration" for his vote.

Of course, in law this is quite as much bribery as if Lorimer had paid him cash in hand. On this the authorities are unanimous.

Representative Clark also met his fellow representative and factional leader, Browne, and his fellow representative, Wilson, Browne's lieutenant, at St. Louis in the same room of the same hotel, at the same times that his fellow members who confessed to taking bribes at those times and places met Browne and Wilson. Also, like the others, Clark met Browne and Wilson in St. Louis at the latter's request.

But Mr. Clark says that he did not receive any money on either of these occasions. He sticks to the story that Browne did nothing but just talk on the first occasion. Browne says that this talk was about "politics." Clark says that his interview with Wilson on the second occasion was more or less miscellaneous. Yet both Browne and Wilson made long and uncomfortable trips for a brief period of such conversation with Clark.

It must be remembered that Clark was a police magistrate in a fair-sized country town. As such he was better schooled than his fellow members in the effectiveness of stout denial and persistent avoidance of damaging admissions. Indeed, we find Clark almost the firmest and cleverest of the conspirators who were resolving and arranging to stand pat in their denials.

Yet Clark, police magistrate of a country town, purchased diamonds during the session of the legislature, for which he paid after the legislature adjourned. Taken in connection with all the testimony in this case, the testimony of Clark himself convinces me that he was as guilty as the others.

If the Senate conclude that these three men, Luke, Shephard, and Clark, also received this bribe money we have 10 tainted votes cast in this election, or 4 more than enough to invalidate the same even under the precedents which the majority cite. With these 10 putrid votes I shall stop, although the evidence also entangles one other. So, if there were 10 votes, or even if only 7 votes were corrupt, what is their legal effect on the election involved?

The law.

To elect, the statute in terms requires "a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting." The number of votes that constituted the joint assembly that elected Mr. Lorimer was 202. "A majority of all" these votes was 102. Mr. Lorimer received 108, or 6 more than "a majority of all votes of said joint assembly."

But at least 7 of these were tainted. This leaves 101 votes for Mr. Lorimer, or one less than "a majority of all the votes of said joint assembly," as required by the specific words of the statute.

If to these 7 corrupt votes, the Senate concludes that the 3 votes of Representatives Luke, Clark, and Shephard should be added, there were 10 tainted votes that went to make up the entire 108 that Mr. Lorimer received.

Deducting these 10 from this 108 leaves 98 untainted votes for Mr. Lorimer, or 4 less than "a majority of all the votes of said joint assembly."

All this is true, even admitting the soundness of the Senate precedents cited by the committee. These precedents are that no matter how many votes were bribed, yet if there was a majority of unbribed votes, the election is valid.

In the present case there was not an unbribed "majority of all the votes of said joint assembly." There was at least 1 vote less than an untainted majority. Including Clark, Shephard, and Luke as corrupt, there were 4 votes less than an untainted majority. So the election was invalid—it never legally occurred.

If it is said that these untainted votes must be expunged and considered as never having been cast, the answer is, in the words of the statute itself, that they were "present and voting."

The only reasonable and legal position is that those tainted votes actually were "present and voting," a part of the joint assembly; but because their votes were tainted they are not to be counted for the candidate for whom they corruptly voted. They were a part of the joint assembly present and voting because this was the case, but they are not to be counted for Mr. Lorimer, because they were bribed to vote for him.

This is the most restricted meaning that reasonably can be put on the statute and precedents. But I think the sound view is much broader. Not only should these votes be considered as "present and voting," which was the actual fact; not only must they be deducted from the vote cast for Mr. Lorimer because of their corruption, but also they must be added to the vote against Mr. Lorimer.

As I have shown above, it is not necessary to take this view in order to invalidate this election. I take it merely on principle as a matter of law when applied to this or any similar case.

All of these tainted votes were stanch partisans of the opposite party to Mr. Lorimer. For more than three months all of them steadily had voted either for the candidate of their party, nominated at their party's primaries by popular vote, or, at least, against any Republican. None of them voted for any Republican until the notable 26th of May, when all of them cast their votes suddenly for Mr. Lorimer upon the occasion of his election.

If they actually were bought to cast their votes for Mr. Lorimer, it follows that they would have continued to vote as they hitherto had done, either for the primary nominee of their own party or at least for some other member of their own party. Was it not for the very purpose of preventing them from so voting and inducing them to vote for Mr. Lorimer that they were bought? If not, for what purpose were they bought?

And were they bought if the buyers did not think their votes were necessary? Is it possible that large sums of money were spent to purchase votes that were not needed? Were thousands of dollars thrown away and the risk of the penitentiary incurred for nothing at all?

While, as I have shown, it is not necessary to a decision of this case, yet I challenge the Senate precedents cited by the majority that even though it be proven that any number of votes were bribed, yet if there were a majority of untainted votes the election can not be questioned.

If only one case of bribery be clearly established in the election of a Senator, I hold that this invalidates the entire election. In my opinion, one act of bribery makes the whole election foul.

In the language of my illustrious predecessor in this body, Senator Morton, "Bribery is to an election what fraud is to a contract."

It is said in defense of these precedents that it would be hard on a personally guiltless and successful candidate who had an honest majority if his election should be invalidated by votes corrupted in his behalf which were not enough in number to destroy his honest majority.

The clear answer is that it is harder on the people whose representative this candidate is to have any corrupt influences employed in his behalf.

We can not consider the personal fortunes or even feelings of a candidate in determining the law of election cases. The candidate is not on trial. The election is on trial. Was the election pure and free, or influenced and venal? The candidate is nothing; the people are everything. Or, rather, the candidate is nothing, except as the representative of the people.

Our business is to guard the purity of elections. Our concern is to permit no chances to be taken. Yet chances always are taken under these ill-considered precedents—dangerous chances. For if a number of corrupt votes are plainly proven to be such, it is reasonable to suppose that others were cast equally corrupt which could not be

proven to be such. The law recognizes no more difficult task than that of proving bribery or conspiracy to bribe.

And would this untainted majority be cast if the uncorrupted votes positively knew of the bribery being practiced for the candidate for whom they voted? If honest members of a legislature innocently vote for a candidate for Senator for whom corrupt members of the legislature were bribed to vote, would these honest members have so voted had they known of this bribery? This simple illustration will prove convincingly the unsoundness of the precedents which I am assailing.

So I propose that we overthrow such unsound precedents and establish a new Senate precedent, that one act of bribery in the election of a Senator makes such an election void—makes an election foul.

The public welfare, the theory of free and fair elections, which it is our sole business to safeguard, and which is the reason and origin of the power we are now exercising, requires the establishment of this new Senate precedent.

We should in this case establish the law of the Senate in conformity with the ancient common law. We should declare that one act of bribery makes a whole election foul.

This pronouncement by the Senate of the United States would prevent an ambitious and wealthy candidate from perpetrating bribery to make his election sure and doing it in such a way as to cover up his tracks. It would give a needed pause to corrupt interests that undertake to make the election of their favorites certain by corrupt practices. It absolutely would prevent overzealous friends, inspired by nothing but the heat of battle and devotion to their favorite, from undertaking to secure his success by infamous methods.

If we make a new Senate precedent that one act of bribery makes a whole election foul, we shall have an end of the amusing and overworked argument of the improper activities of too enthusiastic friends bribing voters for their favorite without any other motive than their fanatical and money-sacrificing devotion to him.

The time has arrived when we had much better take to heart the people's unsullied and uninfluenced representation than that we should continue to bemoan the possible fate of a virtuous candidate in whose behalf the heinous crime of bribery has been practiced, whether by venal interests or by well-intentioned but overzealous and financially affluent friends.

But waive this point. The evidence shows it is not necessary to a decision of this case. I advance it only because this body ought to establish now that one act of bribery invalidates an election.

And this suggests another untenable view heretofore suggested in election cases and which we should now decisively negative. This view is that a single act of bribery perpetrated or countenanced by a person elected to the Senate of the United States does not void the election, but only so taints such a person that he must be expelled. That is, if the sitting Senator personally perpetrated or countenanced bribery to secure his election his seat can not be vacated by a majority vote, but he must be expelled by a two-thirds vote.

I think it clear that this view is wrong. The argument for it is that the bribing Senator is guilty only of a moral defect which renders him unfit to be a member of this body.

It is as if such a Senator had a contagious disease such as smallpox, or that he was dangerously insane, or that he had committed treason, and yet, in any of these cases, insisted upon sitting among us. In any of these cases or others that may suggest themselves such a member may be expelled, but only by a two-thirds vote.

The reason a two-thirds vote was provided in the Constitution to expel a member was that the mental, moral, or physical defect should be so unquestionable that two-thirds of this body would be impelled to vote for expulsion.

And yet it is upon these grounds and these only that the argument is made that a Senator guilty or knowing of bribery in his election must be expelled by a two-thirds vote rather than his election invalidated by a majority vote.

This position is so dangerous to the public welfare, so contrary to public policy, so abhorrent to reason and repugnant to justice that I repudiate and challenge it.

For conceding that an elected Senator had a majority of perfectly honest votes, would they have so cast their votes if they had known that the candidate was bribing other votes.

Let me put an illustration personally to each Senator here. Suppose that we are electing some man to some office within our gift. Suppose that all but one of us were honest and earnest in our intended votes for this man. But suppose that just before our vote we discovered that he had bribed or countenanced the bribery of one of our number. Would a single one of us with such knowledge vote for the man for whom until that moment we had intended to vote? Of course not.

So it is that one act of bribery perpetrated or countenanced by any Senator to secure his election vitiates the same. It does not necessitate an act of expulsion requiring a two-thirds vote, but a resolution requiring a majority vote invalidating the election.

Was Mr. Lorimer informed of what was going on in his behalf? While not necessary to a decision of this case, the evidence and circumstances require the Senate to consider this point.

From his speech on this case in this body it appears that Mr. Lorimer is a seasoned politician of nearly 30 years' experience in practical politics in one of the greatest cities of the country and of the world—a superb organizer who gives attention to the very smallest details of any election.

Mr. Lorimer was on the ground during practically the whole session of this legislature. He was there principally for the purpose of defeating the will of the voters of his party as declared in the primary. He was the "intimate" friend of the leader of the opposite party, Mr. Browne, and had been such for years.

It appears that Mr. Lorimer himself finally developed as a solution of the deadlock which he had precipitated to defeat the decree of the primaries of his own party. To secure his election, he absolutely required the votes of large numbers of members of the general assembly from the opposite party.

His "intimate" friend for years, Mr. Browne, who was the leader of the minority and the captain of a faction, became his needed assistant.

But even Browne, the chief of a minority faction, declined to permit the votes of his faction to go to Mr. Lorimer unless Browne could be assured that with the votes Browne might get Mr. Lorimer could get enough others certainly to elect him.

With this understanding and for this purpose the two "intimate" friends, Browne and Lorimer, worked together for at least 10 days or two weeks. During this time they were in repeated and almost continuous conference, night as well as day, and both were seasoned practical politicians.

If we believe that anybody at all was bribed, the testimony shows that it was during these fateful 10 days or 2 weeks that the bribery was arranged. If we believe that anybody at all was bribed, the evidence shows that Browne was the chief instrument of bribery.

Taking these things altogether, did everything occur that the evidence shows to have occurred without Mr. Lorimer's knowledge?

Even if the corruption fund came from sources higher up, did those exalted sources of iniquity pass by Mr. Lorimer, whom they were trying to elect with this putrid money, without his knowing a thing about it?

In law Mr. Lorimer must be held to have knowledge of these transactions in his behalf.

If so, I contend that his election is invalid upon this ground. If Senators believe that he knew and countenanced a single act of bribery we need not conclude that we must expel him by a two-thirds vote. We need only to conclude that his election was invalid and so declare by a majority vote.

But for the purpose of this particular case it is not necessary to raise the question of Mr. Lorimer's knowledge of any bribery in his behalf. I raise it only because personally I want to go on record against the proposition hitherto advanced, that an act of bribery by a successful candidate does not invalidate his election, but only taints the successful candidate himself.

I conclude that this election was invalid under any possible view of the law. If the Senate so concludes, it is our duty to so declare. Therefore I submit the following resolution:

"*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois."

ALBERT J. BEVERIDGE.

(Cong. Rec., vol. 46, pp. 654–657.)

On the same day Mr. Owen addressed the Senate stating that he could not acquiesce in the conclusions of the Committee on Privileges and Elections, that the election of Mr. Lorimer was not invalidated by any sufficient evidence of corrupt practices, at the conclusion of which he offered the following resolution (S. Res. 316) for the consideration of the Senate:

"*Resolved*, That the so-called election of William Lorimer on May 26, 1909, by the legislature of the State of Illinois was illegal and void, and that he is not entitled to a seat in the United States Senate." (Cong. Rec., vol. 46, pp. 665–668.)

TUESDAY, JANUARY 10, 1911.

Mr. Crawford addressed the Senate supporting the resolution submitted by Mr. Owen (S. Res. 316). (Cong. Rec., vol. 46, pp. 716–728.)

WEDNESDAY, JANUARY 11, 1911.

The resolution (S. Res. 316) submitted by Mr. Owen on the 9th instant was referred to the Committee on Privileges and Elections. [As this resolution was for all practical purposes the same as the one before the Senate (S. Res. 315) no action was taken by the committee.] (Cong. Rec., vol. 46, p. 767.)

MONDAY, JANUARY 30, 1911.

Mr. Frazier, a member of the Committee on Privileges and Elections, submitted the following views to the Senate (Rept. 942, pt. 4), concurring in the resolution offered by Mr. Beveridge (S. Res. 315):

"It is with great reluctance that I differ with my colleagues on the subcommittee, but feeling impelled to do so, I beg leave to state briefly my views and conclusions in this case.

"As I understand the precedents as established by the Senate and the other branch of Congress, and now recognized as the law governing such cases, they are:

"First. If the proof establishes the fact that the Member whose seat is in question because of alleged bribery or corrupt practices resorted to in his election has himself been guilty of bribery or corrupt practices, or knew of or sanctioned such corrupt practices, he may be unseated without reference to the number of votes thus corruptly influenced.

"Second. If the proof fails to show that the Member knew of or participated in or sanctioned such corrupt practices, then, in order to justify unseating him, the proof must show that enough members of the legislature voting for him were bribed or influenced by corrupt practices that deducting their votes from the total vote received by him would reduce his vote below the constitutional majority required for his election.

"While there are some facts and circumstances in this case tending to show that Senator Lorimer may have heard of or known that corrupt practices were being resorted to, and while Senator Lorimer failed to avail himself of the opportunity of going on the stand as a witness and denying any such knowledge or sanction of corrupt practices, if any such were being practiced, still I am of the opinion that the testimony fails to establish the fact that Senator Lorimer was himself guilty of bribery or other corrupt practices, or that he sanctioned or was cognizant of the fact that bribery or other corrupt practices were being used by others to influence votes for him.

"This being true, the question then arises, Was bribery or corrupt practices used by others in his behalf to influence votes for him; and, if so, were enough votes thus tainted with fraud and corruptly influenced, when excluded, to reduce his vote below the legal majority required for his election?

"The Legislature of Illinois consisted of 204 members. There were present and voting on the occasion of the election of Senator Lorimer 202 members. A quorum of both houses being present, in my opinion, he must have received a majority of all those present and voting, or 102 votes, to have been elected. Senator Lorimer received 108 votes, or 6 more than necessary to elect.

"The testimony taken by the committee satisfies me that four members of the legislature were paid money for voting for, or in consequence of having voted for, Senator Lorimer. One Senator and three representatives admitted under oath before the committee that they were paid money, and their admissions and the facts and circumstances surrounding the transactions satisfy me that they received it as a bribe for or in consequence of their votes for Senator Lorimer.

"The four self-confessed bribe takers implicate three other members of the legislature who voted for Senator Lorimer as the persons who bribed them. The testimony satisfies me that the three alleged bribe givers were guilty of that offense. To my mind the man who bribes another is as corrupt as the one who is bribed, and by his corrupt act of bribery he demonstrates the fact that he is none too honest to receive a bribe if offered him.

"While the proof is not clear or conclusive that these three bribe givers were themselves bribed or corruptly influenced to vote for Senator Lorimer, when I take into consideration their corrupt conduct as bribers of others, together with all the facts and circumstances surrounding this case, I can not bring myself to agree with the majority of the subcommittee that their votes are free from taint or corruption. These three votes added to the four confessedly bribed would make 7 tainted votes. Eliminate them, and the vote received by Senator Lorimer was less than a majority of the votes cast.

"As stated above, it is with hesitancy and great reluctance that I differ with my colleagues upon the subcommittee, but I have felt impelled to do so after a most careful and, I trust, unbiased study of this record. In view of the fact that I appear to stand alone in the views herein expressed, I make no recommendation to the com-

mittee, but I do ask that members of the committee not members of the subcommittee carefully read all of the testimony before forming an opinion.

"At the time the foregoing statement of my views and conclusions were filed with the full Committee on Privileges and Elections it was my purpose to file in the Senate a more elaborate statement, setting out in full the reasons which led me to the conclusions reached. It was also my purpose to offer with such statement a resolution declaring that Senator Lorimer was not legally elected Senator from the State of Illinois.

"Since then, to wit, on January 9, 1911, the Senator from Indiana (Mr. Beveridge) has filed an extended statement of his views, with copious reference to the testimony, and has offered a resolution of the character referred to. Hence it is not necessary for me at this time to file either the more extended report contemplated or the resolution. I am gratified that the Senator from Indiana concurs in the conclusion reached by me as to the election of Mr. Lorimer. In the resolution offered by him with respect thereto I concur." (Cong. Rec., vol. 46, pp. 1632–1633.)

The report of the Committee on Privileges and Elections and the resolution of Mr. Beveridge were discussed and debated in the Senate January 18, 1911 (Cong. Rec., vol. 46, pp. 1041-1058); January 23, 1911 (ibid., pp. 1279–1290); January 25, 1911 (ibid., pp. 1413–1425); January 26, 1911 (ibid., pp. 1487-1888); January 27, 1911 (ibid., pp. 1524–1535); February 3, 1911 (ibid., pp. 1886-1896); February 6, 1911 (ibid., pp. 1980–1990); February 7, 1911 (ibid., pp. 2050–2066); February 9, 1911 (ibid., pp. 2187-2189); February 10, 1911 (ibid., pp. 2246–2251); February 13, 14, 1911 (ibid., pp. 2474–2490); February 21, 23, 24, 1911 (ibid., pp. 3258–3306); February 27, 1911 (ibid., pp. 3521-3588); February 28, 1911 (ibid., pp. 3650–3658); and March 1, 1911 (ibid., pp. 3753–3760).

The following extended speeches and statements favoring the resolution of Mr. Beveridge and opposing the report of the Committee on Privileges and Elections were made by Mr. Borah (Cong. Rec., vol. 46, pp. 1050–1058); Mr. Cummins (ibid., pp. 1887, 1524–1535); Mr. Root (ibid., pp. 1886–1892); Mr. Burton (ibid., pp. 1980–1990); Mr. Jones (ibid., pp. 2050–2056); Mr. Beveridge (ibid., pp. 3258–3306); Mr. Crawford (ibid., pp. 3524–3526, 3556–3578); Mr. Bristow (ibid., pp. 3580–3588); Mr. Stone (ibid., pp. 3650–3658); Mr. Owen (ibid., pp. 3753–3756); Mr. Smith of Michigan (ibid., pp. 3757–3759); Mr. La Follette (ibid., pp. 3759–3760)

The following extended speeches and statements upholding the report of the committee and opposing the resolution of Mr. Beveridge were made by Mr. Burrows (Cong. Rec., vol. 46, pp. 1041–1050); Mr. Gamble (ibid., pp. 1279–1290, 2187–2189); Mr. Paynter (ibid., pp. 1413–1425); Mr. Heyburn (ibid., pp. 1893–1896); Mr. Fletcher (ibid., pp. 2057–2066); Mr. Johnston (ibid., pp. 2246–2251); Mr. Bailey (ibid., 2474–2490); and Mr. Simmons (ibid., pp. 3756–3757).

Mr. Lorimer made prepared statements before the Senate on January 9, 1911 (Cong. Rec., vol. 46, p. 648); February 22, 1911 (ibid., pp. 3113-3124); February 28, 1911 (ibid., pp. 3645–3646); and March 1, 1911 (ibid., p. 3757).

WEDNESDAY, MARCH 1, 1911.

Mr. Beveridge's resolution (S. Res. 315), submitted on January 9, 1911, was determined in the negative by the Senate, a roll call thereon resulting in the following vote:

Yeas—Messrs. Bacon, Beveridge, Borah, Bourne, Bristow, Brown, Burkett, Burton, Chamberlain, Clapp, Clarke, Ark., Crawford, Culberson, Cummins, Davis, Dixon, Gore, Gronna, Jones, La Follette, Lodge, Martin, Money, Nelson, Newlands, Overman, Owen, Page, Percy, Rayner, Root, Shively, Smith, Mich., Smith, S. C., Stone, Sutherland, Swanson, Taylor, Warner, Young—40.

Nays—Messrs. Bailey, Bankhead, Bradley, Brandegee, Briggs, Bulkeley, Burnham, Burrows, Carter, Clark, Wyo., Crane, Cullom, Curtis, Depew, Dick, Dillingham, du Pont, Fletcher, Flint, Foster, Frye, Gallinger, Gamble, Guggenheim, Hale, Heyburn, Johnston, Kean, McCumber, Nixon, Oliver, Paynter, Penrose, Perkins, Piles, Richardson, Scott, Simmons, Smith, Md., Smoot, Stephenson, Thornton, Tillman, Warren, Watson, Wetmore—46.

FRIDAY, MARCH 3, 1911.

Mr. Lorimer requested that the amendment to the deficiency appropriation bill, which granted him $25,000 for expenses incurred in defense of his title to his seat in the Senate, be rejected, and it was so ordered. (Cong. Rec., vol. 46, pp. 4113, 4114.)

The Sixty-first Congress adjourned sine die at noon March 4, 1911.

[Sixty-second Congress, first and second sessions.]

WILLIAM LORIMER

of Illinois.

SECOND INVESTIGATION.

Mr. Lorimer took his seat in the United States Senate on June 18, 1909, Sixty-first Congress, first session, as a Senator from the State of Illinois. During the second session of the Sixty-first Congress charges were filed in the Senate that corrupt methods and practices were employed in his election by the Legislature of Illinois that elected him to this office, and the Committee on Privileges and Elections were authorized to investigate these charges. The latter brought in a report vindicating Mr. Lorimer and the Senate by a vote of March 1, 1911, declared that he was duly and legally elected to his seat in the Senate of the United States.

At the opening of the Sixty-second Congress, April 6, 1911, Mr. La Follette introduced a resolution in the Senate providing for a reinvestigation of the election of William Lorimer by a special committee of the United States Senate. Later Mr. La Follette made an extended speech in the Senate in which he alleged that new and material evidence had been produced through the investigation of a committee of the Illinois State Senate, and quoted extensively from the testimony taken before that committee, tending to show that one Edward Hines had raised $100,000 to "put Lorimer over."

Several resolutions were introduced by different Senators providing for a reopening of the case, holding that the Senate had authority to do so upon the ground of newly discovered evidence. There were extended debates in the Senate as to whether the case should be referred to the Committee on Privileges and Elections or investigated by a special committee of the United States Senate, and as to the composition of the committee to conduct the investigation.

June 6, 1911, the Senate of the State of Illinois presented an official resolution to the Senate of the United States asking the United States Senate to further investigate the election of William Lorimer, basing their request on the report of the committee appointed for that purpose from the Senate of the State of Illinois. June 7, 1911, the Senate of the United States passed a resolution which provided for an investigation of these charges against Mr. Lorimer by a committee of the Senate composed of eight specified members of the Committee on Privileges and Elections.

May 20, 1912, the committee of the Senate appointed to investigate the election of William Lorimer as a Senator from the State of Illinois submitted its report, signed by five members of that committee, contending that the Senate had, after a full investigation, already passed upon Mr. Lorimer's right to his seat which, in accordance with the rules of law, judicial procedure, and justice, should stand unless new and convincing evidence was produced establishing corruption in his election; that, as absolutely no new or substantial evidence had been produced or discovered on the reinvestigation showing that Mr. Lorimer was elected by corruption, the previous judgment of the Senate should be held conclusive and final. But in the event that the Senate should hold that its former judgment could be reconsidered and vacated, the committee submitted the following conclusions based on the charges made: That they could find no evidence in all the testimony submitted that Mr. Lorimer was personally guilty of any corrupt practices in securing his election, or that he had any knowledge of any corrupt practices, or that he authorized anyone to employ corrupt practices in his election. The committee further held that no vote in the election of Mr. Lorimer was secured for him by bribery; that whatever money any person in the legislature received was not paid to him by anyone on Mr. Lorimer's behalf or in consideration of or to secure such vote or votes for him; that neither Edward Hines nor anyone else raised or contributed to a fund to be used to secure his election; and that Mr. Lorimer's election was the logical result of existing political conditions in the State of Illinois, and was free from any corrupt practice.

On the same day, May 20, 1912, Mr. Lea submitted the views of three members of the committee, dissenting from the report of the majority, and holding that Mr. Lorimer was not duly and legally elected to his seat in the Senate of the United States, and Mr. Lea submitted a resolution to the Senate to that effect.

The minority held that the doctrine of res adjudicata did not apply to the case, the Senate having adopted the resolution of June 7, 1911, reopening the case for a full and complete reinvestigation of the facts, and that the testimony taken before this committee reinvestigating the case established the contention that at least 10 votes were purchased for the purpose of electing Mr. Lorimer, so his election was obtained by corrupt means and therefore invalid.

The report of the committee, the views of the minority, and the resolution offered by Mr. Lea were discussed and debated on the floor of the Senate at various times until July 13, 1912, when the resolution of Mr. Lea was adopted by a vote of 55 to 28.

The history of the second case here given consists of a statement of the proceedings of the Senate bearing on the case, as published in the Congressional Record, the report of the Committee of the Senate, with the views of the minority, a statement of the days on which the question was debated in the Senate, references to the prepared speeches and statements for and against the Committee report as found in the Congressional Record, and a record of the vote taken on Mr. Lea's resolution.

PROCEEDINGS IN THE SENATE.

[Sixty-second Congress, first session.]

THURSDAY, APRIL 6, 1911.

Mr. La Follette, as a result of certain testimony taken before a special committee appointed by the Senate of the Illinois Legislature to investigate the circumstances connected with the election of Mr. Lorimer as a Senator of the United States from the

State of Illinois on May 26, 1911, presented the following resolution (S. Res. 6) and asked to have it lie on the table subject to call:

"Whereas the Senate by resolution adopted on the 20th day of June, 1910, authorized and directed the Committee on Privileges and Elections to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said Lorimer as a Senator of the United States from said State of Illinois there were used and employed corrupt methods and practices; and

"Whereas said committee, pursuant to said resolution, took the testimony of a large number of witnesses, reduced the testimony to printed form, and reported the same to the Senate, which was thereafter considered and acted upon by the Senate; and

"Whereas the Illinois State Senate thereafter appointed a committee to investigate like charges against William Lorimer and to report to said State senate whether in the election of said Lorimer to the United States Senate corrupt methods and practices were employed and used; and

"Whereas as it appears from the published reports of the proceedings of the said Illinois State Senate committee that witnesses who were not called and sworn by the committee of this Senate appointed to investigate said charges have appeared before the said committee of the Illinois State Senate, and upon being interrogated have given important material testimony tending to prove that $100,000 was corruptly expended to secure the election of William Lorimer to the United States Senate:

"*Resolved*, That Senators John D. Works, Charles E. Townsend, George P. McLean, John W. Kern, and Atlee Pomerene be, and they are hereby, appointed a special committee, and as such committee be, and are hereby, authorized and directed to investigate and report to the Senate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices; that said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, to administer oaths, and to report the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee." (Cong. Rec., vol. 47, p. 101.)

MONDAY, MAY 1, 1911.

Mr. La Follette called up Senate resolution No. 6, which he introduced on April 6, and asked that it be referred to the Committee to Audit and Control the Contingent Expenses of the Senate, and it was so ordered. (Cong. Rec., vol. 47, p. 793.)

THURSDAY, MAY 4, 1911.

Mr. Briggs, from the Committee to Audit and Control the Contingent Expenses of the Senate, reported back Senate resolution No. 6, submitted by Mr. La Follette, accompanied by a report (No. 4), as follows:

"This resolution is reported to the Senate by the Committee to Audit and Control the Contingent Expenses of the Senate with a favorable recommendation. In making this recommendation the committee disclaims any purpose to indicate whether the investigation should be made by the standing Committee on Privileges and Elections or by the special committee whose membership is named in the resolution, or whether the investigation should be made at all; those matters being left, as they must be left, to the future action of the Senate, but intends by its action to provide the money necessary for this investigation if an investigation be made." (Cong. Rec., vol. 47, p. 924.)

MONDAY, MAY 22, 1911.

Mr. Dillingham, as a result of the public press account of the action of the upper branch of the Illinois Legislature in asking that the Senate of the United States reinvestigate the charges relating to the seat of Mr. Lorimer as a Senator from that State, offered the following resolution (S. Res. 46) and asked that it be laid on the table:

"Whereas since the action by the Senate on the resolution of June 20, 1910, relating to the seat of William Lorimer, it is represented that new testimony has been discovered; and

"Whereas the Senate of the State of Illinois did on the 18th day of May, 1911, adopt the following resolutions:

"'Whereas under senate resolution No. 17 a committee was appointed to investigate charges of corruption and official misconduct against members of this senate; and

"'Whereas said committee has reported the result of its investigation to this senate, from which it appears that there were important and material witnesses without the State of Illinois, whose attendance it could not legally compel and which witnesses refused voluntarily to appear; and

"'Whereas said committee was seriously impeded in the performance of its duties by what we believe to be the unwarranted action of a certain judge; and

"'Whereas it appears from the report of said committee that despite its inability to compel the attendance of such foreign witnesses and the adverse action of said judge sufficient evidence was procured to show that without bribery and corruption and by reason of the failure of certain senators and representatives during the different roll calls to carry out the will of the people, as exprssed at the polls, in the choice for a United States Senator, which action we deem most reprehensible and should be condemned, and which we hereby condemn: Therefore be it

"'*Resolved*, That it is the opinion of this senate, based upon the report and findings of the said committee, that the election of William Lorimer to a seat in the United States Senate was brought about by bribery and corruption; and

"'*Resolved*, That the gravity of the situation, involving as it does the integrity and good name of this State and the welfare of the Nation, demands a further investigation and determination of this matter by a body possessing broader jurisdiction and greater powers than does this senate; and be it further

"'*Resolved*, That the secretary of this senate be, and he is hereby, authorized and directed to transmit to the Senate of the Uuited States a copy of the evidence taken by the said committee, together with the report and findings of that committee and a copy of this resolution for such action as the Senate of the United States may deem proper.

"'*Resolved*, That the findings of said committee, as set forth in the report heretofore filed, be, and the same are hereby, ratified and approved.'

"Therefore be it

"*Resolved by the Senate of the United States*, That the Committee on Privileges and Elections are authorized and directed to further investigate the charges made against William Lorimer, a Senator from the State of Illinois, and to inquire and report to the Senate whether in or about the election of the said William Lorimer as a Senator of the United States from the State of Illinois, or in connection with his right to a seat in this body, there were used or employed by any person, firm, corporation, or association any corrupt methods or practices.

"That said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers and such counsel and competent accountants as it may deem necessary; to send for persons and papers and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee." (Cong. Rec., vol. 47, pp. 1430, 1431.)

On the same day Mr. La Follette began a speech, in connection with his resolution (S. Res. 6), questioning the validity of Mr. Lorimer's right to his seat, alleging that new and material evidence had been produced through the investigation of a committee appointed by the Illinois State senate, quoting from the testimony taken before that committee to show that one Edward Hines was accused by witnesses of being connected with the raising of $100,000 to elect Mr. Lorimer, and demanding that the United States Senate make a new investigation of Mr. Lorimer's right to his seat as a Senator from the State of Illinois. (Cong. Rec., vol. 47, pp. 1434–1437.)

[Mr. La Follette continued his remarks on Tuesday, May 23, 1911 (Cong. Rec., vol. 47, pp. 1490–1495); Wednesday, May 24, 1911 (Cong. Rec., vol 47, pp. 1547–1557); and concluded them on Friday, May 26, 1911 (Cong. Rec., vol. 47, pp. 1600–1605).]

TUESDAY, MAY 23, 1911.

Mr. Martin, of Virginia, submitted the following resolution and asked that it be laid on the table (S. Res. 51):

"Whereas the Senate adopted a resolution June 20, 1910, directing the Committee on Privileges and Elections to investigate the charges relating to the election of William Lorimer to the Senate of the United States; and

"Whereas since the Senate voted on the report of that committee it is represented that new material testimony has been discovered in reference to such matter; and

"Whereas the senate of the State of Illinois, on the 18th of May, 1911, adopted a resolution for the reasons therein stated, requesting the Senate of the United States to institute further investigation of the election of William Lorimer to the Senate: It is therefore

"*Resolved by the Senate of the United States*, That the Committee on Privileges and Elections, sitting in banc, be, and are hereby, authorized and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices; that said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers, counsel, and accountants; to send for persons and papers; to administer oaths; and as early as practicable to report the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee. The committee is further and specially instructed to inquire fully into and report upon the alleged 'jack-pot' fund in its relation to and effect, if any, upon the election of William Lorimer to the Senate." (Cong. Rec., vol. 47, p. 1482.)

FRIDAY, MAY 26, 1911.

Mr. Martin called up his resolution (S. Res. 51) and offered it as a substitute for that submitted by Mr. La Follette on April 6, 1911 (S. Res. 6). (Cong. Rec., vol. 47, pp. 1609–1610.)

MONDAY, MAY 29, 1911.

Mr. Martin addressed the Senate in support of his resolution (S. Res. 51), which he offered as a substitute for Senate resolution No. 6. (Cong. Rec., vol. 47, pp. 1628–1632.)

The resolution of Mr. La Follette and the substitute as offered by Mr. Martin were debated at length by different Senators. Mr. Smith of Michigan and Mr. Hitchcock offered amendments to the substitute, but they were rejected by the Senate. (Cong. Rec., vol. 47, pp. 1632–1646.)

THURSDAY, JUNE 1, 1911.

Mr. Brown offered the following resolution (S. Res. 57) and asked that it be printed and lie on the table:

"*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois." (Cong. Rec., vol. 47, p. 1654.)

On the same day Mr. La Follette called up Senate resolution No. 6, which he introduced on April 6, 1911, and asked to make certain modifications in the same, presenting it to the Senate in the following form:

"Whereas the Senate, by resolution adopted on the 20th day of June, 1910, authorized and directed the Committee on Privileges and Elections to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether, in the election of said Lorimer as a Senator of the United States from said State of Illinois, there were used and employed corrupt methods and practices; and

"Whereas said committee, pursuant to said resolution, took the testimony of a large number of witnesses, reduced the testimony to printed form, and reported the same to the Senate, which was thereafter considered and acted upon by the Senate; and

"Whereas the Illinois State Senate thereafter appointed a committee to investigate like charges against William Lorimer and to report to said State senate whether in the election of said Lorimer to the United States Senate corrupt methods and practices were employed and used; and

"Whereas as it appears from the published reports of the proceedings of the said Illinois State Senate committee that witnesses who were not called and sworn by the committee of this Senate appointed to investigate said charges have appeared before the said committee of the Illinois State Senate, and upon being interrogated have given important material testimony tending to prove that $100,000 was corruptly expended to secure the election of William Lorimer to the United States Senate: Therefore be it

"*Resolved*, That a committee composed of five members of the Senate, three of whom shall be of the majority and two of the minority party, shall be elected in the open session by roll call, and when so elected said committee be, and it is hereby, authorized and directed to promptly investigate and report to the Senate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices; that said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress, to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, to administer oaths, and to report the results of its inves-

tigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

"In electing said committee a majority of those present and voting shall be required to elect. Each Senator may vote for five upon the first roll call, and thereafter for such number as have not received the requisite majority. No Senator who was a Member of the Senate on the 3d day of March, 1911, shall be eligible to a place upon such committee, and any votes cast for such a Senator shall be void." (Cong. Rec., vol. 47, p. 1654.)

The revised resolution of Mr. La Follette and the substitute offered by Mr. Martin were debated at length by several Senators. All favored the reopening of the case, basing their action for the most part on the ground of newly discovered evidence, but the personnel of the committee to be appointed to conduct the investigation was the subject of dispute. Finally the Senate agreed to the substitute of Mr. Martin's by a vote of 48 to 20. (Cong. Rec., vol. 47, pp. 1654–1682.)

TUESDAY, JUNE 6, 1911.

The Vice President laid before the Senate the official resolution of the State Senate of Illinois recommending further investigation in the election of William Lorimer as a United States Senator; a copy of the evidence taken before the investigating committee; and the committee's report to the Illinois State Senate. This was ordered to be printed as a public document (S. Doc. No. 45) and referred to the Committee on Privileges and Elections. (Cong. Rec., vol. 47, p. 1693.)

On the same day Mr. Dillingham, from the Committee on Privileges and Elections, reported the following resolution (S. Res. 60):

"*Resolved*, That a committee consisting of the following members of the Committee on Privileges and Elections, Senators Dillingham, Gamble, Jones, Kenyon, Johnston of Alabama, Fletcher, Kern, and Lea, be, and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices, and whether he is now entitled to retain his seat.

"That said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and, as early as practicable, to report to the Senate the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the commitee.

"The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged 'jack-pot' fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate." (Cong. Rec., vol. 47, p. 1698.)

WEDNESDAY, JUNE 7, 1911.

Mr. Dillingham asked to modify his resolution of June 6, 1911 (S. Res. 60), and as amended on motion of Mr. Reed, it passed the Senate in the following form:

"*Resolved*, That a committee of the United States Senate, consisting of the following members of the Committee on Privileges and Elections: Senators Dillingham, Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea, be, and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices.

"That said committee be authorized to sit during the sessions of the Senate, and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and as early as practicable to report to the Senate the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

"The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged 'jack-pot' fund or any other fund in its relation to and effect, if any, upon the election of William Lorimer to the Senate." (Cong. Rec., vol. 47, pp. 1732–1734.)

[Sixty-second Congress, second session.]

MONDAY, MAY 20, 1912.

Mr. Dillingham, from the special committee of the Committee on Privileges and Elections to investigate whether in the election of William Lorimer as a Senator from the State of Illinois, there were employed corrupt methods and practices, submitted the following report (No. 769), together with the testimony taken before that committee:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Dillingham (chairman), Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea.]

IN THE SENATE OF THE UNITED STATES.

MAY 20, 1912.—Ordered to be printed.

The committee named in Senate resolution No. 60 of the Sixty-second Congress, first session, respectfully reports that immediately after the adoption of the same it organized and entered upon the work assigned it. Under its authority to employ counsel the services of John H. Marble, of Washington, and John J. Healy, of Chicago, were secured and the work was mapped out. On the 20th day of June a series of public hearings were inaugurated in Washington, which continued until August 9, when a recess was taken until October 10, on which day the committee convened in Chicago, and public hearings were held until November 22, when another recess was taken until December 5, on which day the committee again took up the work in Washington, where the hearings were continued until February 9, 1912. These public hearings actually occupied 102 working-days. One hundred and eighty different persons appeared and testified as witnesses, and a large volume of documentary evidence was secured.

The record of such hearings has been laid before the Senate for its consideration. It is comprised in eight volumes, containing 8,588 printed pages, with an accompanying digest index.

The following is a copy of the resolution referred to:

"*Resolved*, That a committee of the United States Senate, consisting of the following members of the Committee on Privileges and Elections: Senators Dillingham, Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea, be, and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices.

"That said committee be authorized to sit during the sessions of the Senate, and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and as early as practicable to report to the Senate the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

"The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged 'jack-pot' fund or any other fund in its relation to and effect, if any, upon the election of William Lorimer to the Senate."

Statement regarding a prior investigation.

Inasmuch as under a Senate resolution of June 20, 1910, the Committee on Privileges and Elections of the Senate also made an investigation of the question "Whether in the election of said William Lorimer as a Senator of the United States from said State of Illinois there were used or employed corrupt methods or practices," and inasmuch as the Senate on the 1st day of March, 1911, having fully considered the question, on the reports of such committee and the evidence taken, determined that Mr. Lorimer was entitled to retain his seat; and inasmuch as the present investigation is in the nature of a rehearing of the case, the committee at this point inserts certain important undisputed dates taken from the brief of counsel representing Mr. Lorimer at this time, to aid in a ready reference to different circumstances and events hereinafter more fully stated and considered. They are as follows:

The Forty-sixth General Assembly of Illinois met and organized January 6, 1909. On that day the house elected Edward D. Shurtleff speaker.

The first vote for United States Senator in the separate houses of the legislature was taken January 19, 1909. The first joint ballot for United States Senator was taken January 20, 1909. There were 95 joint ballots for United States Senator. More than 150 different men were voted for, for United States Senator, by that legislature.

The first vote for William Lorimer for United States Senator was cast May 13, 1909. William Lorimer was elected Senator on the ninety-fifth joint ballot, taken on the 26th day of May, 1909.

There were 202 members of the legislature present and voting on the ninety-fifth ballot, May 26, 1909. On that ballot William Lorimer received 108 votes for United States Senator; Albert J. Hopkins received 70 votes, and Lawrence B. Stringer received 24 votes. Senator Lorimer had a majority of 14 votes.

Two hundred and four members had been elected to the Forty-sixth General Assembly of Illinois. Paul Zaable, a member of the house, died in January, and the vacancy was not filled at that session. Frank P. Schmidt, a member of the senate, was not present at the taking of the ninety-fifth ballot.

The total number of Republicans elected to the house was 89; the total number of Democrats elected to the house was 64. The total number of Republicans in the senate was 38; the total number of Democrats in the senate was 13. The total number of Republicans elected to both houses of the legislature was 127; the total number of Democrats elected to both houses of the legislature was 77.

On the ninety-fifth ballot 55 Republican votes and 53 Democratic votes were cast for Mr. Lorimer.

William Lorimer was commissioned United States Senator by Gov. Deneen on May 27, 1909.

Senator Lorimer was sworn in and took his seat in the United States Senate June 18, 1909.

On April 30, 1910, the Chicago Tribune published the White story.

April 29, 1910, State's Attorney Wayman filed a petition for and obtained an order calling a special grand jury in Cook County.

May 2, 1910, the special grand jury convened and was sworn in.

Lee O'Neil Browne was indicted on the 6th day of May, 1910, on a charge of bribing Charles A. White to vote for Senator Lorimer.

May 28, 1910, Senator Lorimer made a speech in the United States Senate and demanded an investigation of the charges made by the Chicago Tribune April 30, 1910.

On June 7, 1910, Clifford W. Barnes filed charges in the Senate of the United States against Senator Lorimer.

June 20, 1910, the United States Senate adopted a resolution, which was as follows:

"*Resolved*, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator of the United States from said State of Illinois there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the sessions of the Senate, and during any recess of the Senate or of Congress, to hold its sessions at such place or places as it shall seem most convenient for the purposes of the investigation, to employ a stenographer, to send for persons and papers, and to administer oaths, and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee."

A subcommittee of the Committee on Privileges and Elections of the Senate of the United States, of which Senator Burrows was chairman, was appointed to investigate the charges against Senator Lorimer.

On the 7th day of June, 1910, Lee O'Neil Browne was placed on trial under the indictment returned against him. The jury in that trial disagreed and were discharged June 29, 1910. Lee O'Neil Browne was placed on trial the second time on the same indictment August 4, 1910. The jury in the second Lee O'Neil Browne trial returned a verdict of not guilty September 9, 1910.

September 20, 1910, the subcommittee of the Committee on Privileges and Elections of the Senate of the United States convened in Chicago to hear testimony. September 22, 1910, the subcommittee of the Senate held its first public hearing.

The subcommittee of the Senate concluded the hearing of testimony in Chicago October 8, 1910.

December 7, 1910, the subcommittee of the United States Senate took further testimony in Washington, D. C., and on that day concluded the public hearings.

December 21, 1910, the Committee on Privileges and Elections of the Senate presented its report to the Senate of the United States. The report exonerated Senator Lorimer and found:

"In our opinion the title of Mr. Lorimer to a seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices."

On January 9, 1911, Senator Beveridge submitted his views to the Senate of the United States, dissenting from the report of the Committee on Privileges and Elections, and offered the following resolution:

"*Resolved*, That William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois."

On January 30, 1911, Senator Frazier, a member of the Committee on Privileges and Elections, submitted his views to the Senate, concurring in the resolution offered by Senator Beveridge.

The report of the Committee on Privileges and Elections and the resolution of Senator Beveridge were discussed and debated on the floor of the Senate at intervals until March 1, 1911.

On the 1st of March, 1911, the resolution of Senator Beveridge was determined in the negative by the Senate; a roll call thereon resulted in a vote—nays 46, yeas 40.

The Sixty-first Congress adjourned sine die at noon March 4, 1911.

Circumstances leading up to present investigation.

While the question of Mr. Lorimer's right to a seat in the United States Senate was under consideration and debate in that body, to wit, on January 17, 1911, a committee was appointed by the Senate of the Illinois Legislature, known as the Helm committee, to investigate the circumstances connected with the election of Mr. Lorimer as a Senator of the United States from the State of Illinois. By a peculiar coincidence Mr. H. H. Kohlsaat, editor of the Chicago Record-Herald, on the same day addressed to the Hon. Elihu Root, a Senator of the United States from the State of New York, the following personal letter, containing information which, if true, would have had a direct bearing upon the question at issue before the Helm committee as well as in the Senate of the United States, but the source of which information and its authenticity he could not make public or consent to have investigated because of the circumstances under which he had received the same. The information Mr. Kohlsaat says was given to him in confidence and, as a newspaper man, he felt "the same obligation to maintain secrecy that a priest does of a confession."

The letter was as follows:

CHICAGO, ILL., *January 17, 1911.*

Senator ELIHU ROOT,
Washington, D. C.

MY DEAR SENATOR: I have just received a call from some well-known people here, among them Mr. Walter L. Fisher, asking me if I would not write you and tell you of an incident in the Lorimer senatorial election. My friends thought that if you had this personal knowledge it would be of assistance to you in strengthening your belief that money was used to elect Lorimer. The information was given to me in confidence, and as a newspaper man I feel the same obligation to maintain secrecy that a priest does of a confession.

Some time last June I met a friend who is general manager of a Chicago corporation with a capital of over $25,000,000. He said, "I have been intending to call on you for some days to tell you of an incident that occurred right after Lorimer's election a year ago. I had a visit from Edward Hines, the lumberman, and he told me that Lorimer's friends had had the opportunity of electing him to the Senate by putting up $100,000; that they had only a few days before the adjournment of the legislature and could not take the time to go around and raise the money, so a half dozen of Lorimer's friends underwrote the $100,000 and gave it to the proper agent. Lorimer was elected, and we are now asking some of the corporations to pay in their share. I am taking care of the down-town district and another man (mentioning his name) has charge of the stockyards. We figure that your share will be $10,000." My friend answered substantially as follows: "I can not give you any money for two reasons: First, we are not in that kind of business, and, second, if you have gotten yourselves into a hole why should you expect us to pull you out?"

On the strength of this statement the Record-Herald has explicitly stated several times, editorially, that $100,000 was raised to buy Lorimer's election, and we have never had a protest from anybody on it. The man who gave me this information is absolutely reliable. He had no object in telling me a falsehood, and I believe him thoroughly.

When Col. Roosevelt was here on his way to Cheyenne, I told him of the incident, and it was the prime motive that prompted him to decline to sit at the Hamilton Club banquet with Lorimer.

Hoping that this may be of some value to you, believe me,

Yours, sincerely,

H. H. KOHLSAAT.

On February 11, 1911, Senator Root replied to this letter, strongly urging Mr. Kohlsaat to induce the friend who had given him the information upon which his letter was based to disclose his identity.

Upon receipt of Senator Root's letter Mr. Kohlsaat sent for Mr. Clarence S. Funk, general manager of the International Harvester Co., the friend to whom he referred in his letter to Senator Root as his informant, but whose name he had not revealed and, showing him the letter, told him that he was the only man who could settle that question. Mr. Funk, after full consideration, refused to allow his name to be given and, on February 15, 1911, Mr. Kohlsaat so informed Senator Root in the following letter:

CHICAGO, ILL., *February 15, 1911.*

DEAR SENATOR ROOT: Your favor of the 11th at hand. I agree with you my friend's testimony would greatly help at this time, but it would absolutely ruin him to take the stand. He was approached as an officer of the company, not as an individual, and could not come out in the open without the consent of the directors, some of whom are friendly to Lorimer. You can imagine the situation he is, and would be, in.

I know some of the forces at work to keep Lorimer in the Senate. If they succeed, God help us; a day of reckoning will surely come to the American people.

The weakness of the anti-Lorimerites is that the Chicago Tribune is back of the fight to unseat Lorimer. That paper is rendering a great service to the people of these United States.

Your speech made a great impression throughout the West. It was a wonderful plea for the right.

Yours, faithfully, H. H. KOHLSAAT.

To Senator ELIHU ROOT,
Washington, D. C.

On the same day, February 15, 1911, Mr. Kohlsaat published in the Record-Herald an editorial in which the following language was used:

"Do we know all there is to be known concerning the $100,000 fund that was raised to pay for Lorimer's votes?"

This attracted wide attention and caused inquiries to be made of Mr. Kohlsaat by Senator La Follette and others who were anxious to ascertain upon what authority such statement and inquiry were made, and what the facts were with respect to the raising of the alleged fund.

Senator La Follette telegraphed Mr. Kohlsaat asking for information regarding the allegation of the existence of a fund of $100,000, and received in reply the following telegram:

CHICAGO, *February 21, 1911.*

Senator LA FOLLETTE, *Washington, D. C.:*

If I had all the details of the raising and disposition of the $100,000, would not have asked the editorial question. That $100,000 was raised for that purpose I have absolutely no shadow of doubt, but can not prove. We have made the assertion a number of times editorially. The assertion has never been challenged. You are the first person to ask for particulars.

H. H. KOHLSAAT.

Senator La Follette was exceedingly anxious to secure the information and endeavored to induce Mr. Kohlsaat to go to Washington, and, failing, wired his friend, Mr. Charles R. Crane, to see and induce Mr. Kohlsaat to do so. Mr. Crane visited Mr. Kohlsaat, exhibited the telegram, and urged him to go. Mr. Kohlsaat repeated to Mr. Crane the story he had written to Senator Root, but refused either to visit Washington or to reveal the name of his informant. Immediately thereafter Mr. Kohlsaat sent the following telegram to Senator La Follette:

CHICAGO, ILL., *February 22, 1911.*

Senator ROBERT M. LA FOLLETTE,
Washington, D. C.:

Please ask Senator Root to show you my letters of January 17 and February 15. I gave Charles Crane this morning my reasons for not giving names. He agreed with me that it would not be just right or wise to do so.

H. H. KOHLSAAT.

Neither Senator made public the contents of such letters and telegrams during the debates in the Senate, and Mr. Lorimer's right to retain his seat in the United States Senate was determined in his favor by vote of that body on the 1st day of March, 1911.

Almost a month thereafter the Helm committee, which did not commence taking testimony until March 28, 1911, summoned Mr. Kohlsaat as a witness to testify regard-

ing the editorial in question and the facts upon which it was based, whereupon the following proceedings were had:

"WEDNESDAY, MARCH 29, 1911—9.45 O'CLOCK A. M.

"The committee convened pursuant to the call of the chair.

"Herman H. Kohlsaat, called as a witness herein, being first duly sworn, was examined by Mr. Healy, and testified as follows:

"Q. What is your full name?—A. Herman H. Kohlsaat.

"Q. Your residence is in Chicago?—A. Chicago.

"Q. You are the editor and proprietor of the Chicago Record-Herald?—A. Yes.

"Q. That is a newspaper published in the city of Chicago?—A. It is, when the strikers do not shut us up.

"Q. As editor and proprietor of that paper, I assume, Mr. Kohlsaat, that you are—that you have general supervision and control over it?—A. Yes.

"Q. Exercise a supervisory control over the paper and over the editorial pages?—A. Yes.

"Q. In February of this year, Mr. Kohlsaat, there was published in the Chicago Record-Herald an editorial in reference to the senatorial action at Springfield. I will show you a copy of that editorial, or what purports to be a substantial copy [handing document to witness].—A. (Examining document). I think that is practically correct, because that is the way I felt and feel.

"Q. That editorial, then, was written by you?—A. Dictated.

"Q. Yes?—A. Yes.

"Q. You had information upon which that editorial was based?—A. Yes.

"Q. Have you any objection to giving the committee that information?—A. Yes.

"Q. You have objection?—A. Yes.

"Q. Well, do you object to giving the committee the information which you had without at this time perhaps identifying the individual or individuals who gave you the information?—A. Yes; because if I did that it would naturally lead up to the main party in the controversy, and it would undo just what I do not want to do.

"Q. That is what I want to show; if there is any main party here it will lead up to, that is what we want to show.—A. Can not I tell this in my own way?

"Q. Yes, certainly.—A. I am willing to answer questions as you put them.

"Q. Go ahead and make any statement that you please.

"Senator BURTON. Can I see that paper?

"Mr. HEALY. I have some other copies here. Just a minute; perhaps you might let the committee familiarize themselves with the edirorial first.

"(Said copy of said editorial is in words and figures as follows, to wit:)

[Wednesday, Feb. 15, 1911.]

"Bailey's fallacy—with applications.

"Senator Bailey has almost convinced himself that there was no corruption at all in the Illinois Legislature which sent Lorimer to the Senate. His grand 'forgery' climax was cruelly spoiled, but undaunted he asserted that there was little except suspicion and talk in the Lorimer and jack-pot scandals. Generalizing, he contends that there is much less corruption and graft in the country than many people, misled by muckrakers, have been led to believe.

"Now, this general statement may be true without lending any force whatever to Bailey's view of concrete cases. Do we know all that we might about the Illinois jack pot? Do we know all there is to know concerning the $100,000 fund that was raised to pay for Lorimer votes? Do we know the true inwardness of the Browne, Erbstein, Keeley trials?

"In some instances there is undoubtedly more cry than there is wool in muckraking affairs. In others, like the Albany Allds-Conger scandal, the Illinois Lorimer affair and jack pot, the facts are much graver than the average voter in certain districts realizes, or men like Browne, Broderick, or Wilson would never have been reelected. If all the facts were known about Springfield and Albany graft, a good many men would be moving penitentiaryward. In cases of bribery, perjury, looting of public treasuries it is not easy to get the 'parties' to talk, for obvious reasons. What loose writers here and there say about unspecified graft has no bearing on concrete cases. In such cases the question is one of evidence—its quantity and quality—and of inference, probability, reasonable interpretation.

"(Mr. Healy here passed copies of the document to the members of the committee.)

"By Mr. HEALY:

"Q. There were a number of editorials written along that same line, were there not? A. Yes.

"Q. About that time?—A. Yes. Shall I just tell this in my own way?

"Q. Just tell it in your own way, yes.—A. Shortly after the Chicago Tribune published Representative White's story last spring I met a friend of mine, a man of the highest character, intelligence, and a man who does not make reckless statements, and he gave me a detailed account of the raising of $100,000 to bring about the election of Mr. Lorimer. He gave it to me in confidence. I told him that the confidence would not be betrayed. With that feeling of perfect security that this man's information that he gave me was absolutely reliable, I took the position that the election should be investigated and came out editorially and backed the Tribune in its fight. The natural inclination in cases of that kind, where there are two great papers striving in the same field for circulation, advertising, and influence, is to, in the language of the street, knock the other paper's story. But I was so impressed with the truth of this that I came out editorially next day after this and backed the Tribune in their story, and have done it ever since.

"As I say, this was given to me in confidence. The cardinal principle of an honorable, upright, newspaper man is confidence. When I engage a cub reporter or put out a correspondent or a financial man on the street, I say: 'Now, one thing you must understand from the start, that when a man gives you a piece of information in confidence you, under no circumstances whatever, must ever divulge his name. If you do, you will be discharged, no matter how important and vital to the newspaper that information is.' About a month ago we printed a story in Chicago exclusively that I would have been glad to pay $500 for—a big financial story. I asked the managing editor who got it, and he told me, and I sent for the man and I complimented him on his story, and then said, 'Who gave it to you?' He said, 'I got it in confidence.' I said, 'If you tell me I will discharge you.'

"Now, I have talked that to my boys and men and correspondents, as Mr. Evans here can assure you personally, for 20 years, and nothing under heaven would make me set an example of breach of confidence to my men and to the other newspaper reporters and the men of this country. There is no one that is more interested in maintaining that status of correct behavior between newspaper men and public men than you gentlemen yourselves. Suppose that during this trial I had given the name of my informant and he had given the testimony; it would have had a wonderful influence in the case. But he is—I asked him if he had changed his mind and if I was at liberty to give the information, and he said, 'No, I could not release you'; and he told me why, and his reasons were absolutely sufficient, and I would not violate that confidence for anything.

"Some of the Senators in Washington got hold of these same editorials, and Senator Root and others asked me if I could bring that evidence out. I told them I could not and would not under any circumstances. When I got the summons from your committee to appear here—I have a great respect for any legislative committees that are out trying to probe and clean up corruption in the State—I came down here, but I wish that some one of the committee had come to see me beforehand, and I think I would not have had to sleep in upper 13 on the Alton last night, or try to sleep. I am sorry I can not do it, that I can not give you the information, but it is really impossible for me to violate that confidence. I have been very frank with you and will answer any question except leading questions that you wish to put to me.

"Q. Did this gentleman, whose identity you do not care to disclose, tell you that he had been personally involved in the matter, or came into personal contact with some one who had——A. Mr. Healy, I will have to refuse to answer all those questions, because you are too clever for me, and if I got started you might uncover some things that I would not want to go into. I have heard you before juries.

"Q. Well, that is very complimentary, Mr. Kohlsaat, but at the same time, I think you are quite capable of taking care of yourself.—A. Well, I find the safest way is to make a complete straight statement in the beginning and then not diverge.

"Q. And in your present frame and attitude of mind that is all the information that you would care to give the committee at this time?—A. Yes. I simply say that I am exactly of the same opinion to-day as I was when those editorials were written. All those editorials were written with this object in view. I felt that I was perfectly justified in taking the position, although legally I might not be able to accomplish anything. I think morally the support that we gave has been very beneficial, not only to the State of Illinois but to the country at large. The question of one man's election to the United States Senate cuts very little figure. I believe that this investigation that has gone on and the publicity and everything else has had a wholesome effect on the whole country, and I feel I would be lax in my duty as a leader in public opinion if I had not used the instrument at hand to strengthen public opinion.

"Q. Well, the information you got at that time impressed you with its accuracy and truth?—A. Absolutely.

"Q. And you were sufficiently impressed to justify the publication of the editorial which has been called to your attention? A.—Yes. And if you will read the editorials you will see that they are all written so that I could not be pulled up in a criminal-libel case and be made to tell the names. I never have used any names.

"Q. I am going to ask you some leading questions now, Mr. Kohlsaat. Did this informant tell you that he was approached with the request that he should contribute $10,000 to this $100,000 fund?—A. I decline to answer, Mr. Healy.

"Q. And which contribution on his part was to be used in conjunction with the senatorial election in Illinois in 1909?—A. I must decline to answer.

"Q. Did he tell you that he was one of the 10 men who were asked to contribute to such a fund?—A. I decline to answer.

"Q. Did he inform you that a fund of $100,000 had been raised to induce the election of Senator Lorimer in the State of Illinois in 1909, and that subsequently the man or men who raised that fund desired to reimburse themselves?—A. Split your question, please, Mr. Healy.

"Mr. HEALY. Just read the first part of the question.

"(The following portion of the question was read: 'Did he inform you that a fund of $100,000 had been raised to induce the election of Senator Lorimer in the State of Illinois?')

"A. He did.

"Q. Did he also tell you that the man or men who had raised that $100,000 fund desired to reimburse themselves, or solicit 10 other men, residents of Chicago, to make that amount good?—A. I must decline to answer.

"Q. And did he tell you that he was one of the men so approached?—A. I decline to answer.

"Q. Did he give you the name or names of men who approached him, and what they said to him in connection with the matter?—A. I must decline to answer.

"Q. I assume that information was obtained—I believe you have answered this question, but in order to have the record clear in that respect, I assume that information was obtained at or about the time these editorials were published?—A. I can not fix that date in my mind, but it was after the publication of the White letter, very shortly after the publication of the White letter.

"Q. That was in April or May, 1910, wasn't it?—A. Well, it was last spring, I did not——

"Q. About a year ago?—A. Just about a year ago.

"Q. Mr. Kohlsaat, did you verify the information received from this unnamed person in any other way?—A. No; I did not have to. I could not verify it, but so many things developed in the trials and everywhere else afterwards that corroborated it, although this man's word personally to me was all that was necessary.

"Q. Well, by verification, I mean did you send to any of the persons whom he had named——A. Oh, no, no.

"Q. And cause them to be interviewed?—A. No; the matter came to me in confidence, and I could not go and ask a man such a question. He would say, 'What is your authority?' And I am in duty bound when I ask a man a question of that kind, that has an insult in the queston, to have some basis for it.

"Q. This man who gave you the information is a resident of Chicago?—A. I refuse to answer. I decline to answer, to put it politely.

"Q. Is he still living, as far as you know?—A. Yes.

"Mr. HEALY. Well, I suggest, Mr. Chairman, that we ought to consider the matter perhaps in executive session and call Mr. Kohlsaat a little later, perhaps.

"The WITNESS. Could I get away at noon, gentlemen, because I have important business in Chicago?

"Senator BURTON. I wish to ask him some questions.

"Chairman HELM. Before we proceed with the executive session you may ask some questions.

"By Senator BURTON:

"Q. Mr. Kohlsaat, you say you are editor of the Record-Herald?—A. Yes, sir.

"Q. Your paper has insisted upon this investigation being conducted?—A. Yes, sir.

"Q. And yet when you are called here you refuse to aid us in that investigation? A. Yes, sir.

"Q. Will you denounce any citizen that takes the same stand that you do and refuses to give us information by reason of a personal confidence?—A. I think a man that would violate a personal confidence is not worth his salt, and a newspaper man beyond all others. We could not run an honorable upright newspaper if we did it, and you, and you gentlemen here, are tremendously interested that there should be a straightforward, manly, decent press.

"Q. Where do you draw the distinction between a private citizen and the editor of a great paper when he undertakes to purge the general assembly of a class of men that you have charged are here?—A. Well, it may be hard for me to impress that upon you, but in my story I told you that I had made that a cardinal principle with all my men, and I am not going to start out by giving them a bad example, no matter what the consequence might be.

"Q. Are you sure you are not giving them a very bad example now?—A. No.

"Q. How can you expect a private citizen to come here and give us information when a man occupying the position you do comes here and refuses to disclose the source of his information that inspired the editorial you have written?—A. Well, I think that a newspaper man, an editor's position, is entirely different from a private individual, but if I were a private individual and gave my word I would not break it any more than I would as a newspaper man.

"Q. Then you think the private citizen that comes here and has obtained information in confidence is justified in refusing to answer, the same as you? A. If that is his code of morals. That is my code. I can not be responsible for other people's.

"Q. Have you a code of morals that justifies you in writing editorials and insisting that there should be a searching investigation and yet when called before this committee to give information you refuse to give it? Is that your code of morals?—A. Well, I do not think that your question is fair. I think that I have stated so clearly my position in this thing, and that ——

"Senator McKenzie. Isn't it true, Mr. Kohlsaat, that in dealing with all public men and getting information from your correspondents that is treated as a privileged communication and the name of the giver of the information is held in the background? Isn't that right; isn't that the way you get the news?—A. It is, if it was given in confidence. Mr. Evans there is my Springfield correspondent. If Senator McKenzie were to give Mr. Evans anything and say, 'Mr. Evans, I don't want my name to appear in this in any manner, shape, or form,' and Mr. Evans said, 'It will not,' nobody could drag it out of him. I could not drag it out of him, and if I could I would not have him here.

"Q. You would not get very much, either.—A. That is so. [Addressing Senator Burton.] Answering your question, I have had very close personal relations with three Presidents of the United States who have sent for me and told me things in confidence that were vital in the extreme. We fought for those principles because they said they wanted to bring them about, they wanted to create public sentiment, and if I had told especially one thing that I have in mind now, when asked by a number of my newspaper editorial associates around the country, the source of the information, it would have created a racket on both sides of the water. But that man knew that he was perfectly safe in talking to me, and when a newspaper man has a reputation of violating confidence his usefulness as a public citizen and leader ceases from that moment on. Now, following along as a private individual, I can not do that. I have got all the trouble I can have looking out for myself, but that is my attitude.

"Mr. Healy. I think before we proceed further in asking questions we had better go into executive session, and we will ask everybody else to retire from the room for the present.

"(Whereupon the committee went into executive session, at the conclusion of which the open session was resumed and the following proceedings had:)

"Chairman Helm. Mr. Kohlsaat, the committee has agreed that we will have to require you to answer, and if you refuse that we will report the matter to the senate and request you to appear back here next Wednesday to see what the senate desires to do in the matter. Will you still persist in refusing to answer?—A. Yes.

"Q. You decline to make any further disclosure?—A. Yes. Could you make that Thursday? You see Tuesday is election day, and I am up pretty nearly all night.

"Chairman Helm. That will be satisfactory.

"Mr. Healy. That will be at what hour?

"Chairman Helm. What hour will satisfy you?

"Mr. Healy. You will probably have to be here, Mr. Kohlsaat, at the morning session of the senate. I suggest we make it 10 o'clock, next Thursday, April 6.

"(The committee then took a recess until 2 o'clock of the same day, Wednesday, March 29, 1911.)"

Having persistently refused to reveal the name of his informant, and the committee having insisted that he do so, Mr. Kohlsaat was excused for a week, pending action of the Illinois Senate thereon, and he returned to Chicago. The press gave great publicity to the incident, emphasizing the fact that he was facing a possible arrest and imprisonment should he persist in such refusal, and much public interest was aroused, the result of all which was that Mr. Clarence S. Funk came forward and for the first time consented that his name as such informant be disclosed; and on April 5, 1911, Mr. Funk,

to save Mr. Kohlsaat from further trouble, assumed the responsibility for such statement and testified before the Helm committee at Springfield as follows:

"Clarence S. Funk, called as a witness herein, being first duly sworn, was examined by Mr. Healy and testified as follows:

"Q. What is your full name, Mr. Funk?—A. Clarence S. Funk.

"Q. Where do you live?—A. In Oak Park, Chicago.

"Q. How old a man are you?—A. Forty-four.

"Q. You are married?—A. Yes.

"Q. Have a family?—A. Yes.

"Q. And what is your business?—A. I am general manager of the International Harvester Co.

"Q. How long have you occupied that position, approximately?—A. Since November 1, 1906.

"Q. And where are your headquarters?—A. Harvester Building, Chicago.

"Q. How long have you been connected with the harvester company in any way? A. Since its organization.

"Q. And about how long is that?—A. Oh, nine years.

"Senator Helm. Are there other witnesses that you desire to have excluded?

"Mr. Healy. No; no others. And I did not ask to have Mr. Funk excluded because the statement was simply preliminary.

"Q. What was your business before that, Mr. Funk?—A. I was sales manager for the Warder, Bushnell & Glessner Co., one of the concerns that sold out to the harvester company.

"Q. What, generally, are your duties as general manager of the International Harvester Co.?—A. General supervision over the operating end of the business.

"Q. I direct your attention to a conversation that you had with Edward Hines, of the Edward Hines Lumber Co., in the latter part of the month of May, 1909, or the early part of the month of June, 1909. Did such a conversation take place?—A. Well, I can not identify the month. I had a conversation with Edward Hines shortly after Lorimer was elected United States Senator by the legislature.

"Q. Well, it is in the record here that the election of Senator Lorimer was on the 26th day of May, 1909. Directing your mind to that time, or about that time, when was it that this conversation occurred?—A. It was shortly after that. I could not say whether it was 5 days or 10, but it was within a short time afterwards.

"Q. Where did that conversation take place?—A. Union League Club, Chicago.

"Q. And with whom was the conversation?—A. Edward Hines.

"Q. Was the conference arranged in any way or was it more or less accidental?—A. I met Mr. Hines accidentally, and he said he had been trying to get a chance to see me or get time to see me.

"Q. In what part of the Union League Club did that conversation take place?—A. In the large lounging room right off of the entrance.

"Q. And about what time of the day, Mr. Funk?—A. It was after lunch, in the afternoon.

"Q. You had gone over there to get your luncheon?—A. Yes. I was just coming out.

"Q. Coming down from the luncheon room, you met him in the lounging room?—A. Yes.

"Q. Now, will you tell the committee, Mr. Funk, what occurred and what was said at that conversation by Mr. Hines and by yourself?—A. Do you want me to undertake to repeat verbatim?

"Q As near as you can remember; otherwise the substance of the conversation.

Senator Helm. Where you can remember the exact language you will give it, and where you can not, then give the substance.

"A. Well, he said I was just the fellow he had been looking for, or trying to see, and said he wanted to talk to me a minute. So we went and sat down on one of the leather couches there on the side of the room, and without any preliminaries, and quite as a matter of course, he said, 'Well, we put Lorimer over down at Springfield, but it cost us about a hundred thousand dollars to do it.' Then he went on to say that they had had to act quickly when the time came; that they had had no chance to consult anyone beforehand. I think his words were these, 'We had to act quickly when the time came, so we put up the money.' Then he said, 'We—now we are seeing some of our friends so as to get it fixed up.' He says they had advanced the money; that they were now seeing several people whom they thought would be interested to get them to reimburse them. I asked him why he came to us. I said, 'Why do you come to us?' —meaning the harvester company. He said, 'Well, you people are just as much interested as any of us in having the right kind of a man at Washington.' Well, I said—I think I replied, and said, 'We won't have anything to do with that matter at all.'

He said, 'Why not?' I said, 'Simply because we are not in that sort of business.' And we had some aimless discussion back and forth, and I remember I asked him how much he was getting from his different friends. He said, 'Well, of course, we can only go to a few big people; but if about 10 of us will put up $10,000 apiece that will clean it up.' That is the substance of the conversation. I am repeating it verbatim just as far as I can, Mr. Chairman. I do not undertake to say that it is absolutely exact.

"I left him then in just a moment. As I left he asked me to think it over. I made no reply to that. I just walekd away.

"Q. Is that the conversation as you remember it now, Mr. Funk, or do you recall anything else which was said with reference to the person to whom the money was to be sent?—A. Well, he—yes, he mentioned another name. Before I had any chance to say anything he had told me this, that he also mentioned the name of the man to whom he wanted me to send the money.

"Q. Who was that man?—A. I do not like to answer that question, because I have no evidence that the man he named had any knowledge of the transaction, had anything to do with it; and I do not want to drag in the name of another man in a matter of this kind, if I can help myself. I have no evidence beyond his statement to me."

After considerable discussion, the committee having held that the name should be revealed, the witness said:

"Well, I will answer, under protest. He told me to send the money to Ed. Tilden.

"Mr. HEALY:

"Q. Who is Ed. Tilden, if you know?—A. Well, I think he is president or vice president of some one of the banks at the stockyards, and I believe he is one of the officials of the National Packing Co. I don't know——

"Q. He is president of the National Packing Co., isn't he, or connected in some official way with that company?—A. I understand so."

Proceedings in the Senate of the United States.

This was the first information given to the public or which had come to the Senate or to any committee of the Senate concerning this now famous interview.

The press of the country gave great publicity to Mr. Funk's testimony before the Helm committee, and the following day, April 6, 1911, Senator La Follette introduced into the Senate a resolution, the preamble of which was as follows:

"Whereas the Senate, by resolution adopted on the twentieth day of June, nineteen hundred and ten, authorized and directed the Committee on Privileges and Elections to investigate certain charges against William Lorimer, a Senator from the State of Illinois, and to report to the Senate whether, in the election of said Lorimer as a Senator of the United States from said State of Illinois, there were used and employed corrupt methods and practices; and

"Whereas said committee, pursuant to said resolution, took the testimony of a large number of witnesses, reduced the testimony to printed form, and reported the same to the Senate, which was thereafter considered and acted upon by the Senate; and

"Whereas the Illinois State Senate thereafter appointed a committee to investigate like charges against William Lorimer and to report to said State senate whether in the election of said Lorimer to the United States Senate corrupt methods and practices were employed and used; and

"Whereas as it appears from the published reports of the proceedings of the said Illinois State Senate committee that witnesses who were not called and sworn by the committee of this Senate appointed to investigate said charges have appeared before the said committee of the Illinois State Senate, and upon being interrogated have given important material testimony tending to prove that one hundred thousand dollars was corruptly expended to secure the election of William Lorimer to the United States Senate."

The resolution provided for the appointment of Senators Works, Townsend, McLean, Kern, and Pomerene as a committee to investigate "and report to the Senate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices."

On May 22 Mr. Dillingham introduced a resolution providing for an investigation of the same character by the Committee on Privileges and Elections, the preamble of which was as follows:

"Whereas since the action by the Senate on the resolution of June twentieth, nineteen hundred and ten, relating to the seat of William Lorimer, it is represented that new testimony has been discovered; and

"Whereas the Senate of the State of Illinois did on the eighteenth day of May, nineteen hundred and eleven, adopt the following resolutions:

"'Whereas, under S. Res. 17, a committee was appointed to investigate charges of corruption and official misconduct against members of this senate; and

"Whereas the said committee has reported the result of its investigation to this senate, from which it appears that there were important and material witnesses without the State of Illinois, whose attendance it could not legally compel and which witnesses refused voluntarily to appear; and

"'Whereas said committee was seriously impeded in the performance of its duties by what we believe to be the unwarranted action of a certain judge; and

"'Whereas it appears from the report of said committee that despite its inability to compel the attendance of such foreign witnesses and the adverse action of said judge, sufficient evidence was procured to show that without bribery and corruption and by reason of the failure of certain senators and representatives during the differ- ent roll calls, to carry out the will of the people as expressed at the polls, in the choice for a United States Senator, which action we deem most reprehensible, and should be condemned, and which we hereby condemn.'"

On the same day, May 22, 1911, Senator La Follette began a speech, dealing generally with the question of the validity of Mr. Lorimer's election, alleging that new and material evidence had been produced through the investigation of the Helm committee, quoting Mr. Funk's testimony regarding his interview with Mr. Hines, as well as the testimony given before that committee in relation to an alleged conversation between Christian F. Wiehe and William M. Burgess on a railroad train; he continued his remarks on May 23 and 24, and concluded them on May 26. Among other things, Senator La Follette said:

"Shortly before the final vote on this case at the last session, when the question was before the Senate of agreeing by unanimous consent to fix a time to vote, I interfered. I objected in the hope that I could, before the Senate completed its consideration and disposed of this case, submit to the Senate reasons why the case should be still further investigated.

"After making such objection I made the most diligent efforts to secure facts of which I had received some intimation, in order to lay them before the Senate and induce it to defer further consideration of the case until there had been a more complete and thorough investigation.

"But, sir, with all that I could do, I was not able to come before the Senate so prepared that I would feel warranted in asking that it arrest the progress of the case and reopen it."

On the same day Senator Bailey engaged in the debate, and, among other things, said:

"I speak without their authority, but I am sure that I speak with absolute accuracy, when I say that in view of the testimony elicited by one of its committees, and in view of the resolution adopted by the State Senate of Illinois, every Democratic Senator favors a further and a thorough inquiry into the election of Senator Lorimer. That was the mind of Democratic Senators before the Senator from Wisconsin began his extended address, and that is the mind of Democratic Senators since he has concluded it. * * *

"We favor this investigation because it is alleged that new and material evidence of corruption has been found. * * * It is upon this new evidence we base our votes and not upon any dissatisfaction with the former judgment of the Senate, nor upon any criticism with the work of the subcommittee which conducted the former investigation, * * * and it is no fair subject of criticism against it that some of the witnesses to those transactions concealed their knowledge from that committee and afterwards imparted it to another committee or to other people.

"If there were no new evidence, I would not vote to grant a new trial. * * * We must some time reach the end of even a proceeding like this; and if, without the discovery of new and material evidence, the Senate of each succeeding Congress could reopen and review the judgment of the preceding Senate, we would forever be in a struggle over questions like this."

On May 26, 1911, Mr. Dillingham also took part in the debate, saying among other things:

"It seems to me, in consideration of the new evidence which has been discovered by the committee of the Illinois Senate, and in view of the difficulties it has encountered in securing witnesses from other States, and especially in view of the request of that body that the case be further investigated by the Senate of the United States, that this body * * * should follow the lines which the courts of law have always adopted under similar circumstances, and grant a new hearing and make further investigation."

In support of his position, Senator Dillingham called attention to the Du Pont case in 1897, reading from the report of the Committee on Privileges and Elections, of which Senator Hoar, of Massachusetts, was then chairman, as follows:

"The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution the judge of election, qualifications, and returns of its Members, and its judgment is just as binding in law, in all constitutional vigor and potency, when it is rendered by one majority as when it is unanimous.

"It is clear that the word 'judge' in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its Members or by their opinion as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals. We can conceive of no case which can arise in human affairs where it is more important that a judgment of any court should be respected and should stand unaffected by caprice or anything likely to excite passion or to tempt virtue. When the Senate decided the question it was sitting as a high constitutional court. In its action we think it ought to respect the principles, in giving effect to its own decision, which have been established in other judicial tribunals in like cases and which the experience of mankind has found safe and salutary."

And further:

"We do not doubt that the Senate, like other courts, may review its own judgments where new evidence has been discovered, or where by reason of fraud or accident it appears that the judgment ought to be reviewed. The remedy which in other courts may be given by writs of review or error or bills of review may doubtless be given here by a simple vote reversing the first adjudication. We have no doubt that a legal doctrine involved in a former judgment of the Senate may be overruled in later cases. But there is no case known in other judicial tribunals in which a final judgment in the same case can be rescinded or reversed merely because the composition of the court has changed or because the members of the court who originally decided it have changed their minds as to the law or facts which is involved."

On May 23, 1911, Senator Martin introduced a resolution providing for a similar investigation by the Committee on Privileges and Elections, the preamble of which was as follows:

"Whereas the Senate adopted a resolution June twentieth, nineteen hundred and ten, directing the Committee on Privileges and Elections to investigate the charges relating to the election of William Lorimer to the Senate of the United States; and

"Whereas since the Senate voted on the report of that committee it is represented that new material testimony has been discovered in reference to such matter; and

"Whereas the senate of the State of Illinois, on the eighteenth of May, nineteen hundred and eleven, adopted a resolution for the reasons therein stated, requesting the Senate of the United States to institute further investigation of the election of William Lorimer to the Senate."

A large number of Senators participated in the debates, which extended from May 22 to June 7, 1911. The greater portion of the time was occupied in a discussion of the work of the former committee and the question of the personnel of the committee to be appointed to conduct the investigation proposed in the several resolutions which were then pending in the Senate. All who took part in these debates favored the reopening of the case, and almost all, if not all, based their action on the ground of newly discovered evidence. As a result of these debates, on June 7, 1911, the following resolution, introduced by Mr. Dillingham, was adopted:

"*Resolved*, That a committee of the United States Senate consisting of the following members of the Committee on Privileges and Elections: Senators Dillingham, Gamble, Jones, Kenyon, Johnston, Fletcher, Kern, and Lea, be,and are hereby, authorized, empowered, and directed forthwith to investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt methods and practices.

"That said committee be authorized to sit during the sessions of the Senate and during any recess of the Senate or of Congress; to hold sessions at such place or places as it shall deem most convenient for the purposes of the investigation; to employ stenographers, counsel, accountants, and such other assistants as it may deem necessary; to send for persons, books, records, and papers; to administer oaths; and as early as practicable to report to the Senate the results of its investigation, including all testimony taken by it; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

"The committee is further and specially instructed to inquire fully into and report upon the sources and use of the alleged 'jack-pot' fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate."

Results of the investigation.

Before taking up for examination the various lines of evidence which have a bearing upon the question submitted to the committee for its investigation, the committee desires to call attention to the fact, well known to the Senate but apparently unknown to a large proportion of the people of the United States, that the investigation is not complicated by any charges which involve Mr. Lorimer's private character, the discharge of his public duties, or any other charge upon which his expulsion from the Senate might be predicated.

The only duty which was laid upon the committee in the first investigation or which has been laid upon this committee is "To investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used and employed corrupt practices."

The newly discovered evidence.

The newly discovered evidence, to which reference is made in the preambles of the resolutions offered in the Senate and to which reference was made in the debates on the same, and the supposed existence of which resulted in the adoption of the resolution of the Senate under which this investigation has been conducted, all bore upon the question whether a fund of $100.000 was raised by or through the efforts of Edward Hines, and others acting with him, or by any other person or persons, with or without his knowledge, which was corruptly used or expended in whole or in part to secure the election of William Lorimer as a Senator of the United States from the State of Illinois by the legislature of that Commonwealth on the 26th day of May, 1909.

The committee, after the most thorough investigation, during which every source of information has been probed, has failed to find any evidence that a fund of $100,000, or of any other sum, was raised or spent by Edward Hines or by him in connection with others, or with his knowledge, or by any other person or persons, to be used in or in connection with the election of Mr. Lorimer to the Senate of the United States, or that any corrupt practices were employed in such election.

The only newly discovered evidence that can be said to refer either to the raising or the existence or to the use of such a fund is that given by Clarence S. Funk, regarding an interview had by him with Edward Hines on May 27, 1909, and that given by William M. Burgess concerning an alleged conversation with C. F. Wiehe, to which reference is hereinafter made.

The evidence given by Mr. Funk before this committee is substantially as follows:

That shortly after the election of Mr. Lorimer Mr. Hines approached him in the Union League Club, Chicago, between the hours of 1 and 2 o'clock, and said: "Hello! You are just the man I was looking for," or "that I wanted to see."

"Mr. MARBLE. What did you say?

"Mr. FUNK. He said: 'I want to see you a moment.'

"Mr. MARBLE. What did you say to him?

"Mr. FUNK. I probably said 'Hello.' I don't remember.

"Mr. MARBLE. What next?

"Mr. FUNK. We walked off toward the end of the room, to the nearest couch, and sat down on the couch. Do you want me to tell what happened?

"Mr. MARBLE. Yes; go right ahead.

"Mr. FUNK. Yes. He seemed to be feeling rather exuberant at the time, and he said: 'Well, we put Lorimer over down at Springfield, but it cost us $100,000 to do it,' or 'about $100,000.'

"Mr. MARBLE. What else?

"Mr. FUNK. Then he went on to explain that they had to act quickly when the time came and did not have any time to consult anybody. And he said: 'So we put up the money. Now, we are seeing some of our friends to get the matter fixed up.'

"Mr. MARBLE. What else?

"Mr. FUNK. I inquired along about that time, how much he was getting from his different friends, and he said: 'Well, we can only go to a few big people; but if about 10 of us would put up $10,000 apiece we would clean it up.' I asked him why he came to me, and he said: 'Because you are as much interested as anybody in having the right kind of a man in Washington.' I told him we would not have anything to do with the matter. He wanted to know why, and I said: 'Because we are not in that kind of business.'" (544–545.)

Mr. Funk further testified that so far as he was aware there was no personal unfriendliness between them; that they did not shake hands at parting, and he does not know where Mr. Hines walked when he left him.

"Senator LEA. Was Mr. Tilden's name mentioned in that conversation—Mr. Ed. Tilden?

"Mr. FUNK. Yes, sir.

"Senator LEA. Tell us about that, please.

"Mr. FUNK. Well, I suppose there is no use of my protesting about bringing in his name, because I have already made my protest in the record. But I want to repeat that I dislike very much to bring in the name of a man simply on Mr. Hines's statement. Mr. Tilden's name was used before he got through his talk. He said: 'Just send the money to Ed. Tilden.' Assuming that we were going to send it, of course." (545, 546–549, 80–85.)

Further testifying, Mr. Funk said:

"He seemed to assume that it would be worth $10,000 to the International Harvester Co. to have the right kind of a man in the Senate from Illinois. (546.)

"Senator KENYON. How early in the conversation did he mention Mr. Tilden's name?

"Mr. FUNK. I think he mentioned it in connection with the contribution of $10,000 apiece by several big people. He talked rapidly, and rather assumed that the thing was going to be done, and he mentioned Tilden's name before I had a chance to say anything. * * * He said that he thought if 10 big people would contribute $10,000 apiece that would clean the matter up. He said: 'Just send the money to Ed. Tilden.'

"Senator JONES. You had not had any opportunity to say anything to him before that?

"Mr. FUNK. No; I let him talk. He wanted to talk, and I was willing to listen until he got through.

"Senator JONES. You made no answer of any kind to his suggestion that it had cost $100,000 to put Mr. Lorimer over?

"Mr. FUNK. No; I think he went right along. That is my recollection. He did not stop there. He simply stated it as a fact, and then went on with his argument.

"Senator JOHNSTON. You did ask him how much he expected you to contribute?

"Mr. FUNK. No; I asked him how much he was getting from his different friends, as I recall it." (546–547.)

How the story was regarded and how it was used.

The subsequent history of this incident, so far as Mr. Funk's conduct is concerned, bears out the conclusion that even if it occurred as he testified he regarded it as unimportant. While he testified that soon after its occurrence he communicated it to the president and to the general counsel of the International Harvester Co. and repeated the substance of it to the assistant manager (Funk, 556, 587), it was never again mentioned between them for a period of 21 months (Funk, 556; Bancroft, 384, 397–399; McCormick, 11–12), and the only other person to whom, so far as the evidence shows, he ever communicated it until he testified before the Helm committee in April, 1911 Funk, 556), was Mr. Kohlsaat, editor of the Chicago Record-Herald, a bitter political enemy of Mr. H. H. Lorimer, with whom he had a street conversation in Chicago immediately are the publication of White's jackpot story in the Chicago Tribune on April 30, 1910..

That he did not then consider the story as a factor of any value in the vigorous investigations which followed the publication of the White story by the legal authorities of Cook and Sangamon Counties is evident from the fact that he not only pledged Mr. Kohlsaat to secrecy, but that he did not disclose the story to the law officers of either of these counties, nor afterwards to the Senate Committee on Privileges and Elections, which was charged with the duty of investigating the whole subject, nor to any tribunal which might have determined the truth or falsity of his version of the interview between himself and Edward Hines or of the truth or falsity of the declarations alleged by him to have been made by Mr. Hines to him in that conversation.

For 20 years prior to that time Mr. Kohlsaat had been strongly opposed to Mr. Lorimer politically (Kohlsaat, 428–431, 457–469), and he was in full sympathy with the investigation then in progress under the direction of the State's attorney of Cook County, but he made no effort to substantiate Mr. Funk's story, nor did he attempt to ascertain whether there was any foundation for the statement which Mr. Funk said Mr. Hines made to him in regard to the raising of a fund of $100,000; nor did he, so far as the evidence shows, ever discuss with Mr. Funk the advisability of communicating this information to the prosecuting authorities of Cook County, nor did he do it himself. That he looked upon the story as a newspaper and political asset is apparent. In his testimony before the Helm committee at Springfield Mr. Kohlsaat says:

"He gave it to me in confidence. I told him that the confidence would not be betrayed. With that feeling of perfect security that this man's information that he gave me was absolutely reliable, I took the position that the election should be investigated and came out editorially and backed the Tribune in its fight. * * * I was so impressed with the truth of this that I came out editorially next day after this and backed the Tribune in their story, and have done it ever since." (Helm report, p. 58.)

It appears also that Mr. Kohlsaat immediately communicated this information which he had received in confidence to Mr. James Keeley, the general manager and editor of the Chicago Tribune, in confidence, who made use of it as early as May 2, 1910, in an editorial paragraph headed, "Was it sawdust," followed by the inquiry, "Who furnished the dust, to use a colloquialism, to bribe the legislature?" and on frequent occasions thereafter. (Keeley, 2010–2011, 2074–2075.)

Mr. Kohlsaat also testified that he communicated the story in confidence to Victor F. Lawson, owner of the Chicago Daily News, going so far as to reveal to him the name of Mr. Funk as his informant, and that the information so conveyed to Mr. Lawson thereafter "influenced his editorial policy during the entire period of the Lorimer investigation (Kohlsaat, 440), and it gave him confidence to be very specific in his editorials in regard to the belief that money was used to buy the election." (Kohlsaat, 440.)

Thus it appears that the three most powerful agencies for the creation of public sentiment in the Central West acted together in a common purpose to convince the public mind that the election of William Lorimer as Senator from the State of Illinois had been brought about by corrupt methods.

The testimony further shows that Mr. Kohlsaat related this story to Theodore Roosevelt, likewise in confidence, late in the month of August, 1910 (p. 440), when the latter made a brief stop in Chicago on his way to Cheyenne. (Kohlsaat, 439, 440, 441.) September 8 following, Col. Roosevelt returned to Chicago to attend a banquet which had been tendered to him by the Hamilton Club of that city. On the morning of that day he publicly announced that he would not attend such banquet if Senator Lorimer was to be present, with the result that, although a member of the club, Mr. Lorimer absented himself on that occasion. The public press teemed with accounts of this incident, producing a profound sensation, and intensifying the prejudice in the public mind against Mr. Lorimer. Col. Roosevelt subsequently wrote Mr. Kohlsaat that the story which the latter had told him as coming from Mr. Hines was the reason he declined to attend the dinner if Mr. Lorimer was to be present. (Kohlsaat, 440.)

Mr. Kohlsaat repeated the story, told him in confidence, wherever it would do the most direct and positive injury to Mr. Lorimer, and always unknown to him, "observing the cardinal principle of an honorable, upright newspaper man," and thus putting into practice observing his obligation to maintain "the same secrecy that a priest does of a confession."

During the summer of 1910 the grand juries of Cook and Sangamon Counties made exhaustive investigations of the charges of corruption in connection with the election of Senator Lorimer; indictments were returned, and Lee O'Neil Browne was tried and acquitted on a charge of having bribed Charles A. White to vote for Mr. Lorimer; on the 20th of September the Subcommittee of the Senate Committee on Privileges and Elections, charged with investigating the question whether Mr. Lorimer's election had been secured by corrupt practices, met in Chicago and remained in session there for three weeks.

During that entire period the evidence discloses no instance when Mr. McCormick, Mr. Bancroft, Mr. Funk, Mr. Kohlsatt, Mr. Lawson, Mr. Keeley, or Col. Roosevelt saw fit to bring the information contained in Mr. Funk's statement to Mr. Kohlsaat to the attention of any person connected with any investigation or prosecution above referred to; nor does it disclose the fact that any of these gentlemen ever suggested to Mr. Funk the propriety of revealing the declaration alleged to have been made to him by Mr. Hines to any public officer or to any investigating body, so that its truth or falsity, and its value as evidence, might be properly determined.

The evidence further shows that although Mr. Keeley disclosed this information to his counsel, Mr. Alfred Austrian, who represented the Chicago Tribune before the first senatorial investigating committee, no suggestion was made by either of them to that committee or any member thereof concerning the Funk story, nor did Mr. Hines's name appear on the list of names of persons furnished by Mr. Austin to be summoned as witnesses before that committee. (Keeley, 1909–1912.)

All the facts adduced by the evidence show that the Senate of the United States was permitted to take final action on the question of the right of Mr. Lorimer to retain his seat without any information whatever, as a body, of the existence of the Funk story,

and the first knowledge of this incident reached the Senate through the public newspaper accounts of the testimony given by Mr. Funk before the Helm committee at Springfield, April 5, 1911, more than a month after the final action of the Senate in confirming Mr. Lorimer's right to his seat in that body.

The testimony of Mr. Funk stands uncorroborated, either by the testimony of any other witness having knowledge of what occurred at this interview between Mr. Funk and Mr. Hines or by any circumstances which tend to establish his version of such interview.

The acquaintance between Mr. Funk and Mr. Hines had been of a casual, passing character. While both were members of the Union League Club, both were exceedingly busy men and met but few times in a year. They had no personal dealings with each other and their personal associations were confined to occasional meetings at the club, on railway trains, on the streets, at hotels, and in other public places.

In view of the fact that it was known to Mr. Hines that the relations existing between the officers of the International Harvester Co. and Mr. Lorimer were those of opponents rather then friends, it is improbable that he would seek from Mr. Funk, the representative of that corporation, a contribution to aid in the election of Mr. Lorimer; and it is inconceivable that Mr. Hines, if guilty of an infamous crime, would have unreservedly revealed it under the circumstances described by Mr. Funk, and in any case to a person with whom he had so slight an acquaintance, and at a time when the election was so fresh in the minds of the public. And particularly when it appears that at no previous time nor even at that time did Mr. Hines know whom Mr. Funk preferred for United States Senator. (Funk, 543–544.)

That Mr. Funk was a more than willing witness against Mr. Hines appears from his testimony. When asked how he knew whom Mr. Hines preferred for United States Senator, he replied:

"You would see his name in the paper every few days in connection with activities at Springfield, or hear it as a matter of general talk in the streets." (Funk, 544.)

On cross-examination, when his mind was specifically directed to this subject, Mr. Funk testified, among other things, as follows:

"Mr. HYNES. You spoke, Mr. Funk, of Mr. Hines's activities at Springfield. What did you have reference to there?

"Mr. FUNK. Why, it was a matter of common talk that he was very active down there.

"Mr. HYNES. What did you understand he was doing down there?

"Mr. FUNK. Pulling wires for the election of Senator Lorimer.

"Mr. HYNES. What do you mean by that? What was he doing? How long was he down there in Springfield before the election?

"Mr. FUNK. I do not know.

"Mr. HYNES. How long before the election did you hear that?

"Mr. FUNK. I heard it frequently. (595.)

* * * * * * *

"Mr. HYNES. Do you remember anybody who told you that he was down at Springfield active there in pulling wires for Senator Lorimer?

"Mr. FUNK. I think that was a matter of common talk.

"Mr. HYNES. Can you tell me anybody that said it?

"Mr. FUNK. I met a great many people that talked about it. I can not recall any particular man that made that particular statement." (595.)

These statements must be considered in connection with the fact that Mr. Hines was not at Springfield during the session of the legislature that elected Mr. Lorimer, had not been there for three years prior thereto, and did not go there afterwards until summoned as a witness before the Helm committee, nearly two years after such election, and that such "reports" must have had birth in Mr. Funk's imagination.

From his own testimony it is clear that Mr. Funk treated his interview with Mr. Hines lightly. He says, "the conversation was quite as casual as if we were discussing the sale of a car of lumber as far as I can recall." (Funk, 546.) He testifies that he was not surprised at what Mr. Hines said to him because it "comported with my general impression of the man" (Funk, 548), and being pressed to give that impression, he said:

"My observation has been that he was a loose talker.

"A man quite inclined to boast of his achievements, quite disposed to be familiar on short acquaintance, and quite anxious to have people think that he was a large factor in large matters." (Funk, 548–549.)

Confessing his inability to substantiate his version of the interview with Mr. Hines, Mr. Funk gave as a reason for keeping the same secret that it was simply his word against that of Mr. Hines.

There the case might have rested but for the fact that Mr. Funk afterwards attempted to corroborate his version of such interview by testifying that a day or two following

the publication of the Record-Herald editorial of February 15, 1911 (Helm report, p. 71), 21 months after the interview took place, Mr. Hines visited Funk's office in the Harvester Building in Chicago, where, as Mr. Funk testified before this committee, the following occurred:

"Mr. FUNK. Mr. Hines arrived at my office one morning shortly after I got there, about 9 o'clock, and he was admitted to my room. He seemed to be considerably agitated, and he immediately began to talk with me about our former conversation.

"Mr. MARBLE. What did he say?

"Mr. FUNK. I can not repeat it verbatim; but in substance he undertook to refresh my memory as to what our previous conversation had been.

"Mr. MARBLE. As nearly as you can, give what he said.

"Senator KERN. It is important that we should have the substance of that conversation if you can not remember the exact words.

"Mr. FUNK. The substance of it was that he did not want me to misunderstand our talk the other day; that he had not meant to say that any money was used, but that he was only discussing with me in a general way the situation down there; and that he got to thinking about it afterwards and thought that I might not have understood it, and he was back there to clear it up for me.

* * * * * * *

"Senator LEA. Did you express dissent?

"Mr. FUNK. My recollection is that I told him that I thought I remembered the thing as it was. I disposed of him as quickly as I could, because, as I remember it, we were having a directors' meeting that morning, or a conference of some kind, which was of considerable importance, and they were waiting for me. And I got rid of him and left the room as soon as I could. I do not think he was in the office over three minutes.

"Senator LEA. Did you part on friendly terms that day?

"Mr. FUNK. Casual terms.

"Senator LEA. Was he satisfied with the visit, apparently, when he left?

"Mr. FUNK. I did not observe in particular as to whether he was or not. My recollection is that he was not.

"Senator LEA. He was not?

"Mr. FUNK. That is just an impression. I did not controvert his version of the thing. I heard him, and got out as soon as I could without making any particular comment about it.

"Senator LEA. Was his manner calm or excited or agitated?

"Mr. FUNK. It was rather agitated." (Funk, 557–559.)

Mr. Hines denies in the most positive terms that this alleged interview ever occurred, and testified that from and after February 6, preceding the date of it, until the morning of March 5 following, he was not in Chicago, and that such an interview was a physical impossibility. His testimony to that effect and to the effect that he spent that entire period in the East, and with the exception of a day in New York and one in Philadelphia he was constantly in Washington, is fully sustained by both personal and documentary evidence of a character which leaves no doubt of the fact. (See record, 904–908, 975–977, 981–983, 1869, 1832–1833, 1857–1858, 1829–1832, 1834–1836, 50–51, 53–56, 1789, 1821–1828, 7054–7055, 7057–7059, 6069.)

The testimony of Senator Lorimer (record, 7575–7576, 7774–7776); Edward Thomas (1789); C. R. Nelson (1821–1828); Thomas F. Toomey (7054–7056, 7063); Albert L. Swift (7069), and the production of hotel bills, letters, telegrams, books, and other documentary evidence fully sustain this finding of the committee.

The attempt and failure of Mr. Funk thus to substantiate his version of his interview with Mr. Hines does not serve to increase confidence in the correctness of the same.

Mr. Hines's version of the Union League Club meeting on May 27, 1909, is as follows:

That he went to the club to keep a business appointment with Mr. Fred Carney, a manufacturer of lumber at Owen Sound, Canada, and the evidence shows that the Hines Lumber Co. was under a continuing contract to take the entire output of the Carney Lumber Co., but that by the terms of the contract the price was to be fixed each year. Mr. Carney was in Chicago at that time to secure an agreement upon that detail of the contract. At this meeting Mr. Hines was accompanied by Isaac Baker and Charles L. Hall, who were employed by the Hines Lumber Co. as buyers. The four met at 1 o'clock and were seated on a long couch in the lounging room of the Union League Club, and Mr. Hines testified that while there discussing the business on account of which they met, he noticed Mr. Funk approaching—first noticed him when he was 6 or 8 feet away; that he arose and shook hands with him; that the conversation was opened by Mr. Funk's declaration, "I am very glad to hear that Mr. Lorimer has been elected Senator," or words to that effect; to which Mr. Hines replied, "I am pleased that you are glad that he is, and he ought to make a good representative of the State." (846.)

That Mr. Funk then continued:

"I would like very much indeed, at your earliest convenience, or convenience, I am not positive which, if you would arrange to introduce me to Senator Lorimer. I have never met him and I would like to have you introduce me to him." (847.)

Mr. Hines told him he would be pleased to do so, and with that they together walked toward the door leading out of the club; that as they neared the exit Mr. Funk said:

"The Senator must have been put to more or less expense in this contest for the senatorship, and he ought not to stand that. The business interests ought to take it off his hands. We would like to contribute to that expense. I said to him that I did not know anything about the matter, but I said: I will see and let you know." (847.)

Mr. Hines then returned to the gentlemen with whom he was engaged when interrupted by the approach of Mr. Funk and said to them: "That was Mr. Funk, general manager of the International Harvester Co." (847.)

In his testimony Mr. Hines denies in general and in detail every material statement made by Mr. Funk as to the interview had between them at that time, except the bare fact that they met and spoke with each other.

In his denial of Mr. Funk's statement that he approached Mr. Funk and said: "You are just the man I was looking for," and in his assertion that Mr. Funk approached him with the declaration: "I am very glad to hear that Mr. Lorimer has been elected Senator," he is corroborated by the testimony of three witnesses: Isaac Baker, Fred Carney, and Charles L. Hall.

Mr. Baker testified:

"There was a gentleman came up and said: 'How do you do, Mr. Hines,' and Mr. Hines got up and shook hands with him; and he made the remark: 'I see that Senator Lorimer is elected, and I am glad of it.' Mr. Hines replied to him and said: 'Yes; I think he will make a good representative.' And the gentleman then said, 'I have never met the Senator and would like to be introduced to him.' At that he turned around and they walked off toward the exit, where they go out of the clubroom. (1431.)

"They stood there maybe two minutes, and Mr. Hines returned to us, and he said to Mr. Carney: 'That is Mr. Funk, the general superintendent of the International Harvester Co.'" (1432.)

Mr. Carney testified:

"As I recall it, we were all sitting on this couch, when a gentleman walked across the room in the direction toward which we were facing. I really did not pay much attention to him, but I do recollect that possibly when he was 10 or 12 or 15 feet, possibly farther away from us, he had a smile on his face, and he evidently had caught somebody's eye—some of the four of us. When he got up possibly within 6 to 7 feet, or 5 or 6 feet, I will not say which, Mr. Hines got up. Mr. Hines was sitting next to me. He got up and stepped out 3 or 4 feet and shook hands with this gentleman.

"Mr. FARRAR. Did you hear the conversation that took place between them?

"Mr. CARNEY. No, sir; I did not.

"Mr. FARRAR. What took place after they met? Explain that.

"Mr. CARNEY. Mr. Hines stood talking with this gentleman for a minute or two, possibly, and, as I remember it, the two of them walked off from there—they had been almost directly in front of this couch—walked off toward the right toward the exit of the room. Mr. Hines came back directly; possibly he was gone three or four minutes.

"Mr. FARRAR. What did Mr. Hines say when he came back?

"Mr. CARNEY. Mr. Hines came back and sat down, and he said, 'Well, Carney, that is not a very heavy fellow for a fellow holding down a big job, is he?' I said, 'No, sir; he is not. Who is it?' He said, 'That is Mr. Funk, general manager of the International Harvester Co.'" (Carney, 1047–1048.)

He also said that Mr. Hines said that Mr. Funk had congratulated him on the election of Mr. Lorimer.

Mr. Hall says in his testimony that they were—

"interrupted by a gentleman coming across the room, diagonally across the room, to where we sat. The gentleman came within a few feet of Mr. Hines and spoke to him and said, 'How do you do, Mr. Hines,' Mr. Hines got up and shook hands with him and called him 'Mr. Funk,' and they talked perhaps two minutes or three minutes to the best of my judgment.

* * * * * * *

"This gentleman said to Mr. Hines, 'I am very glad that Mr. Lorimer has been elected Senator.'

* * * * * * *

"Mr. Hines expressed himself as being pleased. I do not remember just the words he used, but he expressed himself as being pleased, anyway. Mr. Funk said to Mr. Hines: 'I have never met the Senator, and would be glad to have you introduce him to me at your convenience.'" (1064–1065.)

That they then walked away toward the entrance of the room; that Mr. Hines stood there and talked for a few minutes with him, maybe two or three minutes, and returned to where the other three men were on the couch and said: "That is Mr. Funk, general manager of the International Harvester Co." (1064–1065.)

From the testimony of these witnesses it appears that the conversation between Mr. Hines and Mr. Funk was of very brief character, occupying not more than a few minutes, during which time they were walking from the point at which they met to the outside entrance of the club, and that they did not sit down nor have any extended talk.

In his testimony Mr. Hines, referring to Mr. Funk's desire for an introduction to Mr. Lorimer and his willingness to contribute to his campaign expenses, said:

"The impression I got at that time was, knowing the intense feeling that had existed between the McCormick people and Congressman Lorimer, and Mr. Funk having recently taken charge as general manager of the company, I thought he was trying to curry favor with the Senator, who had recently been elected Senator. That was the impression." (849.)

The evidence shows that Mr. Hines called at the home of Mr. Lorimer on the Sunday evening following his election to the Senate (852), at which time he testified:

"I said to him, 'I met Mr. Funk in the Union League Club the other day, and he is very anxious to be introduced to you.' He said, 'What did you say?' I said 'I told him I would be pleased to do so.' He said, 'Mr. Funk is one of my active enemies, Mr. Hines, and I do not care to meet him particularly.' I said, 'Well, Senator, I rather promised to introduce you to him, and I would like very much to carry out my promise.' He said, 'As long as you have promised, I will meet him.'

"Then I said, 'Congressman, were you put to any great expense in the contest down at Springfield?' And in a sort of a half-laughing and jocular way he said, 'Well, you know I don't drink or smoke, and I was not put to any extra expense at Springfield,' and that was all there was to it." (853).

Senator Lorimer corroborates Mr. Hines's statement as to his visit on this occasion, and in regard to the proposed introduction to Mr. Funk, said that he told Mr. Hines that Mr. Funk had always been an enemy of his, and that he did not care to meet him; that after some discussion he agreed to meet him, and while he does not recall the talk concerning his expenses, testified that, if Mr. Hines asked him, he told him he had none (Lorimer, 7564, 7733–7734, 7760–7779), because the only expenses he had were his hotel bills and his railroad fare, which would have been incurred anyway because of his trips back and forth between Washington and Springfield to look after the waterway legislation (7564–7565).

Before leaving Chicago on the morning following this talk at Mr. Lorimer's home, Mr. Hines instructed his brother-in-law, Mr. Wiehe, to see Mr. Funk and tell him there was nothing in the matter about which he talked with him (Hines, 858), but did not explain to Mr. Wiehe to what the remark referred (858), and on the following Wednesday, Mr. Hines being in Washington, Mr. Wiehe called him on the long-distance telephone, and after discussing personal business matters, told him that his message did not seem to suit Mr. Funk, who seemed anxious to meet him in Washington on the following Saturday (858). Mr. Hines was then unable to make an engagement, but on the following Friday, June 4, 1909, telegraphed the Edward Hines Lumber Co. at Chicago as follows:

"Have Funk meet me Chicago Saturday or Sunday. Could meet him any time. Like to leave here to-day. Answer quick."

And received in reply the following:

"Funk New York to-day. Leaves this afternoon, Washington. There to-morrow. You can reach him to-day, George Perkins's office or Judge Gary, 51 Broadway."

This incident is corroborated by the testimony of Mr. Wiehe. (1677, 1741, 1743. 1747.)

Without waiting to meet Mr. Funk in Washington, Mr. Hines left for Chicago that afternoon. (860.) He testified that he had no business of a personal nature pending with Mr. Funk, and that he knew of no reason why the latter desired to meet him beyond what was expressed in the message of Mr. Wiehe to the effect that Mr. Funk did not seem satisfied with what he had said to him and wanted to see Mr. Hines personally.

The statement of Mr. Hines is further corroborated by the fact that during the deep waterways convention which was held in Washington, and as Gov. Deneen testified, in the fall of 1909, Mr. Funk met him in the New Willard Hotel and was taken to Mr.

Mr. Hines to a room upstairs and introduced to Mr. Lorimer. (Funk, 533; Hines, 861–862; Lorimer, 7564, 7575.)

Much time has been spent and space given to a discussion of what occurred during the brief conversation between Messrs. Funk and Hines on May 27, 1909, not because it is conclusive of the facts alleged, but because it was the controlling factor in th action of the Senate in reopening the case and in the appointment of this committee.

The vital question to be determined is whether a fund of $100,000 was in fact raised by or through the efforts of Edward Hines and others acting with him, or by any other person or persons with his knowledge, which was corruptly used or expended in whole or in part to secure the election of William Lorimer as a Senator of the United States from the State of Illinois.

Was such a fund raised?

After the most searching inquiry the committee is unable to find any evidence that any sum of money was raised or contributed by Mr. Hines, or through his suggestion, or with his knowledge, to be used corruptly in securing the election of Mr. Lorimer as a Senator of the United States from the State of Illinois, or that Mr. Hines participated in any corrupt practices of any nature in connection with such election, nor can the committee find that any such fund was raised by any person or persons to be so used. The committee goes further and reports that it finds no evidence that any such fund was ever contemplated by Mr. Hines, or suggested to him by any of the gentlemen with whom he conferred before the election of Mr. Lorimer regarding the election of a Senator of the United States from the State of Illinois, and in fact there is no proof that Mr. Hines raised or furnished or spent improperly any money to aid in the election of Mr. Lorimer.

Mr. Hines's interest in the election.

In connection with this finding the committee thought best to incorporate at this point a statement of what the evidence discloses regarding the activities of Mr. Hines in connection with the election of Mr. Lorimer.

While Mr. Hines has had a general acquaintance with Mr. Lorimer covering about 19 years, he has never had any business relations with him, nor has Senator Lorimer been the owner of stock in any corporation in which Mr. Hines has been interested; and although Mr. Hines was a resident of Mr. Lorimer's congressional district about nine years, he never took any interest in the political fortunes of the latter, beyond voting for him, except in the year 1906, when horses and wagons of the Edward Hines Lumber Co. were loaned to the Lorimer committee for a street parade, and Mr. Hines secured the signatures of 25 or 30 business men to a circular which was sent out to voters, showing Mr. Lorimer to be a protectionist, and the value of his work in favor of deep waterways. Mr. Hines does not remember whether he paid for the printing of these circulars or not; but if so, that is the only contribution ever made by him or any of the companies with which he was connected to any campaign fund to aid Mr. Lorimer at any time (882.)

A major portion of the winter and spring of 1909, during which the Legislature of Illinois was in deadlock over the election of a Senator, Mr. Hines spent in Washington, representing the interests of the National Lumber Manufacturers' Association, in connection with the tariff legislation then under consideration. He did not visit Springfield during the senatorial contest, and had not been in that city for at least five years prior to his appearance as a witness before the Helm committee in the spring of 1911. (813.)

Mr. Hines apparently had no interest in the senatorial contest, and according to the evidence did nothing in connection therewith until the 1st of February, 1909, when, at the request of Mr. Hibbard, of the firm of Hibbard, Spencer & Bartlett, hardware dealers in Chicago, a codirector with Mr. Hines on the Continental National Bank board, he telegraphed Mr. Lorimer, suggesting the candidacy of Mr. A. C. Bartlett, and followed this telegram by a letter, in which he said:

"Mr. Hibbard came to me this morning about the candidacy of Mr. A. C. Bartlett. * * * I feel it might be good policy to nominate a man of this kind, if you have not committed yourself elsewhere. * * * Probably you have already committed yourself along other lines." (811–812.)

In response to this, some time prior to the 1st of April, Mr. Lorimer told Mr. Hines that the different factions could not, apparently, unite on Mr. Bartlett. (812.)

During the next two months, from February 1 to April 1, 1909, Mr. Hines, as representative of the National Lumber Manufacturers' Association, looking after tariff legislation, in Washington, was much occupied and paid no attention to the Illinois situation. In this work he was brought frequently into contact with Senators Aldrich

and Penrose, members of the Senate Committee on Finance, which was then conducting hearings in connection with the tariff schedules.

The legislative deadlock in Illinois naturally became a topic of conversation between them and was discussed first as a matter of political gossip (1791); then as the situation developed the probability of the deadlock being broken was often discussed. (1792.) Early in the month of April Senator Penrose sent for Mr. Hines and asked him if he knew the situation or could find out whether the legislature was liable to adjourn without electing a Senator; Mr. Hines replied that he did not know, but would try to find out.

To this end Mr. Hines talked first with Congressmen Boutell and Madden, of Chicago, who told him they did not know the real situation, but that probably Congressman Lorimer could give him the information, whereupon he telephoned to Mr. Lorimer, who was in Chicago, and arranged to see him at his office upon his return to Washington; at the interview then had Mr. Hines told Congressman Lorimer that he was not personally interested in the matter, but that Senator Penrose appeared to be much interested, and had asked him to make inquiries. Mr. Lorimer stated that the situation was indefinite; that he could not then say what it really was; but that he was going to Springfield the following night; would return to Washington in about a week, and might then be able to speak with a better knowledge. (813.) Mr. Hines reported this conversation to Senator Penrose. (814.)

A week or two later Mr. Hines again talked with Mr. Lorimer, who told him that the situation remained practically unchanged. Mr. Hines then inquired particularly as to the men under consideration, and Mr. Lorimer mentioned Congressmen McKinley and Lowden, Judge Grosscup, and Mr. Calhoun. (816.) Mr. Hines reported this conversation, as well as what he heard from other sources regarding conditions in Illinois, to Senator Penrose, as he met him in connection with the tariff matters. (1794.)

About the last of April Senator Penrose told Mr. Hines that Senator Aldrich would like to see him and went with him to Senator Aldrich's office, and in a conversation between them the general situation in Illinois, including the election of a Senator, was discussed, during which Mr. Hines stated that, in his judgment, Senator Hopkins could not be reelected, and he asked Senator Aldrich what the attitude of the President would be with reference to the matter. Senator Aldrich replied that the President was desirous that a Republican Senator should be elected in Illinois, and while he was naturally friendly to Senator Hopkins on account of the fact that the latter had received the primary nomination, and perhaps for other reasons, he did not intend to take any active part in influencing the action of the legislature; that his wish was that a Republican should be elected, but that he would take no steps in furtherance of Senator Hopkins's candidacy or that of any other person. (1648.)

A little later Mr. Hines had another interview with Mr. Lorimer, in which he asked him the direct question whether or not he was a candidate for the senatorship; and the latter replied that he was not, giving as the one important reason his great interest in the deep-waterway proposition, which he felt he could best promote by remaining in the House. At that time Mr. Lorimer asked Mr. Hines if he had anyone to recommend for the position (821), and Mr. Hines suggested Congressman Boutell, which met the approval of Mr. Lorimer; but he could not tell how Mr. Boutell's name would be received. (822.) Mr. Hines told Senator Penrose of this, who, in turn, had a talk with Mr. Boutell. About the same time Mr. Hines had an interview with Senator Aldrich regarding the attitude of the President toward the candidacy of Mr. Boutell, stating that an effort was being made to agree upon him as the successor of Senator Hopkins.

He asked Senator Aldrich if he would see the President, ascertain his attitude, and advise him, and Senator Aldrich afterwards in another conversation reported to him that the President would be agreeable to Mr. Boutell's candidacy; that his anxiety was to have a Republican elected, and that he was satisfied with Mr. Boutell's Republicanism and would have no objection to his election. (1649.) Mr. Lorimer's candidacy was not suggested or discussed at that time. (817; Aldrich, 1648–1649–1650.) Mr. Hines told Mr. Boutell what he had done, and suggested to him that he see the President. Mr. Boutell did so, and also wrote letters to Chicago to ascertain how his candidacy would be regarded in Illinois; later he went to Chicago and after a careful investigation found that it would be impossible to get the different factions to unite on him (826); and Mr. Hines told Senator Penrose of the failure of that undertaking. (1792.)

As time passed, the names of Messrs. Boutell, Lowden, and others mentioned in connection with this election, were in the progress of events eliminated, and Mr. Hines ultimately suggested to Senator Penrose that Mr. Lorimer might be the man upon whom the different factions could unite, but because Mr. Lorimer had pre-

viously informed him that he preferred to remain in the House it was doubtful if he could be induced to enter the contest. Senator Penrose also learned from other sources that Mr. Lorimer was the only available candidate. (1802.)

Just previous to the election of Mr. Lorimer by the Legislature of the State of Illinois, one or two interviews took place between Senator Aldrich and Mr. Hines regarding the candidacy of Mr. Lorimer and the attitude of the President with respect thereto. Regarding one of these, Senator Aldrich in his testimony says:

"Mr. Hines then told me that it was impossible to agree upon Mr. Boutell, and he thought there was a prospect—he said a very good prospect—of agreeing upon Mr. Lorimer; and he was anxious that I should find out the attitude of the President—the administration—toward Mr. Lorimer's election, and tell him what it would be."

This the committee finds was at Senator Aldrich's committee room, late in the evening; that together they rode to Senator Aldrich's house, where Mr. Hines was left to await the return of Senator Aldrich from the White House, where he went to have a consultation with the President in relation to this matter. Senator Aldrich returned home from this interview about midnight, and in his testimony says:

"I told him that Mr. Lorimer's candidacy would not be objectionable to the President. Then Mr. Hines asked me if I was willing to say that to anyone that he might suggest to inquire of me upon the subject; and I said that I was—that if I were asked in reference to the matter I should say that Mr. Lorimer's candidacy would not be objectionable to the President."

Regarding the time of this interview, Senator Aldrich testifies:

"I know that it was prior to the election, and my impression is that Mr. Hines told me that he was to leave for Chicago either that day or the next day, or some time very near that."

And on this point Senator Aldrich's testimony is as follows:

"Senator KERN (1653). Did you have any conversation with Mr. Hines at all about Gov. Deneen, or the part Gov. Deneen was to take in the contest?

"Senator ALDRICH. I think at this conversation Gov. Deneen's name was mentioned by Mr. Hines; not by me.

* * * * * * *

"The CHAIRMAN. What did he say about Deneen?

"Senator ALDRICH. My recollection is that Deneen was an important party to this arrangement, or agreement, upon a candidate, and that Deneen's attitude would be more or less influenced by knowing whether it would be agreeable to the President. That was my general impression with regard to that matter."

Both Senators Aldrich and Penrose corroborate Mr. Hines in all essential features of his account of what took place leading up to and including his activities in behalf of Senator Lorimer.

Endeavoring to carry out what he understood to be the desire upon the part of Senator Aldrich and the administration, Mr. Hines went from the home of Senator Aldrich to the New Willard Hotel, from whence, sometime after midnight, he called up Congressman Lorimer on long-distance telephone at Springfield and gave him Senator Aldrich's message. Mr. Lorimer expressed some surprise at mention of the President's name, but Mr. Hines repeated the statement, telling him there was no question about it, as he had but then finished talking with Senator Aldrich, after the latter's return from a conference with the President at the White House, and that they would do all they could to assist in his election. Mr. Lorimer asked if Senator Aldrich would send him a telegram to that effect, and Mr. Hines assured him that he himself was authorized to send such a message, and Mr. Lorimer told him to send it. Mr. Hines then asked Congressman Lorimer if he would become a candidate, to which the latter replied:

"At this time I can not say; after I get the telegram I will give the matter consideration."

Mr. Hines accordingly sent the telegram. Senator Lorimer testifies that this was the first word he received from Mr. Hines concerning his candidacy, and Mr. Hines says it was the first time the subject was mentioned between them after the talk in April when Congressman Lorimer told him he would not be a candidate for the senatorship. Senator Lorimer locates the date of this telegram between the 20th and 25th of May, and Mr. Hines puts the date May 23, 1909.

Mr. Hines testifies that matters ran on for a few days, and that Senator Aldrich again sent for him and urged him to go to Springfield and see the governor personally and impress upon his mind the importance to the administration of the election of a Republican, and if Mr. Lorimer could be elected to have him assist in accomplishing it. This was on the morning of May 25, 1909, and Mr. Hines left for Springfield via Chicago that afternoon.

While the committee find some confusion in the testimony on the question whether there were two interviews between Senator Aldrich and Mr. Hines regarding the election of Mr. Lorimer and the mission of Mr. Hines in connection therewith, they are of the opinion that Mr. Hines's memory is the more accurate, and that such was the case; but if, as Senator Aldrich thinks, there was but one interview, it must have been on the night of May 24, 1909, for before leaving Washington the following day, May 25, Mr. Hines sent the following telegrams to Mr. Lorimer, who was at Springfield:

MAY 25, 1909.

WILLIAM LORIMER,
St. Nicholas Hotel, Springfield, Ill.:

Aldrich authorizes governor calling him up telephone. Confirm my message; conference last night; governor requested cooperate bring about result; can bring message to-morrow.

WASHINGTON, D. C., *May 25.*

WILLIAM LORIMER,
St. Nicholas Hotel, Springfield, Ill.:

Leaving for Chicago to-day; can go direct to Springfield. Bring message confirming conference held last night, showing highest authorities want you elected before legislature adjourns. Important Republican Party Illinois politics have strong experienced man, friendly to powers here, elected immediately; needed here now. Telegraph answer quick, duplicate, care limited train, Harrisburg depot.

In both of which messages, as will be observed, he refers to a conference held the night before.

These conferences between Mr. Hines and Senators Aldrich and Penrose impressed Mr. Hines with the importance of the matters under discussion as well as the importance of his activities in connection with them. He understood that in the investigations and reports which he made to them he was carrying out their wishes, that in the end they had reached the conclusion that Mr. Lorimer was the only person upon whom the different factions of the legislature could unite, and they were anxious that he should not only consent to become a candidate but that he should use his best efforts to be elected. In these conferences Gov. Deneen's name had been mentioned as an important factor in the election of a Senator, and Mr. Hines understood, after his last interview with Senator Aldrich at the latter's house, that he was authorized to convey to Mr. Lorimer the wishes of the Senators named, the attitude of the President as to his candidacy, and to urge Gov. Deneen to aid in his election. The telegrams indicate his understanding of the situation and of his mission, and he understood that in carrying this message he was representing the gentlemen with whom he had been in conference, and that he was authorized to refer anyone wishing for further information as to their attitude or that of the President to Senator Aldrich.

Mr. Hines was very much impressed with the importance of his selection as the medium through whom this message was to be carried to Illinois, and he entered with zeal upon the undertaking.

The evidence indicates that Senators Aldrich and Penrose were the only persons with whom Mr. Hines was working or cooperating in the effort to break the deadlock in the Illinois Legislature by the election of a Republican Senator; that the only real interest he had in the matter was aroused by his frequent interviews with those gentlemen; the evidence also shows that neither he nor they had any candidate whom they specially cared to have elected—any Republican would have been satisfactory, and their purpose was to discover some person upon whom the different factions in the legislature would unite, and to that end they called upon Mr. Hines for assistance. Concerning this, Senator Penrose in his testimony says:

"If Mr. Hines had been staying at home and attending to his business in Chicago, and the tariff had not been up, and he had never seen me or a lot of people who were interested in politics night and day, I do not imagine he would ever have gotten interested in the senatorial fight." (Penrose, 1801.)

Mr. Hines left Washington on May 25, 1909, and reached Chicago between 8 and 9 o'clock on the morning of May 26, 1909. It had been his intention to continue the journey to Springfield, in order, as he testified, "to carry out the request made by Senator Aldrich and see the governor and see other leading Republicans, members of the legislature, to impress upon their minds the importance of trying to unite on some Republican as Senator from Illinois." (Hines, 832.)

But upon reaching Chicago he was met at the station by Mr. Wiehe (Hines, 832; Baker, 1476) with a message from Mr. Lorimer to call the latter on the telephone from Chicago instead of continuing his journey to Springfield as intended. Mr. Hines therefore

proceeded at once to the Continental Commercial National Bank, and from there put in a long-distance telephone call for Mr. Lorimer at Springfield. (832.) While waiting for this connection, he sent from the bank the following telegram:

CHICAGO, *May 26, 1909.*

WILLIAM LORIMER, Esq., *Springfield, Ill.:*

Just arrived; trying to get you telephone; Aldrich, Penrose, and higher authority, as telephoned you from Washington, want you elected; authorized have governor others call Washington telephone; confirm this; can be there to-night.

EDWARD HINES.

(Hines, 833.)

Very soon thereafter Mr. Lorimer called him on the telephone and said:

"I would like to have you immediately call up Gov. Deneen on the long-distance telephone, and emphasize to him as strong as possible what you told me from Washington. * * * When you get through talking with Gov. Deneen, call me up on the telephone and let me know what he says." (834.)

Referring to this telephonic conversation with Mr. Hines, Senator Lorimer in his testimony says:

"I told him that the reason I did not want him to go to Springfield was that the governor was not friendly to my candidacy, and that if he came down to deliver the message it would be too late before he arrived, but probably if he delivered the message to him over the long-distance telephone it might have some influence with him. I had not any idea in the world that it would, but I feel when you are in a campaign you ought to do the last thing, and in his case it was the last thing." (Lorimer, 7464.)

Mr. Hines testified that he also called up Gov. Deneen from the bank (Hines, 834; Carroll, 1015–1017, 1030) and said, as he remembers the conversation:

"This is Mr. Edward Hines, at Chicago. I have just come in this morning on the limited train from Washington, and was on my way to Springfield to bring the message to you from Senator Aldrich and the President, urging upon you to do all you possibly can to assist in the election of a Senator at the earliest moment possible. They understand that Congressman Lorimer can be elected if you will assist." (Hines, 834.)

Mr. Hines testified that the governor did not seem to recognize his voice at first, and there was some suggestion of calling Mr. Reynolds, president of the bank, to identify him, but that finally the governor appeared to recognize his voice and said that would be unnecessary (835), and, continuing his conversation, Mr. Hines said then to him, "How soon can you see Congressman Lorimer?" (835); that the governor replied, "I will see him within 10 minutes," (835); and then Mr. Hines asked him the following question, "Can we rely on your assistance?" (835) and understood the governor to say "Yes."

In regard to this Gov. Deneen testified:

"Mr. Hines called me up and asked me whether I had received a message from the President—President Taft—in reference to Senator Lorimer. He stated that President Taft had sent a message to me to support Senator Lorimer, and asked me if I had received the message. I told him no. He said: 'Well, President Taft has sent the message, and I intended to come down myself. I have just arrived this morning, in Chicago;' and my best recollection is that he stated that his train was late, had a five-minutes' connection, and the Pennsylvania train had missed connections. But, in any event, he said that he had intended to come, and did not come, could not come; and he said President Taft had sent that message to me, and I would get it. I said: 'Did President Taft send that message to me? Did he tell you?' He said 'No.' I said 'That is a rather remarkable message to send.' He said 'Well, he is to send it through Senator Aldrich.' He said 'Of course, the President would not send a message to you on such a matter where it would become a public matter; but Senator Aldrich is to convey the message to you.' I said 'Through whom?' He said 'Mr. George Reynolds, of the Continental Commercial Bank, will call up and deliver the message.' I said 'Very well.'" (Deneen, 1147.)

Gov. Deneen says he did not tell Mr. Hines that he would see Mr. Lorimer within a few minutes, or within 10 minutes (1148), and says there was nothing in regard to calling Mr. Reynolds to identify his voice; that he was not sufficiently acquainted with him to recognize Mr. Hines's voice, and doubted personally whether Mr. Hines was telephoning (1148).

While they differ regarding many things which it is claimed were said during this conversation, which is easily accounted for by the difficulty attending a long-distance telephone conversation, they both agree that no reference whatever was made to money matters, and that Mr. Hines said nothing about going to Springfield and taking with

him all the money that was necessary to bring about the election of Mr. Lorimer as testified by the witness Cook. (Deneen, 1148.) Gov. Deneen testified that on May 26, 1909, he did not see or communicate in any way with Mr. Lorimer until after his election, when the latter called upon him about 2 o'clock. (Deneen, 1148.)

On the contrary, Senator Lorimer testified that Gov. Deneen called him on the telephone on the morning of May 26, 1909 (7459), 7464, and said:

"That he had talked with Mr. Hines over the telephone, and that Mr. Hines had delivered a message to him to the effect that Senators Penrose and Aldrich and the President were anxious that I should be elected." (7464.)

And in answer to the question: "What response did you make," Senator Lorimer testified:

"I thanked him for it. I knew the interview Mr. Hines had had with the governor had had no influence with him." (7464.)

And Senator Lorimer says in his testimony that the only reason he did not desire Mr. Hines to go to Springfield was because he could not reach there in time, he having concluded to allow his name to be presented that day (7464), and he understood the only assistance Mr. Hines could render was to deliver the message (7464); that the governor made no comment with reference to the message, and in this respect testified. Mr. Lorimer testified:

"I thought the governor just delivered a message. I got an impression that the governor either felt that it was his duty to call me up and let me know, or that he had been requested to call me up and let me know, what had occurred." (7465.)

Senator Lorimer further testified that up to the night of May 25, 1909, he had not been advised that the President or Senators Aldrich or Penrose had authorized anyone to verify their support, or their desire in regard to having a Republican elected. (7466.) Senator Lorimer further testified that he got the impression from the way Gov. Deneen talked to him over the telephone on the morning of May 26, 1909, that he was—

"just doing what he regarded as a duty, or extending a courtesy to the person he had previously spoken to over the telephone.

"He did not commit himself; and I knew from the way he talked that the message had no influence over the governor." (7467.)

Senator Lorimer testified to a subsequent conversation with Mr. Hines as follows:

"I talked with him over the telephone—quite a while after that, and told him the governor had told me of the message that he delivered to him. When I say 'quite a little while after that,' I mean it may have been 10, or 15, or 20 minutes." (7467.)

After his telephonic conversation with Gov. Deneen from the Continental Commercial National Bank, Mr. Hines went to the Grand Pacific Hotel to meet Messrs. Cook and O'Brien upon a purely business matter, which meeting had been arranged by his subordinates (835), and while in Mr. Cook's room had a second conversation with Mr. Lorimer over the telephone, in which he said in substance:

"I have just talked with the governor, and he said he would see you immediately. The Congressman replied, 'He has already seen me.' I then said, 'Now, if I can do any good I will come down on the afternoon train.' He replied not to come down until he would telephone me. He said, 'If my name goes before the legislature to-day, you could not assist any in time to come here. If you could assist to-morrow, I will let you know late in the afternoon by telephone.'" (Hines, 836; Baker, 1429, 1479; Wiehe, 1749; Carroll, 1028–1030.)

At this point the activities of Edward Hines in connection with the election of William Lorimer ceased. He did not go to Springfield, and the only person whose action he attempted to influence was Gov. Deneen, and in doing that he simply undertook to deliver what he understood to be the message from Senators Aldrich and Penrose.

The significant facts brought out by all the testimony upon the question of Mr. Hines's connection with Mr. Lorimer's election are:

(*a*) That he had no special personal interest in the matter, and did not visit Springfield at any time during the session of the legislature.

(*b*) That he was not urging the candidacy of any particular person.

(*c*) That during the two months in which the situation in Illinois was discussed between him and Senators Aldrich and Penrose the names of several men of reputation and character were considered and dropped, and the name of Mr. Lorimer was not mentioned between them as a candidate until three or four days before his election, and not until after his probable candidacy had been under discussion in Springfield and it was believed there that he would become a candidate. It was practically certain Hopkins could not be elected.

(*d*) That the only object entertained by Messrs. Aldrich and Penrose was to have the deadlock broken and a Republican elected.

(*e*) That to accomplish this Mr. Lorimer was not objectionable as a candidate either to the President or to them, and various names had been tested and it was found that Mr. Lorimer could command more votes than anyone considered.

(*f*) That Mr. Hines was authorized and requested to report these facts to Mr. Lorimer, Gov. Deneen, and other public men, and to refer to both Senators Aldrich and Penrose as his authority.

(*g*) That it flattered Mr. Hines to be consulted by Senators Aldrich and Penrose, and his sense of the importance of the matter was greatly enhanced when he knew that they had been in conference with the President, and that Mr. Lorimer's candidacy would not be objectionable to him, and that to be intrusted with the responsibility of making known their wishes and explaining the attitude of the President to Gov. Deneen and to Mr. Lorimer was a great personal honor.

(*h*) That he believed when the election followed so closely these events that he had been instrumental in bringing it about and was correspondingly elated.

The only testimony before the committee that in any way connects the name of Edward Tilden with the alleged fund raised to aid in the election of William Lorimer is incorporated in the statement reluctantly made by Mr. Funk when he says: "Mr. Hines said, 'Just send the money to Ed. Tilden.'" Not a witness has testified to any fact tending to establish the existence of such a fund or to Mr. Tilden's connection with any such fund. But the committee saw fit to summon Mr. Tilden as a witness and in his testimony he denied with great emphasis any knowledge of the existence of such a fund, or having any connection with it, and stated that the first time he heard his name mentioned in that respect was when he read in the newspapers an account of Mr. Funk's testimony before the Helm committee at Springfield.

To further determine the question whether Mr. Hines had been a contributor to or had any part in it, and whether Mr. Tilden had received or disbursed the same, the committee employed the firm of Barrow, Wade, Guthrie & Co., certified public accountants of New York. Mr. Ritchie of that firm made an examination of the accounts of the Edward Hines Lumber Co. and all its subsidiary branches and of the companies controlled by it, including the North Wisconsin Lumber & Manufacturing Co.; Hayward Mercantile Co.; First National Bank, Hayward, Wis.; Mason State Bank, Mason; White River Lumber Co.; Iron River Lumber Co.; Virginia & Rainy Lake Co., covering the period from April 1, 1909, to December 31, 1909, as well as the personal books of Edward Hines for the year ending December 31, 1909, and reported to the committee as follows:

"(*a*) That there was no evidence of the Edward Hines Lumber Co. or any of its subsidiary or controlled companies having received or disbursed any moneys in connection with the election of Mr. William Lorimer, on May 26, 1909, to the United States Senate from the State of Illinois.

"(*b*) That there was no evidence of Mr. Edward Hines as an individual having received or disbursed any moneys in connection with the aforesaid election.

"In order to ascertain whether or not Mr. Hines might have negotiated a loan from one or other of the banks in Chicago with which he was connected, or with which he had business relations, I visited the following banks and trust companies: Continental National Bank, Hibernian Banking Association, Fort Dearborn National Bank, Northern Trust Co., Corn Exchange National Bank, Metropolitan Trust & Savings Bank.

"At each of these banks I examined their record of notes discounted during the last week in May, 1909, and the first part of June, 1909.

"I am able to report, therefore, that at none of these banks, in the period under review, did Mr. Hines discount any note or notes, either as drawer or as indorser."

An examination was also made of the books of Mr. Edward Tilden, and after reciting the method of the same and the theory upon which it was conducted, Mr. Ritchie reported to the committee that—

"There was no evidence that Mr. Tilden had been custodian of the fund alleged to have been raised in connection with the election of Mr. William Lorimer to the United States Senate from the State of Illinois." (6233.)

The Burgess-Wiehe incident.

The only other incident to which reference is made in the so-called newly discovered evidence tending to show the existence of a fund raised to aid in the election of Mr. Lorimer is that related by William M. Burgess, of Duluth, Minn., who testified that on the evening of March 8, 1911, he boarded the Winnipeg Flyer at Duluth at about 10 minutes past 7 o'clock to go to Virginia, Minn., a run of about two hours (1335); that when he boarded the train he went to the smoking room of the sleeping car, where he remained until he reached his destination (1335); that during that time

the compartment was occupied by others as well as himself, among them Mr. C. F. Wiehe, Mr. Johnson, Mr. Cusson, Frederick J. Weyerhaeuser, Rudolph Weyerhaeuser, Mr. Harper, and Mr. McGowan, whom he described as a "young Canadian," and with whom he had some conversation (1335). The testimony of Mr. Burgess indicates that all of these gentlemen were in the compartment "at various times during the trip" (1335), and that at some period of the ride, when only the witness, Mr. McGowan, and Mr. Wiehe were present, the conversation between himself and the latter drifted onto the subject of Mr. Lorimer's election, concerning which the witness said:

"I remember making some remark regarding the election of Mr. Lorimer, and Mr. Wiehe asked me what I knew about Mr. Lorimer's election, and I told him my knowledge consisted of information gained from the Duluth News-Tribune and the Duluth Evening Herald and the Chicago Examiner. And he made the remark that I did not know very damn much about it. * * * He said that Mr. Lorimer had not spent any of his own money for his election; but there was, as he called it, a jack pot raised for Mr. Lorimer's election; and he made the remark—this remark he made at the finish of the conversation—he says: 'There was a jack pot raised for Mr. Lorimer's election. I know what I am talking about, because I subscribed $10,000 to it myself.'" (1336.)

And further:

"Mr. Wiehe said it was impossible to get anything of merit through the Illinois Legislature without the use of money." (1337.)

Mr. Burgess, Mr. Wiehe, and Mr. McGowan were all absolute strangers to each other; they had never met before; had no introduction at that time, and were ignorant of each other's names. It was not until after reaching the hotel at Virginia that night that Mr. Burgess learned that the gentleman with whom he says he had this conversation was Mr. Wiehe, a brother-in-law of Edward Hines.

Mr. Burgess had never had any business relations with the Edward Hines Lumber Co. except once, in 1906, concerning which he testified as follows:

"The Edward Hines Lumber Co. had banked a certain quantity of pine logs on the Black River, which is about 10 or 11 miles south of West Superior, and that portion of the Black River was controlled by the Black River Water Power Co., of which I was secretary and treasurer. On the land that we own there are two falls, one of 55 feet and one of 190 feet, and there is a dam at the top of the highest fall. This dam was built there by some company prior to our obtaining the fee of the land. The Edward Hines Lumber Co. were going to use the dam to float those logs out, and our man that looks after the property over there notified us that they were going to use the dam. I notified Mr. Cusson that the using of that dam was worth a certain sum.

"Mr. HYNES. How much?

"Mr. BURGESS. At the first conversation I told him I did not know what it was worth; that it was something I knew nothing about; that I would notify Mr. Sargeant, who knew more about that business.

"Mr. HYNES. What did you do?

"Mr. BURGESS. Mr. Sargeant told me to ask him $150, and to get all I could—not less than $25.

"Mr. HYNES. Not less than $25? How much did you ask?

"Mr. BURGESS. I asked $150.

"Mr. HYNES. Is that all?

"Mr. BURGESS. That is all.

"Mr. HYNES. Was it not $250?

"Mr. BURGESS. Well, it might have been. It was a long time ago. My recollection is $150, but it might have been $250.

"Mr. HYNES. To get $250 if you could get it, and to take $25 if you could not?

"Mr. BURGESS. Yes; I was following Mr. Sargeant's advice, and he knew more about it than I did. I think we got $75.

"Mr. HYNES. That was his advice, to ask that amount and take $25 if you could not get the other?

"Mr. BURGESS. Yes; that was it exactly.

"Mr. HYNES. That was his idea of the value of it?

"Mr. BURGESS. Yes.

"Mr. HYNES. Did you at any time ask him $1,000? Think before you answer.

"Mr. BURGESS. Oh, I do not know.

"Mr. HYNES. You do not know whether you did?

"Mr. BURGESS. No; I do not know whether I did or not.

"Mr. HYNES. Did you at one time talk about $2,500?

"Mr. BURGESS. No; I do not think it was that bad; I do not know.

"Mr. HYNES. You do not think it was any worse than a thousand?

"Mr. BURGESS. I do not know. I do not remember; that is, I can not remember the details. It is quite a while ago. I should say it was 8 or 10 years ago. I could not give the dates, even.

"Mr. HYNES. When you say it was not that bad, in what sense do you use that word 'bad'?

"Mr. BURGESS. If I had asked $1,000, that would have been extremely gally, that is all.

"Mr. HYNES. That would depend upon the supply of gall on hand, would it not, whether it was extreme or not? What were you finally paid?

"Mr. BURGESS. I think it was $75.

The evidence shows that the controversy over the amount to be paid extended from early in May, 1906, until the 27th of July, following, and letters from the Hines Lumber Co. to their agent authorizing a settlement of the claim indicate that Burgess had, in fact, demanded $2,500.

Mr. Wiehe denies with great positiveness that any such conversation as mentioned by Mr. Burgess was had between them, and denounced him as "an absolute liar when he makes the statement." (1643-1645.) He further testified that he had no conversation with Mr. Burgess regarding the Lorimer election, or about any jack pot or any other fund to be used in connection with such election, or concerning any contribution by him to such a fund (1643) and that he did not have any specific conversation with Mr. Burgess. (1642, 1645, 1760.)

The testimony shows that at the time of the alleged conversation Mr. Burgess sat diagonally across the compartment from Mr. Wiehe (1642) and that no conversation could have been had with him which others there would not have heard.

It is admitted that Charles McGowan did not leave the room during that ride; he testified, "I was there all the time" (1489, 1513–1516) and heard every word that was said by everyone (1493) and testified that nothing was said that he did not hear (1496); he denies with positiveness the entire Burgess story, further testifying that there was no time during the entire trip when he, Mr. Wiehe, and Mr. Burgess were alone in that compartment (1491), and that there was nothing whatever said about Mr. Lorimer's election (1489–1490).

Mr. Cusson testified that he entered the smoking compartment about 20 minutes after the train left Duluth, and remained there until Virginia was reached (1604); that Mr. Burgess, Mr. Johnson, Mr. F. E. Weyerhaeuser, Mr. Wiehe, and one or two or three strangers were in the compartment when he entered; that he sat between Mr. Wiehe and Mr. Weyerhaeuser on the leather couch; that Mr. Wiehe sat on his left (1604) and that Mr. Burgess sat in a chair directly to the right of the couch (1605); that Mr. Wiehe remained in the smoking compartment possibly 15 minutes after his entrance, when he was called out by Mr. Hines, and that he did not again return to the compartment that night (1605).

Mr. Cusson remembers that among other topics of conversation was the tariff and Canadian reciprocity, but that nothing was said about the election of Senator Lorimer, and he denies in detail the statements contained in the testimony of Mr. Burgess as to the Lorimer case; that nothing of the character was said; that he sat right next to Mr. Wiehe, and not to exceed 2 or 3 feet from Mr. Burgess. (1606.)

Mr. Johnson, a most intelligent witness testified that he entered the smoking compartment soon after the train left Duluth (1522); that Mr. Wiehe, he thinks, came in after he did; that he remained in the compartment during all the time Mr. Wiehe was there, and followed him when he went out, as he desired to discuss a matter of business with him; that during the time he was in the compartment nothing was said by either Mr. Wiehe or Mr. Burgess with respect to the election of Senator Lorimer, nor about the existence of a jack pot or any fund of $100,000 being raised for the election of Senator Lorimer, or about any other amount of money being raised to aid the election of Senator Lorimer, and that Mr. Wiehe did not say that he had contributed to any such fund; in short, he denied everything to which Mr. Burgess testified. (1523, 1524, 1542, 1544–1546, 1549.)

Mr. Price testified that upon entering the train he carried his grip to his berth and immediately went to the smoking compartment (1551), where he remained for perhaps half an hour, when he went out to look after his grip, and was gone just long enough to go to his seat in the other car and return; that he then remained in the smoking compartment until 10 or 15 minutes before the train reached Virginia; that when he went out to look after his grip Mr. Burgess, Mr. Johnson, and Mr. McGowan were in the smoking compartment, and he tells where and how they were sitting. He thinks Mr. Weyerhaeuser was sitting with Mr. Cusson immediately next to him, and that when he returned Mr. Wiehe had taken his seat, and that he was obliged to stand for some time

and until Mr. Wiehe was called from the room by Mr. Hines. (1551.) This is confirmed by Mr. McGowan, who testified that Mr. Wiehe was called out by Mr. Hines. (1489.)

In his testimony Mr. Price tells of other subjects which were discussed, but says nothing was said by any person present regarding the election of Senator Lorimer, and denies everything that has been testified to by Mr. Burgess as having occurred on that occasion. (1552–1553.)

Mr. Harper, who was also present and observed those in the compartment, heard no such conversation. (2240–2241.)

Mr. Wiehe is not a talkative man. He appears rather cautious. It is not reasonable to suppose that he would declare to a stranger who happened to be in the same smoker on a railway train that he had contributed to a corruption fund which had been used in the election of a Senator from his State. He is not a light or foolish man, and the committee is unable to ignore his testimony and that of all the other persons in the smoker, aside from Mr. Burgess, and accept the latter as the only truthful one among them.

Mr. Burgess's story, as set forth in his letter to Mr. Kohlsaat (Record, 1787) which follows, varies materially from his testimony. He appears anxious to get into the controversy, and his account of what occurred in the smoker is as improbable as his "hearsay" regarding the telegram from President Taft. Mr. Wiehe had not then heard of the Father Green episode referred to and could not have mentioned it.

DULUTH, MINN., *April 10, 1911.*

"Mr. H. H. KOHLSAAT,

"*Care of Chicago Record-Herald, Chicago, Ill.*

"DEAR SIR: The writer has been following up the various items in the papers regarding the Kohlsaat-McCormick-Lorimer scandal, or, I should have said, the Hines-McCormick-Lorimer scandal.

"The writer is somewhat interested in this controversy. The writer also notices that Mr. Hines denies the statements made by the representatives of Mr. McCormick's interests, and that is what interests the writer. He will explain.

"On the night of March 6 a train leaving Duluth at 7 o'clock for Virginia, Minn., contained the writer; Mr. Hines, of Chicago; three gentlemen by the name of Weyerhaeuser; Mr. Hornby, of Cloquet; W. H. Cook, William O'Brien, and others. As the train left Duluth the writer was sitting in the smoking compartment of the Winnipeg sleeper. A gentleman entered the smoking compartment dressed in a gray suit of clothes, black stiff hat, and wore a black beard. Conversation started among the occupants of the smoker. After awhile conversation drifted over to politics, and Mr. Lorimer's name was mentioned. The writer made some uncomplimentary remarks regarding Mr. Lorimer and the way his actions were being whitewashed by the Senate, and the gentleman in gray clothes and black whiskers called the writer to account regarding his remarks. The writer stuck to his ground, and the gentleman in gray defended Mr. Lorimer in the strongest kind of language. Now, what I want to get at in as few words as possible is, this gentleman made the statement, among other things that were said during the controversy, that Mr. Lorimer did not spend any of his own money to elect himself, but that there a large jack pot was raised to elect Mr. Lorimer, of which he, the man with the black whiskers, subscribed $10,000 to the fund.

"He made the statement that there couldn't any measure, either of merit or not, be gotten through the Illinois Legislature without the use of money, and that in order to elect Lorimer that they had to raise a large jack pot, which he called it, of which the man of the black whiskers subscribed $10,000, or, in other words, he of the black whiskers gave $10,000 in cold cash toward the electing of Mr. Lorimer.

"The writer afterwards learned that the man of the black whiskers was a Mr. Wiehe, I think, and that he is a brother-in-law of Edward Hines. The train arrived at Virginia that night at 9.10 o'clock, and about 10 o'clock the writer met Mr. W. T. Bailey in the hotel at Virginia and asked who the man in the gray suit and black whiskers was, and Mr. Bailey informed me that he was Mr. Wiehe, a brother-in-law of Mr. Edward Hines; I think that is the way the name is spelled, but I am not positive. The writer then told Mr. Bailey what the conversation had been on the train with the man of the black whiskers.

"I think there is more information to be gotten in Duluth regarding the Hines-Lorimer controversy should you desire it. There is a gentleman in Duluth who was in Mr. Hines's office some time ago—that is, during the investigation of the Senate of Mr. Lorimer's election—when a telegram was received from President Taft by Mr. Hines regarding this investigation. The writer has been told that this telegram requested Mr. Hines to get the matter hushed up as quickly as possible. This infor-

mation regarding the telegram is only hearsay on the writer's part, but I think that the writer can get this information should you desire it.

"If this letter is of any use to you and the information contained in this letter of any use to you, kindly let the writer know, but the writer does not care to have it known that he has written you this letter, although he stands ready to make good all statements.

"Yours, truly, "WM. BURGESS."

With the foregoing convincing array of evidence in denial of all the facts contained in Mr. Burgess's testimony, and in view of the improbability that a man of Mr. Wiehe's intelligence and business experience should, in a public place and to an utter stranger, have confessed to having part in an infamous proceeding, this committee can not do otherwise than discard the testimony of Mr. Burgess as proof of any facts alleged.

Attempt to impeach McGowan.

Mr. McGowan testified before this committee on July 18, 1911. Immediately thereafter Mr. Beck, one of the editors of the Chicago Tribune, conveyed information to counsel for the committee to the effect that one Stewart, a friend of Mr. McGowan, had made loose statements as to the latter's purpose in appearing before the committee, and counsel employed the Burns Detective Agency to investigate the situation and ascertain whether his testimony was impeachable.

An investigator of that company, Arthur C. Bailey, was, on July 20, 1911 (8020), assigned to the work, and followed Mr. McGowan to Saskatchewan, Canada, where he met him at the Grand Hotel, Regina, on August 7, 1911, and adopted all the typical methods of detectives to get into confidential relations with him. He reported from time to time to counsel for this committee until October 24 or 25, 1911. At that time a bill for services and expenses amounting to $2,500 had been run up, and counsel reported to the committee then in session in Chicago that they were "not getting anywhere," that if they continued that sort of service it would simply develop this condition of testimony; the statement of Mr. Bailey on the one hand, and a denial, perhaps, by Mr. McGowan on the other, and it was their judgment that the service ought to be discontinued. (7996.) Counsel for the committee assumed the entire responsibility for discontinuing the service at that time, saying, in a subsequent statement, "It was upon our recommendation, with full knowledge of all that had transpired, so far as the service of Mr. Bailey was concerned, that the service was discontinued." (7997.)

Immediately thereafter the Burns Detective Agency was employed by the Chicago Tribune to further pursue such investigation, and such services culminated at a meeting between the witness McGowan, Detective Bailey, and one Kerr, whose expenses he paid (8056–8057, 8143–8182) at the King Edward Hotel, Toronto, on the evening of January 6, 1912. A dictograph had been secreted in a room to which Mr. McGowan had been invited by Messrs. Bailey and Kerr, from which a wire with a telephonic receiver attached led to an adjoining room where one Sheridan, another employee of the Burns Agency, was stationed to take down in shorthand any conversation which might be had in the other room relative to the Lorimer case. This young man, James E. Sheridan, afterwards appeared as a witness before this committee, with his original shorthand notes claimed to have been taken on that occasion, which he read into the record. Doubt was expressed as to his ability to hear and write under the conditions described, and a test of his ability to do so was made by order of the committee. Mr. Sheridan and Mr. Bailey were permitted to make all the arrangements for the same, so as to reproduce as nearly as possible the conditions under which the work was done in Toronto. They used the same instruments and expressed themselves as satisfied with conditions, but the results were so disastrous to the claims made by Mr. Sheridan in his testimony as to satisfy the committee that no dependence whatever can be placed upon his testimony.

As before stated, the so-called newly discovered evidence on which this investigation was ordered consisted of the alleged declaration of Edward Hines to Clarence S. Funk on May 27, 1909, and an alleged declaration by Mr. Wiehe to Mr. Burgess on a railway journey from Duluth to Virginia, Minn., on March 8, 1912, hereinbefore fully set forth.

The committee has in its investigations secured all available evidence bearing both upon the question whether such declarations were in fact made, as claimed by Mr. Funk and Mr. Burgess, and whether the fund mentioned in such alleged declarations was in fact raised and used as alleged, and having considered such evidence finds nothing in it which in any degree sustains the assumption that such a fund ever existed or that either Edward Hines or C. F. Wiehe ever had any knowledge of such a fund.

Former adjudication conclusive.

Before the public hearings in this case closed counsel for Mr. Lorimer raised the contention that all of the issues relating to the election and qualifications of William Lorimer as a Senator of the United States from the State of Illinois had been adjudicated and finally determined by the Senate of the United States by its action on the 1st day of March, 1911; that such former adjudication and final determination of the issues was in law and justice a bar to any further proceedings designed to call in question the validity and legality of the election of Mr. Lorimer and his right to his seat in the Senate.

Your committee is of the opinion that all such issues touching the election and qualifications of William Lorimer were so finally adjudicated, and that the action of the Senate on the 1st day of March, 1911, recognizing the right of Mr. Lorimer to retain his seat in the Senate of the United States is a bar to any further proceedings in the Senate.

Upon this question the committee invites attention to—

The judicial character of the proceeding.

Article I, section 5, of the Constitution of the United States provides that—

"Each House shall be the judge of the elections, returns, and qualifications of its own Members.

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

Article I, section 3, of the Constitution provides that the Senate shall have the sole power to try all impeachments. And Article II, section 4, enumerates as the persons subject to impeachment the President, Vice President, and all civil officers of the United States.

All these functions are judicial in character. The authorities are numerous in support of the proposition that the determination by the Senate of the election and qualification of the Members is an exercise of a judicial function.

Chancellor Kent, in his Commentaries on the Law, said:

"Each House is made the sole judge of the election, return and qualification of its Members. The same power is vested in the British House of Commons, and in the legislature of the several States, and there is no other body known to the Constitution to which such a power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and, as each House acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law and strictly adhered to for the sake of uniformity and certainty." (1 Kent's Commentaries, p. 235.)

Judge Cooley said:

"In determining questions concerning contested seats the House will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases. (Cooley's Constitutional Limitations, 190.)

"The occasional intermixture of legislative and judicial powers in the Senate is not objectionable as in violation of the Montesquieu maxim on the necessity of a separation of legislative, judicial, and executive functions." (1 Story on the Const., sec. 749; Madison, The Federalist, No. XLVII; Webster's speech in the Senate, May,7, 1834.)

The Supreme Court of the United States has expressly decided that each House of Congress is exercising judicial power vested in it by the Constitution when it is judging of the elections of its Members. (In re Loney, 134 U. S., 372; Kilbourn *v.* Thompson, 103 U. S., 168.)

See, also, the decision of the Supreme Court of Florida in State of Florida ex rel. Fleming, governor, *v.* Crawford, secretary of state (28 Fla., 441; 14 L. R. A., 253), where the court said:

"Neither the secretary of state nor the Supreme Court of Florida has power to pass upon the legality of an election of a United States Senator by the legislature, or of an appointment of a Senator by the executive of the State. The power is in the United States Senate alone."

The supreme courts of various States have decided that each House in deciding as to the validity of elections acts in a purely judicial capacity. (People ex rel. Hatzel *v.* Hall, 80 N. Y., 317; People ex rel. Mahaney, 13 Mich., 481; State ex rel. Benton *v.* Elder, 31 Nebr., 169, 191; The opinion of the justices of the Supreme Court of Maine, 7 Me., 481, 491; the opinion of the justices of the Supreme Court of Massachusetts, 10 Gray, 613, are to the same effect.)

The Senate itself has frequently declared, through its committees and by its decisions, that the power to judge of the elections of its members is a judicial power and is to be exercised in accordance with known principles of law and established precedents.

In the election case of Matt W. Ransom *v.* Joseph C. Abbott in the Forty-second Congress, the majority of the Committee on Privileges and Elections, consisting of Senators O. P. Morton, John A. Logan, A. G. Thurman, and Joshua Hill, said in their report, after quoting the provision of the Constitution as to each House being the judge of the elections, returns, and qualifications of its own Members:

"The duty which devolves upon the Senate in deciding cases that arise under this clause of the Constitution is in the nature of a judicial proceeding, and the cases must be decided upon the evidence presented, and in accordance with legal principles, as established by former parliamentary and judicial proceedings and decisions."

The minority of the committee in that case, consisting of Senators Matt H. Carpenter and B. F. Rice, said:

"The duty cast upon the Senate by this provision of the Constitution is judicial in character. We may not inquire or consider what party interests demand; whether it would appear impartial to decide against a political friend, or whether a decision in his favor would be condemned in political circles. The question to be determined is one of strict right, depending upon legal principles, as settled by former decisions, parliamentary and judicial; and we have no more right than a judge upon the bench to turn away from the law to consider the political or partisan interests involved in the case or to be affected by the decision." (S. Repts., 2d sess. 42d Cong., No. 58.)

To the same effect is the report of the committee in the case of Fitch and Bright *v.* Lane and McCarthy in the Thirty-fifth Congress. (Rept. No. 368.)

In the case of Henry A. du Pont, of Delaware, in the Fifty-fourth Congress, the Committee on Privileges and Elections unanimously said:

"It is clear that the word 'judge' in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its Members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice."

Senator Edmunds, in his remarks in discussing the election case of Senator Henry W. Blair, March 10, 1885, said:

"The Senate in sitting upon such a question sits as judges. The Constitution says so. We are not defining policies; we are not setting up expediencies; we are not carrying on party warfare; we are sitting as the solemn judges sworn to try and determine the election and qualifications of a gentleman who presents himself to be a Member of this body."

This proceeding can not be deemed in any sense a legislative proceeding because exclusive jurisdiction of it is possessed by the Senate alone. The Senate alone is invested with no legislative power. In New York Indians *v.* United States (170 U. S., 1, p. 23) the Supreme Court of the United States said of a resolution adopted by the Senate alone:

"It can not be considered as a legislative act since the power to legislate is in the President, the Senate, and House of Representatives."

Consequently the decision of the questions raised by the resolution must depend upon legal principles and be in accordance with the evidence. In the language of the authorities from whom we have quoted, we can not consider party interests or expediency. We are sitting as the solemn judges sworn to try and judicially determine purely legal rights. The jury system is sometimes attacked because on occasions juries do not enforce the law. Mob violence is everywhere deplored because by it the law is set at defiance. If Senators were unmindful of the law in settling this case their action would be a reproach, and an example for and encouragement of all forms of disobedience to law.

Under all the authorities we have been able to find, the Senate acts in this matter in a judicial character and its decision is of the same nature as the decision of any regularly constituted court of justice, and has the same force and effect. We are here exercising a judicial function. This being true, the doctrine of res adjudicata applies in this case.

The question of res adjudicata.

One of the most elementary doctrines of the law, perhaps the one most universally accepted, is the doctrine of res adjudicata. Bigelow on Estoppel defines that doctrine as follows:

"The fundamental principle concerning judgments is that an issue once determined by a court of competent jurisdiction may be relied on as an effectual bar to any further

dispute upon the same matter, whether by the parties to the litigation or by those who, termed privies, claim under them; this conclusiveness including, of course, as well the law as the facts involved in the case. We speak of this as fundamental because it is the very object of the institution of courts to put an end to disputes—'Interest reipublicae ut litium finis sit.' This is, of course, true under every system of justice; it is peculiar to none. It would therefore be wide of the truth to speak of the doctrine of judgments in the English law as derived from the principles of any other system of law. On the other hand, it would be arrogant and false to assert that the principles of the English law in regard to the effect of judgments had been wholly worked out from within, regardless of that great system of law which Rome developed and gave for an inheritance to most of the continental nations of Europe, and for a light to all the world." (I Bigelow on Estoppel, 37, 38.)

Herman explains the fundamental reason on which the doctrine is based as follows:

"This rule of conclusiveness, this doctrine of estoppel, is one of the most inflexible principles of law, and has its foundation in this fundamental principle, 'Interest reipublicae ut sit finis litium.' When a cause of action is so far the same that a former judgment can be pleaded in bar, or when the matters in controversy in the suit can be shown by record evidence to have been examined and decided in another, there is every reason why that which has attained the highest degree of certainty known to the law should not again be litigated between the same parties; for it concerns the peace and welfare of the community that there should be an end to litigation. Justice requires that every cause should be once fairly tried, and the public tranquillity demands that having been once so fairly tried all litigation of that question between those parties should be concluded forever. Were it otherwise, there would be no security for any person, and great injustice might be done under color and pretense of law. To ascertain the grounds and motives which may have led to the final determination of a question once settled by the jurisdiction to which the law has referred it would be extremely dangerous, and it is better for the general administration of justice that one individual should be inconvenienced than that the whole system of jurisprudence be overthrown and endless uncertainty introduced." (I Herman on Estoppel, sec. 100, p. 101.)

The rule of res adjudicata is in force in every American court and in every governmental body or organization that performs, even though but incidentally, judicial functions. The Cyclopedia of Law and Procedure cites the following bodies, boards, and officers whose judgments have been held to constitute res adjudicata (vol. 23, pp. 1219–1221):

Courts-martial; church judicatories; Commissioner of Patents; Comptroller of the Currency; collector of customs; Board of Land Commissioners; road commissioners in adjudicating upon the necessity of a road and in locating and making assessments for it; the common council of a city in canvassing election returns; board of city police commissioners acting as a court for the trial of members of the police force. All these subordinate and merely quasi judicial agencies, and many others of similar character, are bound by the law of res adjudicata when they seek to review their former decisions in a matter involving the exercise of a judicial function.

The Senate has held that the doctrine of res adjudicata is applicable to election cases and in numerous instances has enforced and applied that doctrine.

The leading case is that of Senators Fitch and Bright and Lane and McCarty, of Indiana, in the Thirty-fourth and Thirty-fifth Congresses. In the Thirty-fourth Congress the election of Senators Fitch and Bright was assailed on the ground that the joint sessions of the two houses of the Indiana Legislature that elected Messrs. Fitch and Bright were illegally organized. At the first session of the Thirty-fifth Congress a resolution that Senators Fitch and Bright were not entitled to their seats was determined in the negative by a vote of yeas 23, nays 30, and the Senate then adopted a resolution that Senators Fitch and Bright were entitled to their seats. Some months later the Legislature of Indiana proceeded by a concurrent vote of the two houses to elect Henry S. Lane and William M. McCarty Senators from the State of Indiana. At the second session of the Thirty-fifth Congress there was presented to the United States Senate a memorial of the Legislature of Indiana representing that it was the wish and desire of the State that said Lane and McCarty be admitted to seats in the Senate as the only legally and constitutionally chosen Senators of the State of Indiana. This memorial was referred to the Committee on the Judiciary. That committee, in a report concurred in by Senators Bayard, Pugh, Benjamin, Green, and Clingman, reported that, in its opinion, the resolution adopted as the first session of the Thirty-fifth Congress "(no motion having been made to reconsider it) finally disposed of all questions presented to the Senate involving the respective rights of Hon. Graham N. Fitch and the Hon. Jesse D. Bright to their seats in the Senate as Senators from the State of Indiana." In conclusion the committee said:

"The decision of the Senate, made on the 12th of June, 1858, established finally and (in the absence of a motion to reconsider) irreversibly the right of the Hon. Graham N. Fitch as a Senator of the State of Indiana until the 4th of March, 1861, and the right of the Hon. Jesse D. Bright as a Senator from the same State until the 4th of March, A. D. 1863.

"The decision was made by an authority having exclusive jurisdiction of the subject; was judicial in its nature, and, being made on a contest in which all the facts and questions of law involving the validity of the election of Messrs. Fitch and Bright, and their respective rights to their seats, were as fully known and presented to the Senate as they are now in the memorial of the Legislature of Indiana, the judgment of the Senate then rendered is final, and precludes further inquiry into the subject to which it relates."

The report of the case (Senate Election Cases, 244) shows that Messrs. McCarty and Lane submitted to the committee a brief in which they argued that the doctrine of res adjudicata did not apply, for the following alleged reasons: Because their rights or titles could not be barred by a decision had before they were created; because it was denied that the judicial power of the Senate was capable of self-exhaustion; because courts are never estopped by their own actions; because sovereigns are not estopped; and because Indiana was not a party to the proceeding in the Senate and had no opportunity to allege or elicit the true facts. The brief of the contestants was embodied in a report to the Senate. The question was debated at length in the Senate and finally the following resolution was adopted by a vote—yeas 30, nays 15—

"*Resolved*, That the committee be discharged from the further consideration of the memorial of the State of Indiana, and that the resolution of the Senate adopted June 12, 1858, affirming the right of Graham N. Fitch and Jesse D. Bright as Senators elected from the State of Indiana, the former until the 4th day of March, 1861, and the latter until the 4th day of March, 1863, was a final decision of all the premises then in controversy, as conclusive, as well upon the Legislature of Indiana and all persons claiming under its authority as upon the Senators named in the resolution."

Thus the Senate adopted the law of res adjudicata as applicable to such proceedings. The case reviewed was a contest between two different sets of persons claiming to be elected as Senators from a State. The rule of res adjudicata was applied even though the parties contesting the election had not been heard in the former proceeding, had not been parties to it. The theory of the decision of the Senate was, however, that the contesting parties derived their claims from and through the Legislature of the State of Indiana and that the Legislature of the State of Indiana had been bound by the first decision. It is further to be noted that the decision of the Senate which was held to be res adjudicata was made at the same Congress as that in which the contest was renewed. In the case at bar the decision claimed to be res adjudicata was rendered at a different Congress. In the Fitch and Bright case the Senate held that the adjudication became final after the end of a single session of Congress. Much stronger reasons support the contention that a judicial decision made by the Senate in one Congress is final upon the Senate in a subsequent Congress, when its membership has been changed, as in the case at bar.

The doctrine of res adjudicata was again applied by the Senate in the case of Francis W. Sykes and George E. Spencer, decided by the Senate in the Forty-third and Forty-fourth Congresses. (Senate Election cases, 611–633.) The Sykes-Spencer case was a contest between Mr. Spencer and Mr. Sykes, each claiming to have been elected by the Legislature of Alabama. March 7, 1873, Mr. Spencer was sworn in as a Senator. December 8, 1873, the memorial of Mr. Sykes, which had been presented to the Senate before Mr. Spencer was sworn in, was referred to the Committee on Privileges and Elections. April 20, 1874, the committee reported in favor of the election of Mr. Spencer. On May 28, 1874, the Senate determined in the negative by a vote—yeas 11, nays 33—a motion to amend the resolution so that it should declare that George E. Spencer had not been elected a Senator by the lawful Legislature of the State of Alabama. The Senate thereupon adopted a resolution discharging the Committee on Privileges and Elections from the further consideration of the memorial of Francis W. Sykes. Those proceedings took place in the first session of the Forty-third Congress. In the first session of the Forty-fourth Congress, on December 16, 1875, the Senate adopted a resolution instructing the Committee on Privileges and Elections to investigate and inquire whether in the election of Mr. Spencer there were used, or caused to be used, and employed corrupt means or corrupt practices to secure his election. On May 20, 1876, the Committee on Privileges and Elections submitted its report; the committee consisted of Senators Morton (chairman), Logan, Mitchell, Wadleigh, Cameron of Wisconsin, McMillan, Saulsbury, Merriman, and Cooper. The committee found in favor of Mr. Spencer on the charges of corruption and said, with reference to the former decision of the Senate in the first contest:

"The question having been definitely settled, it was considered by the committee that it was not competent for the committee or the Senate to reopen it, and that it must be treated as res adjudicata."

The committee asked leave to be discharged from the further consideration of the resolution and memorial. No minority report was filed. No further action was taken by the Senate. The effect of nonaction was to adopt the report of the committee and to permit Senator Spencer to retain his seat.

In the case of David T. Corbin *v.* M. C. Butler, of South Carolina (Senate Election cases, 637–660), the respective credentials of Mr. Corbin and of Mr. Butler were presented to the Senate in 1877 and both were referred to the Committee on Privileges and Elections. November 26, 1877, the Senate, by a resolution, discharged the Committee on Privileges and Elections from a consideration of the credentials of M. C. Butler, and on November 30, 1877, Mr. Butler was sworn in as a Senator in accordance with a motion which had been determined in the affirmative—yeas 29, nays 28. On February 4, 1879, Senator Cameron, of Wisconsin, from the Committee on Privileges and Elections, submitted a report, accompanied by a resolution, that David T. Corbin had been duly elected Senator for the seat then held by Senator Butler. This report of the committee was in response to a reference by the Senate to the committee on March 26, 1878, of a petition presented by Mr. Corbin to the Senate. In the committee Senator Butler objected to the hearing of Mr. Corbin's petition, on the ground that the decision of the Senate November 30, 1877, authorizing him to be sworn, was res adjudicata. The majority of the committee overruled the plea, not on the ground that res adjudicata was not a good defense in the Senate, but because the committee held it was not supported by the facts in the case. The committee held that Mr. Corbin had never been heard and that the controversy had not been determined upon a consideration of the merits. The majority of the committee seem to have overlooked the proposition laid down in the Fitch and Bright case, supra, that the fact that the contestant had not been heard was not controlling, because the judgment of the Senate established the status of the senatorship and was a judgment in rem. The minority, consisting of Senators Merriman, Saulsbury, and Hill, presented to the Senate their views, in which they took the position that the former action of the Senate on November 27 and November 30, 1877, did constitute res adjudicata. The Senate sustained the minority of the committee, and on February 25, 1879, determined in the negative the resolution reported by the committee declaring David T. Corbin duly elected. The vote of the Senate rejecting the majority report in the Corbin and Butler case and upholding the defense of res adjudicata, was yeas 25, nays 36.

A recent case in which the Senate has declared the doctrine of res adjudicata is that of Hon. Henry A. du Pont, of Delaware. (Senate Election cases, 818–874.) At the first session of the Fifty-fourth Congress there was presented to the Senate the petition of Mr. du Pont, claiming a seat in the Senate for the full term commencing March 4, 1895. The validity of his election was attacked on the ground that he had not received a majority of all the votes cast, and that contention turned upon the question whether the vote of William T. Watson as a State senator was valid and legal. It was claimed by Mr. du Pont that Watson had ceased to be a State senator by reason of the fact that, before the vote in question on the election of United States Senator, Watson had been inaugurated as governor of the State of Delaware. The majority of the Committee on Privileges and Elections, consisting of Senators Mitchell, Hoar, Chandler, Burrows, and Pritchard, held that Mr. du Pont's election was legal. A minority, consisting of Senators Turpie, Pugh, Gray, and Palmer, filed their views to the effect that Mr. du Pont did not receive a majority vote of the whole number of members of both houses of the Delaware Legislature. The question was debated at length in the Senate, and on May 15, 1896, a resolution that Mr. du Pont was not entitled to a seat in the Senate was agreed to by a vote of yeas 31, nays 30. At the second session of the Fifty-fourth Congress memorials were presented to the Senate praying that the question of the validity of Mr. du Pont's election again be investigated and reconsidered by the Senate. These memorials were again referred to the Committee on Privileges and Elections. On March 1, 1897, the committee presented to the Senate its report, signed by Senators George F. Hoar, William E. Chandler, J. C. Pritchard, J. C. Burrows, George Gray, David Turpie, James L. Pugh, and John M. Palmer. The committee unanimously reported that the adoption by the Senate, by a majority vote, on May 15, 1896, of the resolution that Mr. du Pont was not entitled to a seat in the Senate was final and conclusive and barred subsequent action by the Senate. The committee in its report said:

"The majority of your committee now, as then, are of the opinion that this decision of the Senate was wrong; but the Senate is made by the Constitution the judge of the elections, qualifications, and returns of its Members, and its judgment is just as binding in law, in all constitutional vigor and potency, when it is rendered by one majority as when it is unanimous.

"It is clear that the word 'judge' in the Constitution was used advisedly. The Senate in the case provided for is to declare a result depending upon the application of law to existing facts, and is not to be affected in its action by the desire of its Members or by their opinions as to public policies or public interest. Its action determines great constitutional rights—the title of an individual citizen to a high office and the title of a sovereign State to be represented in the Senate by the person of its choice. We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals. We can conceive of no case which can arise in human affairs where it is more important that a judgment of any court should be respected and should stand unaffected by caprice or anything likely to excite passion or to tempt virtue. When the Senate decided the question it was sitting as a high constitutional court. In its action we think it ought to respect the principles, in giving effect to its own decision, which have been established in other judicial tribunals in like cases and which the experience of mankind has found safe and salutary."

The committee further said, with reference to the importance of adherence to the doctrine of res adjudicata:

"It seems to us very important to the preservation of constitutional government, very important to the dignity and authority of the Senate, very important to the peace of the country, that we should abide by this principle. There are few greater temptations which affect the conduct of men than the temptation to seize upon political power without regard to the obligation of law. To act upon the doctrine upon which this petition rests would expose the Senate to the temptation to reverse its own judgments and to vacate or to award seats in this Chamber according as the changing majorities should make possible. If such practice should be admitted it would, in our opinion, go far to weaken the respect due to this body and the respect due to constitutional authority." (Congressional Record, vol. 29, pp. 2524, 2525.)

When the Senate held, on the first hearing of the du Pont case, that the election of Mr. du Pont was not legal, the Legislature of Delaware elected to fill the vacancy the Hon. Richard R. Kenney. When the Senate committee unanimously reported that the first decision of the Senate in the du Pont case was a bar to reopening the matter, the Senate unanmiously admitted Senator Kenney. This action of the Senate was equivalent to a unanimous declaration that the doctrine of res adjudicata applied. It is to be inferred from the reports of the committee that at the time of the second application the complexion of the Senate had so changed that those upholding the legality of Mr. du Pont's election were in the majority. It is expressly stated in the report that such was the line of division in the committee itself. Nevertheless, both the committee and the Senate unanimously yielded their personal views of the propriety of Mr. du Pont's election and enforced the important principle of res adjudicata.

Senator Lorimer, by his counsel, in this case claims the benefit of the doctrine of res adjudicata. Before this committee such a claim was made, setting up that the legality and validity of his election were finally adjudicated by the Senate during the Sixty-first Congress, when the Senate pronounced final judgment on the question by determining in the negative the resolution that William Lorimer was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Illinois. No formal plea is necessary in such a matter. In actions where strict pleading is not required, former adjudication need not be specially pleaded. Lord Mansfield decided, in Bird *v.* Randall (3 Burr., 1345), that in actions on the case no plea of former adjudication is necessary. This is the general rule in this country. (2 Greenleaf on Evidence, sec. 231.)

In any event, counsel for Senator Lorimer might well have withheld filing the plea until some resolution was offered declaring the election invalid. The resolution appointing this committee directed an investigation of the election. If, as a result of that investigation or otherwise, any resolution should be hereafter offered to the Senate declaring that the election of William Lorimer as a Senator from Illinois was illegal and invalid, when such a resolution is offered it would be in order for Senator Lorimer to invoke the defense of res adjudicata. Until such a resolution is offered and under consideration in the Senate there would be no occasion, measured by the analogies of a pleading in a court of law or in equity, for a Senator formally to present his defense. The Senate by the adoption of the resolution appointing this committee did not vacate or attempt to vacate the former judgment. The Supreme Court of the United States (In re Chapman, 166 U. S., 661) said of a resolution of the Senate:

"It was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded."

And the court there pointed out that no one could tell what action would be taken or contemplated by the Senate until the investigation was concluded. And so here, neither Senator Lorimer nor anyone else could know what the Senate meditated doing when the investigation was concluded—could not know whether or not any

resolution would even be offered assailing the validity of the election in question. But the plea serves to call to the attention of this committee the question of res adjudicata; and this committee deems it its duty to present to the Senate the facts and the contentions bearing on that question so that the Senate may, as the defense of res adjudicata is made, understand that any resolution which may be offered would be subject to the defense of res adjudicata.

In the argument submitted to this committee on behalf of Senator Lorimer it is said:

"There was in the case at bar (A) a final judgment (B) by a competent tribunal invested with complete jurisdiction to try the issue; (C) the parties to the former judgment are the same parties as are now in controversy, and (D) the issues and causes of action were precisely the same. When these elements are present the former judgment is a bar not only to what was actually litigated in the former suit, but to all matters that might have been litigated under the issues thereof."

That argument then takes up the subjects of the enumerated elements. We agree with the contention that each of those enumerated elements is present in the case before us, so that a resolution declaring against the validity of Senator Lorimer's election would be subject to the defense of res adjudicata.

(A) The adjudication by the Senate, by its action of March 1, 1911, on the resolution, was final. By that action the Senate finally adjudged that Senator Lorimer was duly and legally elected to a seat in the Senate of the United States. As pointed out by counsel for Senator Lorimer, "If the resolution had been adopted Senator Lorimer would have been unseated, and he could not have asked the Senate at the Sixty-second Congress to rehear him and change its judgment." Manifestly, the judgment, if against him, would have been final, and equally plain is the fact that the judgment for him was also final. No contention can be made that the form of the resolution prevents its being considered a final judgment.

Black on Judgments says:

"In considering the effect of a judgment as res adjudicata its actual form or style is not very material, provided it embodies the essential features of an actual sentence or decision of the court."

The sentence or decision of the Senate in all contested election cases and in all expulsion cases has been made by resolution. Counsel cites many cases in the Senate by some of which the title of a Senator to his seat has been confirmed and by others of which expulsion has been defeated, where the judgment of the Senate was expressed by the determination of a resolution in the negative. We deem it unnecessary to review these cases. It is sufficient to refer to but one, namely, the unanimous report of the Committee on Privileges and Elections in the du Pont case, supra, where the committee said:

"We can not doubt that this declaration of the Senate is a judgment in the sense in which that word is used by judicial tribunals."

The courts have decided that the determination of a matter of election by the adoption of a resolution in a legislative body constitutes a final adjudication. (State of Maryland *v.* Jarrett & Harwood, 17 Md., 309; Opinion of the Justices, 56 N. H., 570.)

(B) The Senate was a tribunal competent to render the judgment.

The numerous decisions of the courts and of the Senate itself cited of this report establish that the Senate, in passing upon an election case, is a court exercising purely judicial functions. Moreover, the jurisdiction of the Senate in such a matter is exclusive.

Herman on Estoppel says (sec. 131, p. 143):

"A much more conclusive effect is given to judgments of courts of exclusive jurisdiction than to judgments of courts which have only concurrent jurisdiction."

The fact that the judgment was rendered by a divided court does not detract from its conclusiveness as res adjudicata. It has been held by the Supreme Court of the United States, and by many other courts, that the fact the former judgment was pronounced by a divided court, or even a court equally divided, as sometimes happens in cases of affirmance by operation of law in courts of appellate review, makes the judgment none the less binding. (Durant *v.* Essex County, 7 Wall., 107; McAllister *v.* Hamilton, 61 S. C., 6; 39 S. E., 182; Kolb *v.* Swann, 68 Md., 516; 13 Atl., 379.)

(C) The parties to the proceeding are the same.

In cases of judgments in rem identity of parties is not an element essential to the application of the doctrine of res adjudicata because in such a case the former judgment concludes not only the parties, but the whole world. In the Fitch and Bright case the Senate treated the former judgment as a judgment in rem. When the judgment is in personam the law requires that the parties in the second proceeding be the same as the parties in the proceeding leading to the former judgment. In any proceeding against the validity of the election of William Lorimer the plaintiff would be the Senate itself in its inquisitorial or prosecuting capacity and the defendant would

be, of course, William Lorimer. Much of the law of res adjudicata has been borrowed by modern jurisdictions from the civil law of Rome. In the Roman law the respective parties were known as the actor and the reus. In legal contemplation the judgment pronounced by the Senate, March 1, 1911, was in the action of the United States Senate, actor, *v.* William Lorimer, reus. The Government and its branches and agencies are subject to the operation of the law of res adjudicata the same as individuals. (See the decision of the Supreme Court of the United States in United States *v.* California & Oregon Land Co., 192 U. S., 355.)

(D) If, as a result of this investigation, there should be presented to the Senate a resolution that the election of William Lorimer was invalid, then the issue raised by that resolution would be precisely the same as that in the proceeding leading to the judgment of March 1, 1911, whereby the Senate adjudicated that the election of William Lorimer was valid and legal. Beyond all question, complete identity of issue is shown by the record.

Your committee, therefore, concludes that both on principle and by authority the action of the Senate March 1, 1911, deciding that the election of William Lorimer was valid and legal, constitutes res adjudicata as against any subsequent attempt to have the Senate decide that the election was not valid and legal.

In this connection it is well to direct attention to the fact that the principle of res adjudicata embraces not only what was actually determined, but extends also to every matter which, under the issues, the parties might have litigated. As pointed out in the briefs submitted, there is some misunderstanding as to the law of res adjudicata, due to attempts to cover the whole subject by definite rules intended to be applicable to all cases. Where the issues are the same the bar of the former judgment extends not only to points actually decided but to all the points and questions which could have been litigated under the issues in the former proceeding. Where the issues are not the same and where a former judgment is relied on simply as an estoppel on some limited issue that is common to both proceedings, then the law is that the former judgment is conclusive only as to what was actually decided. But the latter principle has no possible application here because, beyond all question, the issue would be the same as it was in the former proceeding in the Senate, namely, whether the election of William Lorimer as a Senator from Illinois was valid and legal. The rule that where the former judgment was upon the same issues it is a bar not only as to what was actually litigated and decided, but as to everything that might have been litigated under the issues in the former proceeding, has, as said by Herman on Estoppel (sec. 125, pp. 133, 134), "not only gone unchallenged for more than half a century, but a uniform and unbroken line of cases has given it approval."

In the brief filed by counsel for Senator Lorimer, in order to show the universality of that rule, counsel has reviewed many decisions of the Supreme Court of the United States and has cited decisions of the highest courts of each of the eight States represented in the Senate by members of this committee. An examination of the general digests shows that the same rule is in force in practically every State of the United States.

The doctrine that the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand is a bar not only as to every matter which was offered and received to sustain or defeat the claim or demand, bu as to every other matter which might have been offered for that purpose, was elaborately explained by the Supreme Court of the United States in Cromwell *v.* Sac County (94 U. S., 351). It appears that the decision on that point has been cited and followed by the Supreme Court in more than 40 subsequent decisions. Counsel has reviewed many decisions of the Supreme Court of the United States which establish the doctrine, but it is unnecessary to cite more than the following: Northern Pacific Ry. Co. *v.* Slaght (205 U. S., 122); Green *v.* Bogue (158 U. S., 478); Werlein *v.* New Orleans (177 U. S., 390); National Foundry, etc., *v.* Oconto Water Supply (183 U. S., 216).

Everything that has been brought forward in the present investigation could have been presented and litigated in the former proceeding under the issues thereof. The existence of the evidence with the taking of which the present hearing was begun, namely, the testimony of Clarence S. Funk, was known to some Senators at the time of the former hearing of this matter before the Senate. Mr. Kohlsaat, the editor of the Chicago Record-Herald, sent telegrams and letters to a number of Senators advising them of the existence of that evidence during the pendency of the question before the Senate and before its final action. The former committee permitted the Tribune to be represented before it by counsel. The editor of the Tribune knew from Mr. Kohlsaat of the existence of that evidence while the subcommittee was sitting in Chicago engaged in taking the testimony. (Record, 2001–2003.) No effort was ever made by those who undertook to present all the evidence and who knew of the Funk story

to present in that proceeding any phase of the subject covered by the testimony of Mr. Funk. Manifestly no judicial tribunal should encourage the trying of a case by piecemeal. The very object of courts is to put an end to controversy. And no court would permit a party who has knowledge of his evidence to withhold it at the first trial for the purpose of getting a second trial if defeated in the first.

As an application of the principle established by the authorities last referred to, the law is clearly to the effect that newly discovered evidence furnishes no ground for avoiding the bar of a former final judgment. Some of the laity may have the impression that a former judgment can be nullified by bringing forth at a second hearing newly discovered evidence. No law author and no court recognizes any such exception to the doctrine of res adjudicata. The Supreme Court of the United States, speaking through Mr. Justice Harlan, in Southern Pacific Ry. Co. *v.* United States (168 U. S., 1), said:

"We can not concur in the view that the evidence upon this branch of the case is of such nature as to compel the court, in the interest of truth and justice, not only to consider it but to pass again upon the issue made in the former suits as to the character of the maps of 1872. Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of res adjudicata."

In Hubbell *v.* United States (171 U. S., 203), at page 209, the Supreme Court declared that the development of a different theory or state of facts on the second trial does not change the rule of res adjudicata. The court said:

"But, even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee can not bring suit against an infringer upon a certain state of facts, and after a dismissal of his action, bring another suit against the same party upon the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts."

The Supreme Court of Illinois has forcefully expressed the same view in the recent case of Marie M. E. Church *v.* Trinity M. E. Church (253 Ill., 21).

Black on Judgments (vol. 2, sec. 731) says:

"The parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action as well as all other evidence and all necessary parts of their case or defense, on pain of being barred in a subsequent controversy."

To the same effect are 1 Van Fleet on Former Adjudication (p. 209, sec. 83); 23 Cyclopedia of Law and Procedure, 1291, citing decisions from the Federal courts of California, Colorado, Louisiana, New Jersey, Ohio, Pennsylvania, Texas, Wisconsin, and England.

The authorities make it plain that the Senate is barred by the rule of res adjudicata from reopening and rehearing this case on the ground of newly discovered evidence.

But the newly discovered evidence question is not one of great importance in this matter, for the reason that even if the doctrine of res adjudicata were not in the way no case whatever has been made out that would warrant the granting of a new trial on the ground of newly discovered evidence. In that class of cases where the courts set aside verdicts and grant new trials for newly discovered evidence, there are certain well-defined limitations upon granting new trials on that ground. The granting of new trials on the ground of newly discovered evidence is a power cautiously exercised by the courts, and the strictest rules are applied in examining an application on such a ground.

In the first place, the evidence newly discovered must be "of such a character and strength that it is reasonably certain that it would have produced an opposite result if produced at the trial;" the new evidence must be incontrovertible and conclusive. (29 Cyclopedia of Law and Procedure, 900–902, and several hundred decisions cited in notes; 23 Cyclopedia of Law and Procedure, 1031.) "The evidence must not be merely cumulative or corroborative or merely intended to impeach some of the witnesses at the former trial." (Same authorities, and 29 Cyclopedia of Law and Procedure, 907–918.)

In the next place, the evidence must actually have been discovered after the time of the former trial, and the party seeking the new trial must excuse his failure to produce the new evidence by showing that he failed to discover it, notwithstanding the exercise of due diligence by him. Of course, if the party knows of the new evidence at the time of the former trial, such knowledge is a complete bar to the granting of a

new trial on this ground. (29 Cyclopedia of Law and Procedure, 885, 886, et seq.; 23 Cyclopedia of Law and Procedure, 103.)

The record clearly shows in the present proceeding that the existence of the principal new evidence which it may be claimed was the occasion for making the new inquiry was known to some Senators at the time of the former hearing before the Senate. See testimony of Mr. Kohlsaat and letters and telegrams of Mr. Kohlsaat to divers Senators. (Record, vol. 1, pp. 438, 445, 451, 455, 467–473; vol. 8, pp. 7332–7335.)

Moreover, the granting of new trials on the ground of newly discovered evidence is usually to the party defendant. (6 Pomeroy's Equity Jurisprudence, edition of 1905, sec. 661; 23 Cyclopedia of Law and Procedure, 1030.) Few, if any, cases can be found where such relief was granted to one who occupied the position of plaintiff in the former trial. The reason for this is that it generally lies within the power of the party plaintiff to dismiss his proceedings and to start them anew if he deems his evidence insufficient, especially if he had any intimation that additional evidence could be produced.

The new evidence introduced on this hearing was mainly of these three classes: (1) Rumor, gossip, and opinion about various members of the Illinois Legislature; (2) evidence such as the testimony of Clarence S. Funk as to talk of a fund in connection with the senatorial election, which we show elsewhere, was known by those urging this reinvestigation while the former one was in progress; (3) evidence favorable to Senator Lorimer, contradicting certain testimony adverse to him, and explaining many circumstances not explained on the first investigation.

Of course, the evidence of the third class furnishes no newly discovered evidence to overturn the former judgment.

No one could say that the evidence of the first class was conclusive. It was not even evidence in any legal sense. Thousands of pages of the record contain testimony of this kind, which would not have been competent under any rules governing the admissibility of evidence, but which was received by this committee in order to obtain every possible matter of information bearing on the situation. For example, there was evidence that some members of the Illinois Legislature, several months after the senatorial election, were seen in possession of a number of $100 bills. The possession of such money was no evidence that it was acquired corruptly, for it is at least as reasonable to infer that it was obtained honestly. But if it appeared the member was unable to account clearly for the possession of the money, and if there were anything to indicate a possibility that the money was obtained as a result of corrupt practices, there is no reason whatever for inferring from the fact of possession of the money by such a member that the money was received as a payment for voting for Senator Lorimer. Such a member voted on several hundred measures in the session. One of the laws enacted at that session limited the hours of work for women in factories to 10 hours. It would be absurd to say that the possession of the money was proof that a member who voted for that law was paid for so doing. It is equally absurd to contend that the mere fact that some member of the legislature not in any way otherwise subject to any imputation of corruption in voting for Mr. Lorimer, was in possession of money several months after the election, was evidence that he had received that money for voting for Senator Lorimer. All the evidence of this class was lacking in that conclusiveness essential to the granting of new trials on the ground of newly discovered evidence.

The Funk testimony was also lacking in conclusiveness. In fact, it has been taken cum grano salis by nearly everyone who has heard it. Mr. Funk himself admitted that he thought his story would not be believed. His associates, to whom it is claimed he told the story at the time, did not take it seriously enough to report it to any of the public authorities or to the committee of the Senate that shortly afterwards was in session across the street from the office of Mr. Funk and his associates, and these associates of Mr. Funk who testified that they heard from him the story profess to be very good citizens. Mr. Kohlsaat did not have enough confidence in the story of Mr. Funk to insist upon the right to give it full and unqualified publicity. He did make the story known (without revealing Funk's identity) to several Senators some time before the final action of the Senate in the former proceeding. No Senator thus advised treated the information as of enough importance to ask for a reference back to the committee or the reopening of the taking of evidence, though all knew Mr. Kohlsaat could not refuse to reveal the name of his informant if Mr. Kohlsaat were called as a witness. When Mr. Funk did give his testimony its very improbability was its most marked feature. It was wholly uncorroborated. His version was contradicted in its various parts by many witnesses. No one could say it was sustained by the preponderance of the evidence. The testimony of others as to the gossip regarding a fund used in the senatorial election was speculative and worthless and wherever it had any tangibility it was conclusively contradicted and refuted.

So, even if it were proper to vacate the former judgment on the ground of newly discovered evidence, there is no newly discovered evidence to which attaches conclusiveness and the other elements uniformly recognized by the courts as necessary to be present in order to warrant granting a new trial on the ground of newly discovered evidence.

It is a general rule that no court has a right to vacate its judgment after the expiration of the term at which it was rendered. The Senate has no fixed terms, but in the Fitch and Bright case, supra, and in other res adjudicata cases of the Senate, the expiration of a session of Congress has been treated as the lapse of a term. In this case the second investigation is at a different Congress and a considerable portion of the membership of the Senate is changed.

In Anderson *v.* Dunn (6 Wheat., 204) the Supreme Court of the United States held that a House of Congress ceases to exist the moment of its periodical adjournment or duration.

The Supreme Court of the United States is a tribunal of last resort, and there would be no power in the Government to overrule it if it should choose to grant a rehearing on any ground after the expiration of the term at which it renders a judgment. Yet that court has always refused so to do. In Bronson *v.* Schulten (104 U. S., 410) the Supreme Court of the United States said:

"In this country all courts have terms and vacations. The time of the commemcement of every term, if there be half a dozen a year, is fixed by statute and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified, or annulled by that court.

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court that while realizing that there is no court which can review its decisions it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." (Brooks *v.* R. R. Co., ante, 91; Public Schools *v.* Walker, 9 Wall., 603; Brown *v.* Aspden, 14 How., 25; Cameron *v.* McRoberts, 3 Wheat., 591; ex parte Sibbard *v.* U. S., 12 Pet., 488; U. S. *v.* Glamorgan, 2 Curtis, 236; Bradford *v.* Patterson, 1 A. D. Marsh, 464; Ballard *v.* Davis, 3 J. J. Marsh, 656.)

Many authorities on this proposition are collected and reviewed in Phillips *v.* Negley (117 U. S., 665).

If a tribunal will not respect its own judgments it can not expect others to do so. This committee submits the enforcement of the doctrine of res adjudicata is essential to uphold the dignity of the court pronouncing the judgment in this case. The reasons which call for the enforcement of the doctrine of res adjudicata by the courts apply even more strongly to the Senate.

The Supreme Court of the United States, in Southern Pacific Railway Co. *v.* United States (168 U. S., 1), at page 49, said:

"This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Our conclusion is the doctrine of res adjudicata applies here and the former judgment of the Senate rendered March 1, 1911, herein is conclusive.

Under the principles laid down by the highest judicial tribunals in the land, the Senate of the Sixty-second Congress would not question the title of Mr. Lorimer to his seat, the right to which was determined in the Sixty-first Congress, even though new evidence had been produced to impeach it. This committee, however, would not feel inclined to follow this rule implicitly, and if new and substantial evidence had been discovered, showing clearly that he had secured his election by corruption, we would recommend a reconsideration in order that the honor and integrity of the Senate may be maintained. Absolutely no new and substantial evidence has been discov-

ered impeaching his title, and for the Senate under such circumstances to reconsider its action taken in another Congress would be to invoke the rule of might instead of the rule of right, and would violate the uniform and universal rule of action followed by all the courts of Christendom and the unbroken precedents of the Senate itself.

The jack pot.

This committee was specially instructed to inquire fully into and report upon the sources and use of the alleged jack-pot fund, or any other fund, in its relation to and effect, if any, upon the election of William Lorimer to the Senate.

The committee has hereinbefore specifically reported its inability to find any evidence of the existence of a jack-pot or any other fund raised or used for the purpose of affecting such election.

Whether corruption existed in the General Assembly of Illinois of 1909 or in previous legislatures affecting general legislation is a question concerning which it is difficult to secure definite information. This is apparent from the nature of the case, for no one participating in it would willingly admit his guilt.

Many members of the legislature of 1909 testified that they had never heard the question discussed; others that it had been discussed, but in a joking way; that if a man changed his vote on any question or if a bill passed or failed to pass some one would inquire, "What was there in it?" or make other inquiries of that character. But there were witnesses who testified to gossips and common report that in previous legislatures and in the legislature of 1909 corruption was practiced either to secure or retard legislation.

For instance, Mr. Hinman, editor of the Inter-Ocean, while having no personal knowledge on the subject, testified that it was a matter of common report and it was his opinion and belief that there has been a jack pot in every legislature since he has lived in Illinois, a period of 12 years (Hinman, 203, 209), and that common report connected the liquor interests with such jack pots (209–210). Mr. Keeley, editor and manager of the Chicago Tribune, testified that he heard charges that there were jack pots; that various bill were hold-up bills; that money had been paid or solicited for their passage (record, 1908); that the liquor interests had contributed; that it was a matter of common gossip, but not of knowledge; that in his experience of 20 years in the newspaper business it has been common gossip, but apparently incapable of proof (1916). Mr. Kohlsaat, editor of the Chicago Record-Herald, testified that it was the general impression that the jack pot has been an established institution in the Legislature of Illinois for years, although he has no definite knowledge of the fact (495).

Speaker Shurtleff in his testimony (record, 4585–4586) states that during his service in the legislature he heard many statements regarding corruption, some of which he thinks were seriously made and others in a jocular way, but in the spring of 1909 he was invited to a dinner by certain gentlemen from different parts of the country who were connected with railroads, at which the subject of railroad legislation was freely discussed, and protests made against the nature of bills that were introduced in the legislature, and they sought his cooperation in the assembly of 1909 against bills and proposed legislation which they deemed radical. He does not remember the language used, but says that he absorbed the impression that in years back the railroads had felt that they had been blackmailed or compelled to pay tribute (4585–4586) and that the dinner was by way of a declaration of independence from such legislation, and to ask his assistance in the effort they were making to protect themselves against being held up and blackmailed. No particular bill was discussed and no specific instance alleged.

Gov. Deneen testified, in substance, that there is a general understanding that they began in 1897 and have continued ever since. Concerning the existence of jack pots, he did not profess to have any personal knowledge or to be able to state any definite fact, but he testified that it is the general understanding in Illinois that money is paid; that it accumulates in the hands of several men and is distributed according to the judgment of the men who control (1122). He further testified that he did not know upon what principle the fund was distributed, but assumed that the men who create, who gather the fund, certain leaders, have the determining power as to how it shall be done. He testified that he had heard that the railroads have contributed for years to protect themselves against legislation; that the gas companies, or gas company, of Chicago, and the electric light company, the liquor interests, and the stock yards companies and the elevator companies, he thought, and the Pullman company and the street car companies have contributed (1123); that such is the general running rumor, but that he does not know that it is based on facts at all (1123); that he never made an investigation and had no power or facilities to do so (1123).

It further appears from Gov. Deneen's testimony that in the forty-sixth general assembly (that of 1909) railroad presidents from different parts of the country asked

him to meet them, saying that bills were being presented that went to the extent of confiscation of their property; and that, under the Federal laws, their books were examined to such an extent that they could not do what they were going to be asked to do, even if they wanted to; that they were against such practices, except in self-defense, where the men "held them up" at the point of a gun (1131).

The governor testified that he told them that the only way to do would be to call in the leading men and have them go down to Springfield in such numbers as to overcome the influence of the other men, and that they said that they intended to make a stand against the practice, and that they would cease to be "held up" by them.

Gov. Deneen testified that according to the newspapers they sent a thousand men down there at one time, and that they were greatly excited about the situation and appealed to him for aid (1131). Further testifying, the governor said that the implication was that the railroads had been previously "held up" and that they took that method of defeating legislation instead of contributing to a jack pot (1132).

From all the evidence secured it is clear that the term "jack pot," as used by the people of Illinois and by the newspapers of that State, refers to a supposed fund created by contributions from persons or corporations with a purpose either to secure or defeat pending or proposed legislation, such fund to be corruptly used for one of those purposes and to be distributed according to the judgment of men in control and, ordinarily, a considerable time after the adjournment of the legislature.

Without definite proof of the existence of specific jack pots the committee can only report that a general belief exists among many classes in Illinois that corruption funds which have recently come to be known as jack pots have been more or less common, in connection with legislation in that State.

Was there a jack pot in 1909?

If a jack pot was made up during the session of the Illinois Legislature of 1909, the evidence goes to establish the fact that it was of the ordinary character of jack pots referred to in the foregoing statements—that is to say—made up of contributions from those interested in special branches of legislation, but there is no evidence showing the existence of any fund, whether it be called jack pot or otherwise, which was contributed to for the purpose of aiding in the election of Mr. Lorimer to the Senate. The evidence is conclusive that Mr. Lorimer not only was not a candidate, but steadfastly refused to entertain any suggestion to become a candidate for the position of United States Senator until about 10 or 12 days before his election, and the only evidence hinting at the creation of such a fund after that time is the Funk story, already discussed in this report, the investigation of which not only disclosed no evidence of the existence of such a fund, but resulted in the discovery of conditions and circumstances conclusively disproving its existence. And there is no evidence of any character that representatives of any special industry or industries were acting in Mr. Lorimer's behalf.

Aside from the testimony of White, Beckemeyer, Link, and Holstlaw there is no evidence of any corruption fund during the session of 1909 or after its adjournment.

White, Link, and Beckemeyer say that they received $1,000 each from Mr. Browne and $900 each from Mr. Wilson. In this respect they stand on a common basis. Of these three so receiving $1,900 each, Beckemeyer and Link have insisted from first to last, and under extraordinary inducements, to connect the receipt of such money with the election of Mr. Lorimer, that they never received a dollar by reason of having voted for him. They have not only refused to admit that they received any money in consideration of their votes for Mr. Lorimer, but they have at all times positively sworn that they did not, and that they were not promised and did not expect any compensation for their votes.

It is evident from all the circumstances that the $1,900 paid to each of the three—White, Beckemeyer, and Link—all came from the same source.

Mr. Link had long been an admirer of Mr. Lorimer and was much interested in the plans which he advocated to accomplish the construction of the much talked of deep waterway between the Lakes and the Gulf. (Record, 7307.) In 1908 he heard Mr. Lorimer speak three times in Madison County, on which occasions he exhibited charts and made full explanation of the plans and the practicability of the project, and Mr. Link was so much interested and so much impressed by his arguments that he followed him to Granite City and to Edwardsville, where meetings were held. (Record, 6196.) He also heard Mr. Lorimer discuss the waterway question before the Legislature of Illinois and determined that if he could help elect him Senator he would do so, provided a Democrat could not be elected. (6197–97.) Mr. Link testified that he thought Mr. Lorimer could do more in the United States Senate than any other man

to carry into operation the plan and as a result of this, about 10 days prior to his election, he met Mr. Lorimer in Springfield and assured him of his support (Record, 6173–75, 6205–06), and later on when Lee O'Neil Browne asked him he if would vote for a Republican, he replied, "It is according to what Republican you have in view," and when Mr. Browne asked him how Mr. Lorimer would suit him, he told him that he had promised Mr. Lorimer personally a week or 10 days before that he would vote for him. (6173–74, 6201.)

Mr. Link has steadfastly insisted in the most positive terms that he was never promised any money or any thing of value in consideration of his vote for Mr. Lorimer (Record, 7307), and there is no evidence to the contrary. Although he freely admitted having received $1,000 from Lee O'Neil Browne and $900 from Rovert E. Wilson, he has always stated that it had no connection whatever with his vote for Mr. Lorimer.

Early in the proceedings Mr. Beckemeyer sent a telegram to the Chicago Daily News, in answer to an inquiry from that paper, in which he said:

"No one ever talked to me about money for voting for Lorimer. I did it of my own free will and accord. I know nothing of a jack pot that was distributed, nor did I ever hear of it." (2898.)

Before this committee he was specially interrogated regarding the contents of that telegram, and among other the said that nobody ever talked with him about money for voting for Mr. Lorimer before he did so vote; that nobody ever intimated to him at any time or place that if he voted for Mr. Lorimer he would receive money or any other thing of value; that he did not have any understanding of any kind from any source that if he did vote for Mr. Lorimer he would receive money or any other thing of value or any other consideration whatever therefor; that the first element in that telegram was true, but upon being questioned concerning the second element in the telegram the following testimony was given:

"Judge HANECY. You say, 'I know nothing of a jack pot that was distributed.'

"Mr. BECKEMEYER. No, sir; that is not true, because I did know about it at that time." (2899.)

Mr. Beckemeyer further testified that the statement in the telegram that he never had heard of the jack pot was a lie, and that he knew it was a lie when he sent the telegram. (2899.)

The only testimony that can be said to contain even a suggestion that the money paid Beckemeyer by Browne was not jack-pot money, within the meaning of the term as used by Beckemeyer in the foregoing testimony, in his statement that when Lee O'Neil Browne handed a him roll he told him that it was a thousand dollars, and said, "This is the Lorimer money and there will be some more in the future." (2840.)

This statement was first made to State's Attorney Wayman after Beckemeyer had been three times before the Cook County grand jury, on neither of which occasions had he mentioned it. In the meantime, for two days he had been constantly in the custody of Officer Keeley and had been subjected to every kind of pressure to induce him to testify to various matters. When not before the grand jury he had been permitted to drink heavily, and the preceding night had been taken by Officer Keeley to public resorts about Chicago, and late that night when grossly intoxicated had been taken by Officer Keeley to a house of ill fame, where they both remained for the balance of that night. Beckemeyer's wife was then critically ill in a hospital in St. Louis, and he was in dire distress because of prospective indictments against him, and because of his fear of exposure of his conduct in Chicago. The statement was made after repeated conferences with the State's attorney as to the testimony he intended to give regarding the part he had taken in receiving money from Browne and Wilson (Record, 5761), in which he was assured by Mr. Wayman that he could not be indicted in Illinois for what occurred in St. Louis, and the further assurance on the part of Mr. Wayman of full immunity for any offense committed in the State of Illinois, which promise has been faithfully kept. Even when Beckemeyer made this statement to Mr. Wayman, according to the testimony of the latter, it was accompanied by the claim that he had no understanding with Browne before he voted for Mr. Lorimer (5765); that he was not expecting any money because of his vote for Mr. Lorimer, "but his supposition was that it was sort of understood that whatever there was in anything down there would be distributed, and they relied upon the integrity and honesty of their leader" (Wayman, 5765), "and that the balance of the jack pot or the fund could not be distributed until something else was attended to" (Wayman, 5765), which fully accords with Beckemeyer's testimony that at that time he knew there was a jack pot, and with his unbroken insistence that his vote for Mr. Lorimer had no connection therewith.

The committee is convinced that Browne never mentioned "Lorimer" in connection with the $1,000 Beckemeyer says he received, and that Beckemeyer brought Mr. Lorimer into the statement he made to Mr. Wayman in order to insure immunity.

Charles A. White is the only one of the three who ever asserted that the money he received from Mr. Browne was for voting for Mr. Lorimer, and it is a significant fact

that he has always contended that the remaining $900 received through Mr. Wilson was from the jack-pot fund, and he complained because he did not get more, and Mr. Beckemeyer admits that he had knowledge of the jack pot.

The only legal evidence tending to show that it had any connection with the election of Mr. Lorimer is the testimony of White, given a year after the transaction and after he had, in consideration of $3,500, sold to the Chicago Tribune his "jack-pot story," in which for the first time he made this claim.

The testimony given by White before the grand jury of Cook County, the courts of that county, the first senatorial investigating committee, and this committee, is substantially as follows:

"Mr. MARBLE. Who first asked you to vote for Mr. Lorimer for Senator?

"Mr. WHITE. Representative Lee O'Neil Browne.

"Mr. MARBLE. Had you discussed the possible election of Mr. Lorimer with any other person before that request was made?

"Mr. WHITE. No, sir.

"Mr. MARBLE. Had you heard him discussed by members of the legislature prior to that request?

"Mr. WHITE. Not to my knowledge; no, sir.

"Mr. MARBLE. When was that request made by Lee O'Neil Browne?

"Mr. WHITE. The first time he talked with me about it was the night of the 24th of May, 1909. * * * In his room at the St. Nicholas Hotel, in Springfield, Ill. * * * He called me over the phone. I was in my room and he called me over the phone and told me he would be up in a little while. He wanted to see me. * * * It was late at night. I would not want to fix the exact time; possibly between 10 and 12 or 1 and 2 o'clock; somewhere in that time. He came up to the room afterwards, and invited me to go to his room." (2463–2464.)

Mr. White says that Mr. Browne came to his room possibly 30 minutes after telephoning; that he came alone, and that Otis V. Yarbrough and Sidney C. Yarbrough were in bed in his room at the time; that Mr. Browne entered the room and made some remark about three sleeping in one room; that there were some jokes passed, and Mr. Browne told him he wanted to have a little talk with him and invited him to his (Browne's) room (2464); that he did so, where the following took place:

"Mr. WHITE. He asked me if I could vote for a Republican. I replied, 'Yes; I can vote for anything.' Then he asked me if I could vote for Lorimer for Senator. He might have said 'Mr. Lorimer' or 'William Lorimer.' I told him I could. He wanted to know whether he could depend on me or not. I told him yes. Then I think the question came up—I asked him how many men were going to vote for Mr. Lorimer, if I remember correctly, and I mentioned a few names. I asked him if certain members of the house were going to vote for Mr. Lorimer. About some he replied, 'Yes' and about some he replied, 'No.' He told me it was strictly under my hat. He said, 'Now, it won't be any chicken feed, either.' (White, 2465.)

"Mr. MARBLE. What members were mentioned?

"Mr. WHITE. I asked him if Mr. Naylor was going to vote for Mr. Lorimer. He said, 'No.' I asked him if Mr. Morris was. He said, 'Yes.' I asked him if Mr. Fahy was. He said, 'No.' I asked him if Mr. Wilson was. He said, 'Yes.' I asked him if Mr. Abrahams was. He answered, 'Yes.' I asked him if Mr. McGuire was. He said, 'Yes.' I might have mentioned a few more." (2466.)

And he adds:

"I think there might have been something suggested to the effect that he would let me know when to vote." (2466.)

And continuing Mr. White testified:

"Mr. Browne cautioned me again about being quiet. He said he was suspicious of a little place above there that they called Joliet." (2466.)

Mr. White testifies that on the following day, May 25, in the afternoon, after the house adjourned, he had a further conversation with Lee O'Neil Browne in his room in the St. Nicholas Hotel, during which Browne said:

"'Charlie, old boy, what seems to be troubling you?' I told him, 'Nothing, Lee, only I would like to know what the members are getting out of this proposition, or what I am to get out of it.' I do not remember the exact language now. He said, 'Can't you trust that to me, old boy?' I said, 'Yes; I can do that, but I want to know.' He said, 'You are to get $1,000, and it is ready cash, too.' I told him all right; that that was what I wanted. He cautioned me again about keeping quiet. He said, 'Don't talk to anyone. Keep this under your hat;' and he remarked again that he was suspicious of the little place above there that they called Joliet." (White, 2469.)

Mr. White further testified:

"During that conversation I did ask him what there was from the other resources. He said, 'The jack pot won't be distributed for about three months after the legis-

lature adjourns. There will be about that much or possibly a little more later on.'" (2469.)

The following day, May 26, White testifies that Mr. Browne came to him in the house of representatives and said:

"This comes off on the first ballot; now, don't forget."

And that he told him "All right," and Mr. Browne told someone at the rear of White the same thing. (2470.)

The weight to be attached to White's story.

In considering the weight which should be attached to White's story it is to be observed that his testimony was given nearly a year after the date of the alleged interview, during which time White had confessedly spent his legislative salary, $2,130, the money received from Browne and Wilson, $1,900, amounting in the whole to $4,030, together with various sums borrowed, and at a time when he was badly in need of funds. It was given after he had vainly attempted to extort $75,000 from Mr. Lorimer on false pretenses, as shown by the correspondence between them which will hereinafter appear.

Up to the time that he became the legislative agent of certain labor organizations before the legislature of 1907 the highest rate of wages he had ever received was $65 per month as street car conductor; during that session of 1907 while a member of the labor lobby at Springfield he received $6 per day and his expenses, and as a result he quickly acquired extravagant habits and became dissipated. White was elected a member of the general assembly through the support and influence of the labor organizations, and when he entered the legislature in January, 1909, he was $200 in debt on account of election expenses; he was 28 years of age, and the extravagant habits contracted during his service and experience as a lobbyist in the session of 1907 were renewed when he returned to Springfield and established himself again at the St. Nicholas Hotel. He drew his entire salary, amounting to $2,132, including mileage and stationery, in two or three installments, before the last of February (2460) and was borrowing money by the 1st of May. (2461.) His corrupt mind and vicious purposes are shown by the testimony of various witnesses, among them Thomas Curran, chairman of the house committee on labor, who testified that after Mr. White, who was also a member of that committee, had joined with the committee in favorably reporting out the women's 10-hour bill, and who was publicly for and secretly opposed to the bill, approached him with a proposition to "hold it up," and, as he understood, smother the bill, and that when he refused to do this, White said, "Well, I thought you were a good fellow." (6251.) In the testimony of Mr. Webb, an attorney, with whom White consulted as to "the legal status of a man who had accepted a portion of what he termed jack-pot money," and in which he said he had received $850 or $900 as his pro rata share of the jack pot (R., Webb, 7288), the following interpretation of the term "good fellow" is found:

"Mr. HANECY. Did he say from whom he received the $850 or $900?

"Mr. WEBB. No, sir; he did not except that he was a member of what he termed the 'good-fellow gang.'" (7288–7289.)

Mr. Curran further testified that White during the same conversation asked him "what was doing on the senatorial business yesterday" [the day Mr. Lorimer was elected]. Curran said he knew of nothing; that if there was anything doing he (White) ought to know, and said "Why do you ask?" White said, "Well, I thought Browne was double-crossing us." (6251–6252.)

William M. Rossell testified that during the forty-fifth assembly, when he was a labor lobbyist, White proposed to him to take pictures of members of the house and senate in compromising positions and then go through the State, Rossell to lecture and he to show the pictures on a screen and so make barrels of money. (6783–6787.) (6667.) This condition of mind is further shown by his own confession of actual corruption in receiving jack-pot money and converting it to his own use.

While in his testimony White lays great stress upon his virtuous intention to expose corruption, there is not a single instance showing that he tried to carry out this high purpose, and the only exposure he ever attempted had for its sole purpose the extortion of money for the suppression of his manuscript, or the receipt by him of a large sum of money for the sale of the same.

The legislature adjourned June 4, 1909, following which White visited O'Fallon and East St. Louis, but had no work, no position, and no income. About the middle of June he visited Chicago, where he alleges he received from Lee O'Neil Browne $900, which, with the $100 previously received from him, made the $1,000 to which reference has been made. (White, 2483–2485.) He testifies that a month later he met Robert E. Wilson in St. Louis and received from him $900 which he admits had no connection with Mr. Lorimer's election, but states that it was from the jack-pot fund.

(2499.) He made another trip to Chicago the last of July or first of August, and about 10 days later, accompanied by Lee O'Neil Browne and Fred T. Zentner, took certain lake trips, during which there was much dissipation and a reckless expenditure of money. (2508.) At that time he had received from legislative sources $2,130 and from Browne and Wilson $1,900, and had borrowed sundry sums from various individuals, but according to his own testimony he had when he started on these trips from Chicago only $550. Out of this sum he loaned Browne $220. During the following days of dissipation the balance was so recklessly spent that in order to pay his hotel bill he borrowed $20 from Browne. (2508, White.)

The conception and growth of the story.

It was at this point, following a period of gross dissipation, when his funds were exhausted, that White, upon his return from the lake trips, in the barroom of the Briggs House, in Chicago, on August 19, 1909, first conceived the idea of rehabilitating himself financially by charging that the money he received from Lee O'Neil Browne was in consideration of his vote for Mr. Lorimer for Senator. At this time, in the presence of William H. Sturmer and Fred Zentner, White said that he was going to take a trip in the fall and winter; going to his home in O'Fallon first, then down to New Orleans, then to Cuba, and up to New York; that he was going to have a big time in New York, and then come back home again.

Zentner remarked that he must have a lot of money to spend. White said, "No; I have not a lot of money, but I am going to get it, and I am going to get it without working." * * * "Well, that Lorimer crowd and our old pal Browne, too, have got to 'come across' good and hard when I say the word, and I am going to say it." Mr. Zentner then asked him if he had anything on them.

White replied: "No; I ain't. I got the worst of it down there in Springfield, but that makes no difference. I voted for Lorimer, and I am a Democrat, and I can say I got money for voting for Lorimer. Do you suppose they can stand for it a moment? I guess they will cough up when I say the word to them." Mr. Zentner said, "God, you would not treat Browne that way, would you?" to which White replied: "I am looking out for White, and besides Browne would not have to pay. That bunch behind him would have to, and it would not hurt him." (6355–6357, 6359–6361, 6364, 6367, 6371, 6373–6377.)

(Zentner. 6402.)

So far as the evidence shows, this was the first inception of the jack-pot story afterwards written by Charles A. White and published in the Chicago Tribune April 30, 1910.

White testifies that he commenced to prepare the manuscript about the last of August or first of September, and immediately a search for a publisher began. (2567.)

At the time his statement was made it was considered by Sturmer an idle boast, because White was intoxicated (Zentner, 6380), but it appears as a matter of fact that it did have foundation in White's mind, and that he saw in the fact that he, a Democrat, had voted for a Republican, a basis for fabricating such a charge, because immediately thereafter he began the preparation of his jack-pot story (White, 2567), and as early as September 7 following, only three weeks after he had asserted his purpose, he wrote Doubleday, Page & Co. and on September 9, Everybody's Magazine inquiring in what manner they published articles of the character indicated, and in other letters he fully informed them of the nature of his manuscript. The correspondence with these companies continued from time to time down to February 11, 1910, at which date he turned the manuscript over to Doubleday, Page & Co. for examination.

While engaged in the preparation of his story, White, on two or three different occasions, talked with Katherine A. Woods, owner of cigar stand in the Illmo Hotel, East St. Louis, with whom he had been on most friendly terms, telling her that he was writing a history of his life and of the Illinois Legislature; that he expected to make a fortune out of it, and that the Lorimer bunch would have to pay him enough money to keep him the rest of his life, and if the Lorimer bunch did not do it, he would make it hot for Lorimer; that he was going to run for Congress; that rich people of Chicago were backing him; that he had spent $3,000 and a lot of time in making the history of his life and of the Illinois Legislature, and that he was going to get it back. (7006–7007.)

White further told Miss Woods that he was going to get a lot of money out of the Lorimer bunch—enough to take care of him the rest of his life, and that he was going to get something on Congressman Rodenberg and was going to put him out of business, and that he (White) would then run for Congress and settle down and get married. (7007.)

The following letter to Hon. Roger C. Sullivan, Democratic national committeeman for Illinois, discloses another scheme on the part of White to obtain money.

FORTY-SIXTH GENERAL ASSEMBLY, STATE OF ILLINOIS,
HOUSE OF REPRESENTATIVES,
O'Fallon, Ill., September 19, 1909.

Hon. ROGER C. SULLIVAN,
Chicago, Ill.

MY DEAR SIR: My friends, by the score, are urging me to enter the race in this congressional district for Congress.

I have failed to give any one of them any satisfactory answer as to what my future plans would be.

Two of the leading daily newspapers have also been urging me to enter the race, and want to begin booming me as a probable candidate.

What is your opinion of the matter?

Do you think it advisable for me to permit them to use my name?

I feel confident that Wm. Rodenberg, our present Representative in Congress, will be a candidate for reelection. I realize it will take a large sum of money to put up the right kind of a fight and do not know that much money could be raised here.

I would not consent for the use of my name unless there was the proper assurance of sufficient funds to carry on a stampede campaign.

I feel more than confident that I could carry St. Clair and Madison Counties, and, with sufficient backing, could get an even break in Bond County, and a little better than an even break in the remaining counties.

Kindly drop me a line and express your opinion on the subject.

With best wishes, I remain,

Respectfully, yours,

CHAS. A. WHITE.

And the answer, dated September 23, 1909, is as follows:

SEPTEMBER 23, 1909.

Hon. CHAS. A. WHITE,
O'Fallon, Ill.

MY DEAR SIR: Your letter of the 19th instant received and contents noted. I really do not know how to advise you in reference to your candidacy for Congress. I realize you would make a strong run, and the district is not overwhelmingly Republican. In reference to finances, will say the State committee has no funds whatever to give to any candidates, the treasury being completely exhausted, and I know of no place outside of your district where funds could be secured.

Wishing you all the success in the world, I remain,

Very sincerely, yours,

ROGER C. SULLIVAN.

(Record 4386–4387.)

About Thanksgiving time, 1909, he told Miss Woods that he had been to Chicago several times; to watch the Chicago papers, for he was going to make enough out of the Lorimer bunch to live comfortably, and that when he got the trouble started he was going on a trip to Europe and to let them fight it out. (7008.)

About centennial week, in St. Louis, 1909, White told Miss Woods, "I have got it in for Lorimer, Senator Lorimer and his bunch, and they will have to come across or I will make them pay dearly for it. I have spent $5,000 this session having a good time and looking up the dope on them. I have a friend in Chicago who will back me up and furnish me all the money I want." (7008, 7009.)

The last conversation between Miss Woods and White on these matters was on April 20, 1910, when he told her to watch the newspapers; that it would come out in the newspapers in about two weeks.

Meantime, soon after his Thanksgiving talk with Miss Woods, having failed to secure from Mr. Sullivan any promise of "a large sum of money" and having also failed in his efforts with the publishing companies, on December 4, 1909, Mr. White, pursuant to the plan and purpose indicated, addressed to Senator Lorimer the following letter:

O'FALLON, ILL., *December 4, 1909.*

Hon. WILLIAM H. LORIMER,
Washington, D. C.

MY DEAR SIR: I am preparing to place before the people of this country an article I have written giving my true experiences as a member of the Illinois Legislature. The article will appear either in book form or will be published in one of the largest magazines in the United States.

I have just completed the manuscript, which contains about 30,000 words, giving in detail my absolutely true experiences as a member of the forty-sixth assembly. As yet I have not closed a deal with any publishing house, but when my terms a e acceptable will dispose of it.

I have been offered a sum sufficient to value the manuscript at about $2.50 per word.

Believing that you would be more deeply interested in the works and actions of the members of the last session of the Illinois Legislatiure, owing to the fact that possibly your experience with that general assembly will be one of the questions freely discussed, and assuring you that I have severed all connections with the party leaders, as well as am to be independent in the future in all my political dealings, I am,

Respectfully, yours,

CHAS. A. WHITE.

Senator Lorimer replied as follows:

UNITED STATES SENATE,
December 13, 1909.

Hon. CHARLES A. WHITE,
O'Fallon, Ill.

MY DEAR SIR: I am in receipt of your letter of December 4, in which you advise me that you have manuscript ready to place with the publishers, treating on your experience as a member of the Illinois Legislature. I would be very glad, indeed, to note your success as an author.

With kindest personal regards, I am,

Yours, very truly,

WM. LORIMER.

(2556–2557.)

White testified before the committee that he had then received no offer for the manuscript, but that he hoped to receive a reply from Mr. Lorimer that would be of advantage, adding, "I had no evidence against Senator Lorimer directly and had no dealings with him," and before the first investigating committee he testified that if Senator Lorimer had met his demand and paid him $75,000, he would have surrendered the manuscript to him. (Burrows, record, 164.)

Late in February, Doubleday, Page & Co. returned the manuscript to White, with the statement that it would take at least six months to investigate the story, and they did not have men whom they could spare to do that work. Thereafter White was looking for a purchaser for his story, and was eventually brought into contact with James Keeley, editor and general manager of the Chicago Tribune, which paper had for 20 years or more been opposed to Mr. Lorimer politically, its policy being, as stated by Mr. Keeley, to drive William Lorimer out of politics in Chicago and Illinois because they thought he was a malign influence.

The committee does not undertake to determine the merits of the controversy between the Tribune and Mr. Lorimer, concerning which there is much testimony, but finds the fact that Mr. Keeley, the present manager of the Tribune, was so intent upon carrying out the policy of his paper that he was glad to secure at large expense any information which would enable him to accomplish that result.

In this connection it should be stated that State's Attorney Wayman, to whose examination the manuscript had been submitted, testified that he called Mr. Keeley's attention to the fact that it would be a very expensive proposition to investigate, and Mr. Keeley replied that the Tribune would be willing to pay the expenses of such investigation. (5743, 5809.)

After several conferences between Mr. Keeley and Mr. White, in which White first demanded $50,000 for the manuscript, the jack-pot story was finally purchased by the Tribune in consideration of the payment to White of $3,500, and his agreement "to devote my time and services to substantiate the story referred to as and when requested by you so to do and in such manner as you may direct."

The complete contract appears hereafter in this report. The story was published in the Chicago Tribune on April 30, 1910. Immediately following its publication White was called as a witness before Cook County grand jury.

The evidence shows that in the prosecutions which followed, and which were based upon White's story, the county of Cook expended the sum of $18,952.43 (record, 5913) and the Tribune co. in and about the same purpose expended about $20,000. (Record, 2033.)

Circumstances under which White testified.

It was upon White's testimony that Lee O'Neil Browne was indicted on the charge of having bribed him to vote for Mr. Lorimer; it was upon White's testimony that the State relied at both trials of Lee O'Neil Browne upon such charge, and of which charge Mr. Browne was acquitted and discharged. White also testified before the subcommittee of the Committee on Privileges and Elections of the United States Senate, in the months of September and October, 1910, as well as before this committee.

In considering the value of the testimony so given by White on all these different occasions the fact should not be overlooked that he was in charge of an officer detailed by the State's attorney of Cook County, in whose custody he remained day and night durin the entire period extending from April 29, 1910, when the con ract for the sale of the jack-pot story between the Tribune and White was signed, dow to December 23, 1910—a period of eight months—with all of his living and traveling expenses paid by Cook County, and he was not discharged from custody until two days after the report of the Committee on Privileges and Elections had been made to the United States Senate, although the last trial of Lee O'Neil Browne ended on September 9, 1910, and the hearings of the subcommittee in Chicago ended October 8, 1910.

The methods adopted to hold White to his obligation and the expense thereby incurred and paid by Cook County are found in the following affidavit:

STATE OF ILLINOIS, *County of Cook, ss:*

"Walter Kossack, being duly sworn, on oath deposes and says that he is bookkeeper and cashier in the office of the State's attorney of Cook County, and held s ch position during all of the year 1910; that he has made an investigation of the accounts on file in the office of the State's attorney of Cook County to determine the total expense of the maintenance of one Charles A. White, a witness in the case of People *v.* Browne and others, and that he finds the fact to be that the witness, Charles A. White was, on May 5, 1910, placed in charge of James Kerr, a police officer of the city of Chicago, assigned to duty in the State's attorney's office, and remained in charge of such officer until August 16, 1910; and that on August 16, 1910, Officer Kerr was relieved of that duty, and the witness, White, placed in charge of Officer Oakey, and remained in charge of Officer Oakey until September 26, 1910, when Officer Oakey was relieved of that duty, and the witness, White, placed in charge of Officer Hepp until December 23, 1910, when he was relieved; and upon December 23, 1910, until January 16, 1911, the witness, White, remained at the Lexington Hotel not in charge of any officer, but at the expense of Cook County.

"Affiant further states that the total expense thus incurred was twenty-five hundred thirty-one dollars and fifty-two cents ($2,531.52); and

"Affiant further states that this amount covers the expense and keep of both White and the officer during the period above named, and that the rooms alone at the Lexington Hotel, exclusive of board, cost ten hundred sixty-eight dollars and seventeen cents ($1,068.17), and that the officer while in charge of White paid for he meals both of White and himself, and also this amount covers railroad fare and expense while the officer and White were out of the State.

"And further affiant says not.

"WALTER KOSSACK.

"Subscribed and sworn to before me this 20th day of November, A. D. 1911.

[SEAL.] "BERT E. BETTS,

"*Notary Public.*"

(Record, 6120.)

Mr. White's testimony was first given before the grand jury of Cook County within a week after he had entered into and become bound by a contract with the Tribune Co., which reads as follows:

"THE CHICAGO TRIBUNE, OFFICE OF PUBLISHER,
"*Chicago, Ill., April 29, 1910.*

"TO CHARLES A. WHITE:

"You offered to sell to us for publication a story written by you, which story gives your experience while a member of the House of Representatives of Illinois during 1909–10, and giving also certain information as to what transpired by reason of your voting for certain measures, etc., while a member of such house.

"We refused to pay you for that story or to print the same unless such story was verified and corroborated by persons selected by the Tribune.

"For more than four weeks we, with your cooperation, through different agencies have caused your story to be fully investigated.

"For the sole and exclusive right hereby granted by you to the Tribune Co. to publish this story, or a revision thereof, or excerpts therefrom, in the Chicago Tribune and copyright it either in your name or in that of the Tribune Co., but in which shall be at our election, and also in full compensation for the time already spent by you in assisting us in obtaining corroborative evidence of the facts contained in this story and in full payment for all your time which shall be devoted by you to further substantiate this story at any time, which time you hereby agree to devote to that pur-

pose as and when called upon so to do, the Tribune Co. hereby agrees to pay you $3,250, of which said sum $1,250 shall be paid upon the printing of the said story or the first installment thereof, $1,000 30 days after said first payment, and $1,000 60 days thereafter.

You reserve to yourself all book or other rights to the story other than the exclusive newspaper rights hereinbefore referred to, which belong under the terms hereof to the Tribune Co.

J. KEELEY, *Vice President Tribune Co.*

CHICAGO, ILL., *April —, 1910.*

To the Chicago Tribune and the Tribune Co.

GENTLEMEN: I have read the above and foregoing and agree to the terms thereof and to accept the sums of money as therein set forth, and I further agree to devote my time and services to substantiate the story referred to as and when requested by you so to do and in such manner as you may direct.

CHARLES A. WHITE.

At the time the Tribune Co. contemplated the purchase of White's jack-pot story they were advised by Mr. Wayman, the State's attorney, that White, being an accomplice, would discount his evidence 50 per cent; the Tribune buying the story would discount it 30 per cent more, so that White would be a 20 per cent witness. (Wayman, 5809.)

The estimate thus placed upon the story by Mr. Wayman was undoubtedly a fair one from his viewpoint at that time, but in the light of all of the circumstances which have since developed, the committee is of the opinion that the story is a pure fabrication so far as it relates to the election of Senator Lorimer.

As he makes his case, it is this: He never heard the name of William Lorimer mentioned in connection with the Senatorship prior to the night of May 24, 1909, two days before his election. By four witnesses this is disproved, and his own conduct corroborates these witnesses. (Lorimer, 7646; O'Neill, 6648–6654, 6655, 6656; Shaw, 6283, 6818, 6819, 6820; Browne, 4918.)

To Mr. Browne's inquiry whether he could vote for a Republican, White answered without hesitation that he would vote for Mr. Lorimer; he did this before he knew who among his Democratic friends would do the same; that it was not until after he had promised to vote for him, and assured Mr. Browne that he could be relied upon, that he had the curiosity to inquire regarding other of Browne's followers in the legislature. There was not the slightest need for Mr. Browne to mention "chicken feed" to him or to hold out any inducement. That such is the case is apparent from the face of the story.

From the foregoing history of its inception, its development, and the uses to which it was put, Mr. White's story is so thoroughly discredited that it could have no weight in any court of law. The acquittal of Lee O'Neil Browne by an impartial jury is an evidence of this fact. It is a significant fact that when White testified at the first trial of Lee O'Neil Browne, which occurred in June, 1910, and resulted in a disagreement of the jury, no attempt was made to corroborate his story of the interview which he claims to have had with Lee O'Neil Browne on the night of May 24, 1909, by the production, as witnesses, of Otis V. and Sidney C. Yarbrough, who, it is now contended, were present when Browne visited White's room. They first made their appearance at the second Browne trial, which occurred in Chicago late in August, 1910, and which resulted in his acquittal. It is also a significant fact that the Yarbroughs were not produced as witnesses before the subcommittee of the Committee on Privileges and Elections of the Senate, which convened in Chicago in less than two weeks after the acquittal of Lee O'Neil Browne, before which committee Mr. Austrian, counsel for the Tribune, conducted the prosecution, and who submitted to that committee the names of witnesses to be called.

Both Sidney C. and Otis V. Yarbrough were brought before this committee, and both testified that they spent the night of May 24, 1909, in the room of Charles A. White in the St. Nicholas Hotel in Springfield and were there when Lee O'Neil Browne entered that room and invited White to go to his room, where the alleged interview with Browne was held. The production of these witnesses, it seems to the committee, destroys the story of White. They attempt to corroborate White's statement of what occurred in his room on that occasion, while the evidence conclusively establishes the fact that Sidney Yarbrough was not in the city of Springfield at that time.

Both the Yarbroughs testify that they went to Springfield from East St. Louis on Monday, May 24, 1909, Sidney being positive that he went up on White's pass on the Illinois Traction (5086–5092), and Otis claiming that he probably went that day and met Sidney in the lobby of the St. Nicholas Hotel that evening about 9 or 10 o'clock. (5081–5083, 5515–5517, 5170–5175, 5214–5250.)

On the other hand, Lee O'Neil Browne not only denies having any such interview with White, but the testimony conclusively establishes the fact that Sidney Yarbrough was in Chicago that night and that neither of them could have been from East St. Louis that day. It is shown conclusively that White and the two Yarbroughs were in Chicago from the Saturday, May 22, and that they spent Sunday and Monday in that city in dissipation, and, according to their own admissions, a portion of the time in a house of ill fame. (Otis Yarbrough, 5195–5202.) It is clear that Otis Yarbrough and White did not leave Chicago until Monday night, May 24 (Gloss, 6444–6491, 6567), and the train was so late that they did not reach Springfield until 11.41, instead of on schedule time, which was 11.15; and it is shown that White did not register and was not assigned to a room until after midnight.

White intended to vote for Lorimer.

It is clear that White intended to join the great throng of Democrats who intended to vote for Mr. Lorimer, for the reason that a Democratic Senator could not be elected, and they were unalterably opposed to the reelection of Senator Hopkins. This is made clear by the first expression given by White after the election explaining the reason for his vote in the following letter, which was written before he conceived the idea of extorting money by blackmail:

SPRINGFIELD, ILL., *May 29, 1909.*

Hon. FRED J. KERN, *Belleville, Ill.*

MY DEAR MR. KERN: I received the copy of your paper, the News-Democrat, and read with great interest your editorial relative to the position of the Democratic members of the legislature taken in settling the longest drawn-out senatorial contest ever experienced in the history of the State of Illinois.

It gives me pleasure to know that there are men in public life prominent in the Democratic Party who can look upon a situation of this character with as broad and liberal views as you have expressed yourself through the editorial of your valuable paper. The Republican Party of this State is, as has been demonstrated in this present session of the legislature, divided in such a manner that it was practically impossible, beyond any reasonable doubt, for them to settle this long and expensive drawn-out contest; and, feeling that the State of Illinois should be represented in the United States Senate during these critical moments by a man from this State, I felt it a public duty, after careful conference with older and more experienced workers in the Democratic ranks, to cast my vote for the Hon. William Lorimer for United States Senator.

This contest has been carried on now for five months, and I voted upon each ballot for a Democratic candidate, and realizing that the State has been put to an expense of many thousands of dollars through the disruption in the Republican ranks, I believed that it was a charitable act, in the interest of the taxpayers and the whole people of the State of Illinois, for the Democratic Party here in the house and senate to step in and settle their unsolved and uncompromising difficulties, and relieve the State of the suspension and anxiety connected with torture and extravagance which they have carried on here for these long-drawn-out months.

I again wish to express my sincere thanks to you and your editorial staff for the kind sentiment you have expressed publicly in defense of the Democratic Party's action here. True, I expect condemnation from both Democrats and Republicans for my action here in voting for a Republican; but, however that may be, I presume that no man in public life is exempt from criticism at some time or other, and knowing that I was here, where the situation was constantly before me, and that it was my duty to take step in the interest of the people, I did the best my judgment would permit me to do under the prevailing circumstances. You may state, if you desire, the substance of my communication to you through your press, that there may be no misunderstanding as to the motive of not only myself, but of the 53 loyal Democrats that voted for a Republican for United States Senator. With best wishes, I remain,

Your friend,

CHAS. A. WHITE.

(Record, 2475.)

For more than a week prior to the election of Mr. Lorimer and before his alleged interview with Browne it had been the intention of White to vote for him if an opportunity to do so occurred.

Mr. Lorimer testified—

"About 10 days before I was elected—8 or 10 days—I met him in the house of representatives, and he volunteered that he was going to vote for me. He said he understood that I was going to be a candidate, and if I was he would vote for me." (7646.)

Mr. Lorimer stated in that connection that 95 per cent of the street car men in Chicago always voted for him, because of the fact that he had been one of them, and

he received the impression that White was going to vote for him (7646) for the same reason.

John O'Neill, business agent of the Firemen's Association of Chicago, who represented the Chicago Federation of Labor before the forty-sixth general assembly in 1909 and who became acquainted with White during that time, testified (6648–6654) that in conversation with White about a week before the election, he expressed the wish that they might break the deadlock because all their legislation was tied up by it. White said he thought it would not last much longer, and inquired "Who do you think will be the man?" To which Mr. O'Neill replied:

"I do not know, but if you ask me, Charlie, as a Democrat, I will tell you what I think: If I was a Democrat and a member of the house, knowing Mr. Lorimer as I do, and from what I hear of Senator Hopkins, I certainly would not hesitate in voting for Lorimer if there is not any possible chance of electing a Democrat." (6655.)

White then asked him if he knew Mr. Lorimer very well, and he replied, "I have known him pretty nearly all my life." White said:

"A great many of the boys seem to think the same of him, and I would not be surprised if a great many of them will vote for him—meaning the Democratic members." (O'Neill, 6655–6656.)

Homer A. Shaw, Democrat, and a banker, who was chairman of an organization of Democrats who were endeavoring to hold their forces in sufficient numbers to make impossible the election of Mr. Lorimer (6283), testified that three or four days before, or possibly a week before, the election of Mr. Lorimer, Mr. White made to him the assertion "that he would vote for Bill Lorimer if he got a chance" (6818), and Mr. Shaw says "I told him that I thought it would be a very unwise thing for him to do; that he was a new man in his district and was undoubtedly well thought of there at the time; and that knowing, as I did, the character of the people in his district, I thought it would be a very unwise thing for him to do. He made the remark, in substance, that he did not give a damn what the people thought about it; he was going to do it anyway. I think I told him, to the best of my recollection, that if he did do this and went back to O'Fallon, his best friends would not have anything to do with him—would not speak to him." (6819.)

Mr. Shaw took this position not because of any personal opposition to Mr. Lorimer, but because he considered it bad policy; "just simply a matter of party politics." He "thought it was a very bad idea for any Democrat to vote for a Republican for Senator." (6818–6819.)

Further testifying, Mr. Shaw says that on the first or second day of the first extra session of the forty-sixth assembly (which was in the autumn of 1909) he had a talk with White in his seat in the Illinois House of Representatives, at which time White "grunted" at him in response to his greeting, and after finishing his mail Mr. Shaw turned and said:

"What is the matter with you, Charlie?" "Oh," he said, "I am sore at myself and sore at the world and sore at everybody in general." I said, "What has gone wrong with you?" He said, "Well, about everything that you told me would happen to me if I voted for Lorimer has happened to me, and a great many more." I said, "Why, what else has happened to you?" He said, "My best friends walk across the street to keep from speaking to me." (6820.)

Lee O'Neil Browne testified that the only conversation worthy of the name relative to the matter of candidacy of Mr. Lorimer which he had with Mr. White occurred in the lobby of the St. Nicholas Hotel, something in the neighborhood of a week before the election, and in this connection Mr. Browne says:

"I do not just now recollect how the conversation came up, whether I asked him if he could vote for Senator Lorimer or whether he first broached the subject; but in any event he said to me that he felt very kindly toward Senator Lorimer, felt favorable to his candidacy, and that he was going to vote for him and had told Mr. Lorimer that he was going to do so—had already told him so himself. I do not think he told me where he had told him that. He further said to me, 'Lorimer is a good friend of organized labor, or the labor men tell me so, and for that reason I feel very kindly toward him. I understand that he has been a street-car man and came up from a street-car man, and,' he said, 'I am one, too, and for these reasons I am going to vote for Senator Lorimer.' * * * And because he had made up his mind to vote for Senator Lorimer I am inclined to think that he was the one who broached the subject to me instead of me broaching it to him." (Browne, 4918.)

From a most exhaustive examination and painstaking consideration of all the testimony in the case, the committee finds that White was one of the 53 Democrats in the Legislature of Illinois who for good and valid reasons felt justified in voting for Mr. Lorimer in order to break the deadlock which had existed in that body for so many months, and that White's attempt to enrich himself at the expense of his own reputation was the result of an afterthought and of a purpose which he conceived at a time when he had reached the lowest depths of degredation.

Daniel W. Holstlaw.

The case of Daniel W. Holstlaw, member of the State Senate of Illinois, stands alone and is independent of all others. He is a landowner, country banker, and cattle jobber, and was worth from $100,000 to $200,000.

Senator Holstlaw was elected as a Democrat and during the long senatorial contest which continued month after month, he consistently supported the Democratic nominee for United States Senator, Mr. Stringer. It appears, however, that like most of the members of the legislature, he became exceedingly weary, and about four weeks prior to the election of Mr. Lorimer he discussed with a considerable number of his friends in his district the probability of ending the struggle, and the manner in which this might possibly be accomplished. The project of selecting some Republican other than Senator Hopkins, whom the Democrats could support was one of the plans proposed. Among these friends was Mr. J. B. Lewis, editor of the Democrat, a newspaper published in his district, who evidently favored the plan last outlined, because the evidence is that he requested Senator Holstlaw to support Mr. Lorimer for the Senatorship if the time came when he could, and Senator Holstlaw assured him that he would do so. Senator Holstlaw stated to several of his friends that if a Democrat could not be elected he intended to vote for some Republican rather than remain in Springfield very much longer, and added that if such an opportunity came he would favor Mr. Lorimer. (Record, 3017.) Among those with whom he had similar conversations were Mr. J. J. Bell, Democrat, and Mr. John Eddings, Republican. (3017.)

The committee is fully convinced that Senator Holstlaw intended for a considerable time before the deadlock ended to support Mr. Lorimer, if the opportunity should offer. From the testimony of Senator Holstlaw it appears that for some days before May 26, 1909, the Democrats in the legislature were generally willing to adopt that course; that he found from inquiry that there were more who felt that way than he had supposed; that they were worn out by the long strain, and (in view of the fact that the salary of members of the general assembly is fixed by law at $2,000 for the entire term) the burden of remaining so long in Springfield at their own expense was felt, so that, all things considered, they deemed it good policy on the part of the Democrats to elect Mr. Lorimer rather than to continue the deadlock, and they were not sure they could prevent the election of a Republican who might be less acceptable to them. Senator Holstlaw, in common with the other Democrats, cast his vote for Mr. Lorimer on the last ballot. No question of his honesty in so doing would ever have arisen had it not been for the fact that during the same session of the legislature he had become a member of a commission to select and purchase furniture—chairs and desks—for the senate and house (3051), and during the investigations made by the State's attorney of Sangamon County soon after the publication of White's jackpot story a letter had fallen into his hands which had been written by Senator Holstlaw to Mr. Knox, a representative of a furniture company, arranging a meeting between them regarding this furniture deal. Senator Holstlaw was summoned before the grand jury of Sangamon County. (3037–3038, 3079, 5568.) The evidence discloses the fact, which Senator Holstlaw freely admits (3049–3057), that he entered into a corrupt agreement with the representative of a furniture company by which he was to receive $1,500 in consideration of favoring the bid made by the company so represented.

When Senator Holstlaw appeared before the grand jury of Sangamon County he swore that he had not written such a letter to Mr. Knox, and upon this testimony he was once indicted for perjury, and placed under arrest within two hours after he left the grand-jury room. (3038.) He was much alarmed by his arrest, and immediately asked the deputy sheriff who had him in custody to convey his request to the State's attorney to be permitted to go again before the grand jury and correct the mistake he had made, but he testifies that he received word in reply that he would not be allowed to do so unless he "would tell all about the Lorimer deal," because the State's attorney felt that he knew something about it. (3038.) This message from the State's attorney caused him still greater agitation, but suggested a way of escaping from his troubles. By the advice of the officer in whose custody he was he at once retained the firm of Gillespie & Fitzgerald, attorneys at Springfield, as counsel, who arranged for his bail by the deposit of his personal check for $5,000, and for a professional consultation the next morning. (3039.) During the night that followed Senator Holstlaw was deeply distressed, and it appears from his testimony that his thoughts centered around the problem of how best to free himself from his difficulties. His sin in connection with the furniture deal had found him out, and as it now appears, he was also conscious that after the adjournment in June, 1909, of the legislature he had received from Senator John Broderick, of Chicago, the sum of $3,200 for the payment of which he had never given any reasonable or legitimate explanation.

The consideration for such payment to him by Broderick does not directly appear in the evidence and can only be surmised. Whatever it may have been, Senator Holstlaw saw in the fact of having received the money an opportunity to take advantage of the intimation of the State's attorney and save himself. The result was that on the following morning he informed his counsel, so he testifies, that he wanted to make a clean breast of the matter and secure immunity from further prosecution of himself. (3043.) The predominant thought in his mind was to secure immunity. He testified to this over and over again, and he was willing to do anything to secure it. After consultation with his counsel (3043) they prepared a statement setting forth in the form of questions and answers the story of his infamy, from which it appears he was to receive $1,500 as soon as the furniture was delivered. Among other things contained in that statement was the following:

"Q. You are a Democrat, are you not?—A. Yes, sir.

"Q. Did you vote for Lorimer for United States Senator?—A. I did.

"Q. Before the voting came off was anything said to you about paying you anything for voting for Lorimer?—A. There was.

"Q. Who talked to you on that subject, and what was said?—A. Senator Broderick, of Chicago. He said to me: 'Mr. Lorimer is going to be elected to-morrow'—that is, as well as I remember the date, and he said: 'There is $2,500 for you if you want to vote that way'; and the next morning I voted for him.

"Q. Did you tell Mr. Broderick that you would vote for Mr. Lorimer?—A. I do not know whether I did or not, but I think I did." (Record, 3046.)

In his testimony before this committee, as well as before the other senatorial committee, and upon the trial of John Broderick, Senator Holstlaw completely reverses the foregoing statement, and says that before Mr. Broderick made the remark, "There is $2,500 for you if you want to vote that way," he had told Senator Broderick that he was going to vote for Mr. Lorimer, and throughout his testimony he insists that such is the fact; that it had been his determination for days and weeks before the election, if an opportunity to vote for Mr. Lorimer presented itself, to do so, and that he would have voted for him under any circumstances and conditions, so strong was his desire to do so. (3047.) And he further testifies that he was not influenced by what Senator Broderick said, because he intended to vote for Mr. Lorimer anyway. (3019.)

John Broderick was afterwards indicted for having bribed Holstlaw to vote for Mr. Lorimer, tried in Sangamon County, and acquitted of the charge. In that trial Mr. Holstlaw testified as he did before this committee, as follows (referring to Senator Broderick):

"He was standing out in front of the St. Nick, and I happened to step out, and we were talking, and he said 'Senator Lorimer will be elected to-morrow.' I said, 'I think so, and I am going to vote for him.' He said, 'You are?' I said, 'Yes, sir.' He said, 'If you want to vote that way, there is $2,500 for you.'

"Mr. MARBLE. What did you say?

"Mr. HOLSTLAW. I did not say a word." (3018.)

And he testified that no further conversation followed.

Senator Broderick stoutly denies that any such conversation ever took place between them, and while the committee is satisfied that Broderick did pay Holstlaw $2,500 at one time and $700 at another time in the summer of 1909, there is nothing whatever in the evidence connecting these payments with Senator Holstlaw's support of Mr. Lorimer for the Senatorship. The evidence shows conclusively that Senator Holstlaw's only reason for linking Mr. Lorimer's name with that transaction was to satisfy the State's attorney of Sangamon County, and through him to secure an order of immunity from the court, in which he was successful. He testifies that his attorneys told him he would have to sign that statement to satisfy the State's attorney, and that without it the latter would not grant him immunity or dismiss the indictment pending against him. (3081.) He further testifies that after this consultation, and before the statement was prepared, his attorneys conferred with the State's attorney, and brought him word that if he wanted to go ahead and tell the whole story to do so and he would get immunity. (3047.)

It was under these circumstances that the statement was prepared and presented to the State's attorney, and Holstlaw also testifies (3048) that Mr. Fitzgerald went with him to the office of the State's attorney, turned over to the latter the statement, whereupon Mr. Burke asked him to go with him before the judge and have the immunity order entered, and that was done, and he was discharged and never again heard about the indictment. (3048.) Mr. Fitzgerald corroborates this. (4705–4732.)

The committee is satisfied that Broderick never suggested to Holstlaw that there would be $2,500 for him upon his statement that he was going to vote for Lorimer, and that he never received it, was promised, or expected to receive a dollar for such vote. (3086–3087.)

Senator Holstlaw testifies that he would not have voted for any Republican other than Lorimer for anything on earth. (3087.)

The circumstances connected with the election of Senator Holstlaw to the State senate may throw some light upon the probable source of the money he received from Senator Broderick. As before stated, Senator Holstlaw is a man who professes to stand for good things, and in regard to the liquor problems which have challenged public attention in Illinois, poses as a "dry"—an advocate of the temperance cause. The district which he represented in the State senate was composed of four counties, two "wets" and two "drys." Efforts were made to ascertain the approximate amount of his campaign expenses, but he evaded giving this information. While admitting that it was a considerable amount, he would not swear it was not $5,000 (5550–5552), but intimated that it might have been in the neighborhood of $3,000 (5551), which sum would, in the opinion of the committee, look like an enormous price to him to be paid for an election, upon which he was to have a return of $2,000 in salary. In Marion, his home county, and in Clay, both "dry" counties, he ran far behind, and was defeated by over 5,000 majority; but in Effingham and Clinton, both "wet" counties, he received a majority large enough to overcome the loss sustained in the other two counties, and to elect him to the general assembly, Clinton being the county in which he made his greatest gains. (550–555.)

Although a Democrat and a candidate of the Democratic Party, he received the enthusiastic support of G. N. Welch, a Republican, and a saloon keeper in Clinton County, as well as that of his numerous friends. (5557.) All the circumstances lead to the conclusion that Senator Holstlaw was elected to the Illinois Senate by the so-called "wets" of his district, a most suggestive fact, when considered in connection with the other fact that the $3,200 was paid to him by John Broderick, likewise a Democrat, and a saloon keeper of 17 or 18 years' standing in Chicago. (3903–3904.) This is particularly significant in view of the fact that Senator Holstlaw, grasping as he is in financial matters, could not or would not make any definite statement to this committee concerning the expenses incurred by him in his campaign, nor did he see fit to give any reason why Senator Broderick should pay him $3,200. In his confusion and desperation he set up the claim that he regarded it as a gift, but did not know why it was made, and did not care to know (2110); that he had no curiosity to know (3111); that he did not tell his family, and after studying about it, felt a delicacy about saying anything concerning it; that it did not impress him as improper at the time (3114), but finally admitted it "might be a little improper." (3114–3117.)

From a consideration of all the circumstances, the committee is satisfied that Holstlaw was the candidate of the liquor interests in his senatorial district and was elected by them; that he was subjected to large campaign expenses, and money being dearer to him than his reputation and feel convinced that he would not be likely to incur such expenses unless assured that he would be reimbursed. It is conceded that liquor legislation has been one of the prominent and continuing elements in the Illinois General Assembly, and John Broderick, being a saloon keeper in the city of Chicago, was naturally a representative of the liquor interests, and money passing from him to Holstlaw is a feature of the case so suggestive, in the absence of any other consideration for its payment, as to raise a strong presumption at least that its payment had some connection with the election of Mr. Holstlaw to the Senate of Illinois.

Everything connected with the evidence given by Senator Holstlaw indicates that his love of money is a consuming passion; that it dominates his judgment, deadens his conscience, and destroys his regard for truth.

Testimony of Coan before Helm committee.

In the debate on the reopening of this case in the Senate particular reference was made to the testimony of M. B. Coan, employed as an investigator by the Helm committee, given before that committee, in which he named certain persons who were supposed to be possessed of valuable information bearing upon the question at issue, in view of which the committee summoned such persons as witnesses without securing any evidence of the character indicated by Mr. Coan in his testimony. (Record, O'Brien, 688–700–705; Jones, 705–720; Culver, 721–742; McLean, 742–747; McLeod, 748–755.)

Political conditions in Illinois and the influences which led to the election of Senator Lorimer.

In the Senate and throughout the United States there has been an unprecedented interest in the circumstances connected with the election of Mr. Lorimer to the United States Senate. The evidence taken before this committee sheds light on

many of these circumstances, removing some misapprehension heretofore prevailing and establishing certain facts heretofore unknown and demonstrating that Mr. Lorimer's election was the natural outcome of the political conditions then existing in Illinois, and that it was brought about without resorting to corrupt practices either on his part or the part of his friends.

All the evidence tends to show that the personal popularity of Mr. Lorimer had given him a remarkable following throughout the State, and particularly in Chicago. On the other hand, he was the object of the most bitter opposition from certain newspapers and certain influential persons.

When political conditions so developed in the Forty-sixth General Assembly of the State of Illinois that the different factions of the Republican membership of that body could not unite in the election of any other person as Senator from that State, his election followed as a natural consequence.

A glance at the political situation in Illinois during the four years preceding Mr. Lorimer's election to the Senate helps to disclose the conditions existing at the time of his election. For many years prior to 1904, as well as since, most of the Chicago newspapers, led by the Chicago Tribune, had persistently opposed Mr. Lorimer politically. The relation between Mr. Lorimer and Gov. Deneen prior to that year was that of warm personal and political friendship. (Deneen, 1221; Lorimer, 7441.)

In 1904 Mr. Yates, then governor of Illinois, was a candidate for renomination before the Republican State convention. Mr. Deneen was a candidate for the same position before that convention. Mr. Lorimer, who had previously been his warm political friend, would not support him at this time for the reason, as he says, that he had received definite information that Mr. Deneen had gone over to the newspaper people (Lorimer, 7678), thus breaking the political affiliations before that time existing between them. In that convention Mr. Lorimer actively supported the candidacy of Mr. Lowden for governor. The convention was unexampled both in length and character. A deadlock developed early in its history which extended over a period of about 4 weeks, during which time a recess of 10 days was taken. Mr. Yates, while unable to secure the nomination for himself, held the balance of power and was able to direct the nomination of either of his principal opponents. In his testimony he says:

"My friends * * * had the power to nominate in that convention either Mr. Lowden or Gov. Deneen. We decided that we would support Gov. Deneen (227), and Charles S. Deneen was nominated in my stead and by my votes" (226).

While Gov. Yates says that no promises were made him before such action on his part, he asserts as a fact, which Gov. Deneen denies, that after he had told Gov. Deneen of his intention to support him for the governorship the latter assured Gov. Yates that he would support him for United States Senator in 1906. Whatever that fact may have been, Gov. Deneen failed to do so, and there arose upon the part of Gov. Yates and his friends a feeling of bitterness against Gov. Deneen which has continued ever since and which was specially manifest during the session of the legislature in 1909.

In the years following 1904 the Republican Party in Illinois was divided into two factions, Gov. Deneen being most prominent in one and Mr. Lorimer being most prominent in the other. Although Mr. Yates had for a time felt unkindly politically toward Mr. Lorimer because of his failure to give him his support for the governorship in 1904 and because he had supported Senator Cullom for reelection to the Senate of the United States in 1906, he entertained no lasting feeling against him, for the reason, as he testified, that Mr. Lorimer never deceived him "in word or deed at any turn of the road." On the other hand, the indignation of Gov. Yates toward Gov. Deneen because of his failure to support him for the United States Senatorship in 1906 knew no bounds, and his dislike for him personally and politically was extreme.

In 1908 Mr. Yates was again a candidate for governor against Mr. Deneen, and Mr. Lorimer was his strong and active supporter throughout the primary contest, which was bitter in character and waged with great vigor throughout the State. The contest was complicated by the candidacy of Mr. Hopkins for the United States Senatorship, and it is claimed by both Mr. Lorimer and Mr. Yates that Mr. Hopkins and his friends promised them that in this contest Mr. Yates would have his and their warm support in his fight for the governorship nomination; that, relying upon these assurances, they did everything in their power to secure the indorsement of the people for the candidacy of Mr. Hopkins.

As the result of this primary Mr. Deneen was nominated for governor and Mr. Hopkins received a plurality nomination for the Senatorship. In the meantime, however, the fact developed that Mr. Hopkins had been conducting his campaign without reference to the effect it might have upon the political fortunes of either Mr.

Yates or Mr. Deneen in their contest for the governorship. He states in his testimony that he had determined not to mix up in State politics, and that in making his canvass he did so with reference to his own election as Senator alone and without reference to the candidates on the State ticket. As a result of Senator Hopkins's failure to aid Gov. Yates in his campaign, the relations before that time existing between him on the one hand and Messrs. Lorimer and Yates on the other, became strained; they felt that he had failed to keep faith with them, and they lost interest in his election. Gov. Yates's feelings toward Senator Hopkins were undoubtedly bitter; Mr. Lorimer would have been glad to join with anybody to defeat his election by the legislature but did not think it could be done. He did not, however, conceal his unfriendliness toward Senator Hopkins, with whom he avoided an interview which the latter attempted to arrange through the telephone, and when Senator Hopkins sought him in Washington and inquired of him as to his attitude on the question of his (Hopkins's) candidacy before the legislature, Mr. Lorimer frankly told him that there was no use in discussing the matter.

Gov. Deneen's attitude of mind toward Mr. Hopkins is indicated by his statement to the committee, as follows:

"Senator Hopkins at that time, I think, was against me, opposed my nomination both times, and fought it with Federal patronage." (1134.)

On the other hand, Gov. Deneen, having been an advocate of direct primaries, felt compelled to nominally, at least, support Senator Hopkins before the legislature as the plurality candidate.

Organization of legislature.

When the legislature of 1909 convened the political conditions were both peculiar and complicated.

At the November election President Taft had carried the State of Illinois by a majority of 179,000, while Gov. Deneen had received only about 23,000 majority, and it was known that the Democratic candidate for governor, Hon. Adlai E. Stevenson, would contest the election before the legislature. The Forty-sixth General Assembly of the State of Illinois met in Springfield January 6, 1909; both political parties as represented in that body were badly disorganized.

In view of the probable contest between him and Mr. Stevenson which was to come before the legislature, and his desire to carry out certain policies, Gov. Deneen was keenly alive to the necessity of having the legislative organization in the hands of his friends. Edward D. Shurtleff had twice been speaker of the Illinois House of Representatives, first in 1905 and again in 1907, on both occasions enjoying the friendship of Gov. Deneen, and when in 1908 Mr. Shurtleff announced his candidacy for membership in the house a third time, it was plain that he would, if elected, be again a candidate for the speakership. In the meantime, differences had arisen between him and Gov. Deneen regarding various matters of policy, and the latter had become unfriendly to his candidacy.

A majority of the Republicans in the senate were Gov. Deneen's political friends and were able to organize that body in a manner satisfactory to him. A majority of the Republican members of the house were also undoubtedly Gov. Deneen's friends; but among them were several who aspired to the speakership of that body, and the result of a party caucus, if called under such conditions, was feared by him and his friends. It was therefore agreed to hold a conference of the Republican members of the house who were favorable to Gov. Deneen for the purpose of uniting upon some one man for speaker before a caucus should be called. This conference was held on the evening of the Monday preceding the convening of the legislature on Wednesday, January 6, and to it were invited only those known to be Deneen adherents. The process of elimination was invoked, and one after another of those who had aspired to the speakership dropped from consideration until it was agreed to support Mr. King for that position.

Then followed a call for a caucus of all the Republican members of the house to be held on the following evening; but learning that the Deneen Republicans had taken the action above mentioned, Mr. Shurtleff and his friends declined to enter that caucus, and the following day he was elected speaker, receiving 85 votes—25 Republican and 60 Democratic. The Democratic support, which secured his election, was accounted for by different factions in different ways. It was stated by practically all the Democrats appearing before the committee that it was because he had been fair and impartial in his rulings; that he had established a reputation for fair treatment of the minority in previous legislatures, thereby endearing himself to the Democrats, and that inasmuch as it was impossible to elect a Democrat to that position they much preferred Mr. Shurtleff to any other Republican for speaker. Many Democrats also, having in mind the contest which it was known Mr. Stevenson proposed to make of

Gov. Deneen's election, resented the efforts which it was understood the latter was making to control the organization of the house, and before the voting for speaker began it was understood that the Democrats would, almost as a body, vote for Mr. Shurtleff. (Donahue, 3307.) Gov. Deneen also attributed this action of the Democrats to the fact that the contest over the governorship would come before the legislature and they did not want him to control the organization; also that in the preceding legislature the Democrats had agreed to an investigation of his administration with reference to charitable institutions and that Speaker Shurtleff had made this possible by cooperating with them.

Gov. Deneen admits that there was a bitter feeling against Speaker Shurtleff on the part of his friends. That there was an equally strong feeling against him, Deneen, on the part of the Democratic membership of the house is unquestioned.

The prospective gubernatorial contest between Gov. Deneen and Mr. Stevenson was undoubtedly a strong factor in the organization of the house. While it was not intended, nor was it supposed it would in any way affect the election of Senator Hopkins by the legislature, it did in fact lead to his defeat after a deadlock extending over a period of more than four months. The friends of Gov. Deneen felt that Senator Hopkins's friends intended to join the movement to deprive him of the office of governor; not with the approval, however, of Senator Hopkins. For this reason several of Gov. Deneen's friends refused to vote for Senator Hopkins when the voting began, and his election was postponed until the settlement of the governor's contest. This was done with Gov. Deneen's consent and at his instance. As a result of this procrastination, which extended from January 19 to March 22, an opportunity presented itself for uniting all the various influences existing against Senator Hopkins, and as a result there was a common effort to secure his defeat.

Senator Hopkins had failed to carry Cook County in the primary election, as well as Kane, in which county he had his residence; he also failed in Sangamon and some other counties, and, as already stated, there existed in the Republican Party a considerable degree of unfriendliness toward him. His own legislative district had been carried against him and was represented in the house by a Democrat, George W. Alschuler, a resident of his home town, Aurora, who accepted the election for the express purpose of defeating Senator Hopkins; and he devoted all his energies during the entire session to that end. The feeling against Senator Hopkins was so general and so pronounced among the Democrats that Gov. Deneen, in his testimony, says:

"I think a number of Democrats would have voted for me before they would vote for Senator Hopkins."

Representative Shaw, a prominent Democrat, stated that Senator Hopkins was extremely unpopular with the Democrats. "He could not have been more so." Representative Donahue confirmed this, and gave as a reason that Senator Hopkins always assailed them; that in his speeches he "said everything mean that he could about the Democrats." Representative Alschuler testified that if the Democrats could voice their sentiment he would not get 100 votes in the Democratic Party; that he never had a kind word to speak of a Democrat; that he had vilified them; that he was vicious toward the Democratic Party at all times; and that there was ill will toward him in his community. Representative Copley, a Republican, the present Representative from the Aurora district in the National House, testified that Senator Hopkins was disliked by the Democrats; that he had been so offensive to them that he did not know a single Democrat who was not bitterly opposed to him, and, although a Republican himself, Col. Copley was opposed to him.

The testimony also shows much opposition to him among the Republicans. He was not personally popular and, though he had carried the primaries by a small plurality, there was a strong impression that he had not intended to abide the result if it had been against him.

Attention is called to these conditions to indicate the general sentiment of the legislature toward Senator Hopkins and to show how the long delay resulting from the gubernatorial contest operated to render his election impossible.

The evidence does not indicate that Mr. Lorimer had anything to do with the organization of the Illinois Legislature. As before stated, this body convened on the 6th day of January, 1909, at which time Mr. Lorimer was in Washington, and he had not visited Springfield at any time between the election in November, 1908, and the election of Mr. Shurtleff as speaker. On the 15th day of September previous he became ill and remained at his home until after the November election; immediately thereafter he went to the Pacific coast to recuperate, was again taken ill and obliged to submit to an operation while in Oregon. On November 28 or 29 he started East, accompanied for the greater part of the journey by his physician. Congress met December 7, 1908, and Mr. Lorimer was in Washington shortly after if not on the opening day, where he remained until the Christmas holidays, when he returned to his home

in Chicago. During this recess Mr. Lorimer met in Chicago Messrs. Shurtleff and Shanahan, members elect of the Illinois Legislature, and a conference was had regarding the speakership. It was stated that Gov. Deneen had suggested Mr. Chiperfield, who was then a member of his military staff, in connection with the position, and that Mr. Chiperfield had been twice to Chicago to confer with Mr. Shurtleff in regard to his proposed candidacy. Although Mr. Chiperfield had not been one of his political friends, Mr. Lorimer expressed the opinion that in the interest of party harmony the selection of Mr. Chiperfield for the speakership was a proper course to pursue and that he would ask his friends to cooperate in securing his election; but as Gov. Deneen subsequently declined to support Mr. Chiperfield, nothing resulted from the conference.

That is all that Mr. Lorimer had to do with the organization of the Illinois House of Representatives, and with the exception of that interview the evidence does not show that he ever conferred with any member of the legislature regarding such organization. In his testimony, Mr. Lorimer states that he did not know that Mr. Shurtleff was a candidate until he had been elected to the office of speaker, and there is no evidence that he had anyone acting for or representing him in any way in the organization of the legislature.

Mr. Lorimer was again in Washington on January 4 or 5 and was present at the sessions of the House between that time and the 8th of January and did not reach Springfield until January 11 or 12, five or six days after Mr. Shurtleff was elected speaker.

No one connected with the legislature has suggested that Mr. Shurtleff's election as speaker was intended or expected to have any connection with Mr. Lorimer's election as Senator. He was not a candidate. But he and his friends expected that Senator Hopkins would be chosen by the Republican majority to that office to succeed himself, and he would undoubtedly have been so elected had it not been for Gov. Deneen's "postponement" of his election for a period of two months or more, as before stated.

The only definite suggestion to the contrary appears in the following:

In answer to a question by Mr. Kenyon as to whether Mr. Shurtleff's election was the first step in the election of Mr. Lorimer, Gov. Yates testified:

"I did not try to elect Speaker Shurtleff for the purpose of electing Mr. Lorimer as Senator."

And he further says:

"I was for Ed. Shurtleff. I wanted to see him speaker, and I did have the desire all the time, as I stated before, that it might come Mr. Lorimer's way; but when you asked me if that was the first step, the vital step, in a prearranged plan to which I was a party to bring about the election of Mr. Lorimer, that is incorrect."

Gov. Yates also testified that he did not know of any such arrangement and had nothing to do with it, and that the election of Mr. Lorimer was never mentioned in connection with the election of Speaker Shurtleff. The only ground upon which any such claim could be based so far as Gov. Yates is concerned is the testimony of Edward O. Phillips, a reporter for the Chicago Tribune, who testified that Gov. Yates had told him at the time of Mr. Shurtleff's election that this meant the election of Mr. Lorimer to the Senate. Mr. Phillips was at that time employed on the Record-Herald and was assisting in covering the legislature for that paper, and had written an article for the Record-Herald which appeared January 7, 1909, based on the statement of Gov. Yates, which on the day of Mr. Lorimer's election he showed to Gov. Yates and others in the speaker's room, and Gov. Yates said it was good information or something of that sort. Gov. Yates stated in his testimony before the committee that he had no recollection of making this statement, but thought he did say it if Mr. Phillips said he did; and while this would tend to lend color to the theory that the election of Mr. Shurtleff as speaker was a part of a prearranged plan, Gov. Yates's statement that there was no such arrangement, and that the election of Mr. Lorimer was never mentioned in connection with the election of Speaker Shurtleff, is supported by all the other testimony in the case.

Roger C. Sullivan, Democratic national committeeman for Illinois, stated to the committee that—

"They happened to elect the speaker by Democratic votes. There was not any material objection to it so far as the public is concerned, or anybody else. Then I think that some of these Republican leaders took advantage of that situation to go on and help to stop the election of Mr. Hopkins as Senator; and then after they had got that far and got that stopped to their satisfaction, the selfishness of mankind asserted itself and made them commence to look around and wonder if there was not some chance for themselves or somebody else, and then they started in and tried to elect a Senator. I think those three stages surely came about." (4379.)

Many prominent members of the legislature testified that the election of Speaker Shurtleff was no part of such a plan and was never mentioned by anyone. Speaker Shurtleff said: "I never heard it mentioned in any way whatever." (4561.)

Thomas Tippit, leader of one faction of the Democrats in the house, testified: "There was no thought of it." (4255.)

Representative De Wolf (Democrat) testified that he heard no intimation at the time the speaker was elected that the senatorial election was involved. (5399.)

Mr. Espy (Democrat) testified that the election of speaker had no sort of reference or relation to the senatorial election. (4328.)

Mr. Donahue (Democrat), testified:

"Mr. HEALY. Did you have any understanding of any sort with reference to the election of Mr. Shurtleff which in any way affected the Democratic membership of that body?

"Mr. DONAHUE. No. Mr. Shurtleff stood pretty well throughout the State as being a very fair speaker. He was very popular with the Democrats, and they thought he was the fairest speaker Illinois had had for many years. That was the general impression among the Democrats. It was discussed, and it was said that former speakers, be they Democrats or Republicans, would not recognize the minority at all in any legislation or in any way; but Mr. Shurtleff broke over that rule and gave every member a fair show to get measures through if he could. He did not recognize any politics in so far as general legislation was concerned. That was the feeling among the Democrats throughout the State. There was talk of a contest over the governorship, and the Democrats felt that if Shurtleff was speaker they would probably get a recount of the votes." (3302.)

It also appears that 17 members of the house who voted for Senator Hopkins also voted for the election of Mr. Shurtleff (7408). Senator Hopkins testified that personal friends of his and supporters who voted for him all the way through also voted for Mr. Shurtleff for speaker (314, Hopkins), though the majority of his supporters favored Deneen's candidate (314), and that he regarded the speakership as a controversy between Gov. Deneen and Mr. Shurtleff at the time; he thinks there was no general talk to that effect, and his friends did not suggest that the senatorship was involved, though he says, "as a matter of fact I discovered that it did involve the senatorship to quite a large extent, later" (315). In answer to a direct question by Senator Fletcher as to whether from knowledge he then had or since acquired he would say the election of speaker had any connection with or reference to the election of Senator, he testified:

"I could not say, Senator, whether that is so or not. I only can judge of results. I know the result was that it was very detrimental to my candidacy. Whether that was in the mind of Shurtleff and the men that supported him at the time he was elected, I do not know." (327.) (Hopkins, 372–373.)

Following the election of Mr. Shurtleff as speaker on the 12th day of January, 1909, a meeting of the Republican State central committee was held in Springfield. Roy O. West, its chairman, was a close political and personal friend of Gov. Deneen. The meeting was called to devise means to induce the Republican members of the house of representatives to support the governor in an effort to have the appointment of the house committees taken away from the speaker, but the committee refused to thus cooperate with the governor, and the feeling of Gov. Deneen toward Speaker Shurtleff became extreme.

Meetings between Gov. Deneen and Mr. Lorimer.

In an attempt to secure party harmony Mr. West then arranged a meeting between the governor and Mr. Lorimer for January 13. Gov. Deneen testified that he and Mr. Lorimer had not previously met for five or six years except on the street, and on this occasion they met about 5 o'clock in the afternoon, remained in conference at the executive office until about 9 o'clock in the evening, when they went to the mansion, there remaining together until about midnight. According to the testimony of Gov. Deneen, they discussed waterway legislation, an anticipated decision nullifying the primary law, their previous relations, political conditions generally, the senatorial situation, and the organization of the house. (Deneen, 1099, 1106.) Mr. Lorimer testified that they talked about the committee that would probably be appointed to investigate Gov. Deneen's election, and the organization of the house only to the extent of discussing that committee (7415–7416); that subsequently, at another interview (the latter part of January) (7412–7416), the governor positively stated that he should try to defeat Hopkins, and in that connection asked Mr. Lorimer to suggest to Speaker Shurtleff in the appointment of a committee to visit charitable institutions of the State he should select only Hopkins men, their duties as members of such committee would take them away from Springfield for a couple of weeks and tide over the period of voting on the senatorship (7415); Mr. Lorimer understood that the committee was so constituted, he having carried the governor's suggestion to the speaker, who called upon the governor the following day to discuss it (7415). This was the only

time Mr. Lorimer ever discussed the organization of the house with the governor, and only the membership of this committee was discussed between them (7416).

Gov. Deneen complained to Mr. Lorimer of the harsh treatment by Senator Hopkins in not giving him support, and particularly of his lack of support from Senator Hopkins and his friends at the State committee meeting, over which he felt much chagrin. (Lorimer, 7400.)

Gov. Deneen and Mr. Lorimer had a second conference on January 18 (Lorimer, 7401–7402), following which Mr. Lorimer left Springfield. He was not there on the first two days of the balloting for the senatorship, when 15 Republican members of the house, friends of Gov. Deneen, failed to vote for Senator Hopkins on the first ballot taken in separate houses, and when 13 of the same element failed to vote for him on the first joint ballot, thus inaugurating the plan of Gov. Deneen and his friends to, as he testified, "postpone the election of Senator" until the gubernatorial contest was settled.

Mr. Lorimer returned to Springfield about January 27, 1909, and thereafter had number of conferences with Gov. Deneen, in which the governor said he would not not help in reelecting Senator Hopkins, and grew firmer in that determination as time progressed. By that time the opposition to Senator Hopkins was so strongly crystalized that his election had become improbable. It has already appeared in this report that Mr. Lorimer had energetically supported Senator Hopkins in the primary in 1908 and was indignant when he found that Senator Hopkins had not lent his assistance to Gov. Yates in his candidacy for the governorship, as it was claimed he had had promised to do. He afterwards told Senator Hopkins frankly that he would not support him before the legislature. He did not, however, formulate any plan to defeat Senator Hopkins, and in fact did not believe it possible to do so until after his conference with Gov. Deneen about the middle of January.

Men and measures discussed.

As these interviews between Gov. Deneen and Mr. Lorimer continued their relations became more cordial, and, according to Gov. Deneen, the old friendly feeling had been restored, and the opposition of both to Senator Hopkins's candidacy grew more firm.

They frequently conferred together as to the advisability of breaking the deadlock by bringing forward some person other than Senator Hopkins who could command a majority of the votes of the joint assembly. In February after they had discussed the possible candidacy of Gov. Deneen the latter suggested that they cooperate in putting the election of Senator over until after the 4th of March, when the seat would be vacant and the people insistent that it be filled, thereby creating a condition under which Gov. Deneen could accept the place. About March 15 Gov. Deneen suggested that it would be embarrassing for him to make arrangements to become a candidate for the Senate, and Mr. Lorimer suggested that he have his friend Roy O. West come to Springfield the following week and he (Lorimer) would discuss the plan with him (7417, Lorimer). This was done and plans made between Messrs. Lorimer and West to bring about the election of Gov. Deneen, it being agreed that his name would be presented to the legislature on March 24. On the evening of March 23, Mr. West informed Mr. Lorimer that the governor would not be a candidate.

When this statement was subsequently confirmed by Gov. Deneen personally, they began discussing whom they could support, and Mr. Lorimer suggested Speaker Shurtleff; the governor said he thought Mr. Lorimer ought to become the candidate, as he had insisted from their first interviews. This was considerably discussed between them, the governor strongly urging Mr. Lorimer to permit his name to be used instead of urging Mr. Shurtleff (Deneen, 1269). When Mr. Lorimer first suggested the candidacy of Mr. Shurtleff, the governor said he would let him know in about a week, and thereafter told him that he could not support Mr. Shurtleff because his newspaper and Chicago friends would not agree to it, and he could not afford to break with them on that account (Lorimer, 7422).

Mr. Lorimer then presented for the consideration of the governor the names of other men, among them Congressman Boutell, Lowden, McKinley, and Rodenberg, as well as A. C. Bartlett, and the possible candidacy of William J. Calhoun, whose name was suggested by Mr. Beale, trustee for the Joseph Medill estate and Chicago Tribune. At these conferences, although Mr. Lorimer expressed the opinion that Senator Hopkins could not be elected (Lorimer, 7425–7426), Gov. Deneen found reasons for refusing to support any of the persons named. Gov. Deneen testified that Mr. Lorimer, about March 20, again urged him strongly to become a candidate, and he urged Mr. Lorimer to become a candidate, saying that if he could elect Mr. Shurtleff he could elect himself; that he was a greater power than the latter. (Deneen, 1269). By that time it seemed to be understood by most people having knowledge of the situation that

Senator Hopkins could not be elected, and representatives of the various men mentioned as possible candidates had appeared in Springfield to sound the sentiment of the general assembly. Mr. West had ambitions to be named for the senatorship, but Mr. Lorimer refused to support him (7423–7424), and the governor told Mr. Lorimer he was embarrassed by West's attitude. These general conditions continued for some considerable time; the situation was discussed in the newspapers and it seemed that no one among those mentioned was developing any strength; several State senators, some of whom were friendly to both Mr. Lorimer and Gov. Deneen, importuned Gov. Deneen to enter the race. And after the situation had been generally discussed for some time in the public press and otherwise, Mr. Lorimer again took up with the governor the question of his becoming a candidate, strongly urged him to enter the field, and assured him that he and his friends would support him. Gov. Deneen testified that the "Senator urged me very strongly to take it," stating that it was a position where "I must expect criticism," but that it was the only opportunity "I would ever have to go to the Senate, because if I did not the party would be organized on other theories and it would be impossible to overcome the difficulties." (1113–1114, Deneen.) Senator Curtis had presented the matter to Gov. Deneen and discussed it with him several times, urging as a reason the harmony which his candidacy would bring to the party, and that it would quiet the disturbances which had existed there for years. Mr. Lorimer also assured him that he would receive all but 15 of the Republican votes in the general assembly and most of the Democrats.

Gov. Deneen's reluctance to enter the contest was based in part on the fact that he had been responsible for the primary law, and notwithstanding the feeling he entertained regarding the attitude of Senator Hopkins toward some of his wishes he would not allow himself to be made the means of breaking down the law itself.

It appears from the testimony of Hon. Frederick Lundin, former member of the Illinois State Senate, and also of Congress, that he had frequent conferences with Gov. Deneen regarding the senatorial situation; that as late as the first week in May in a conference between them the governor thought it would be a good plan and good politics to make the deadlock secure and not elect a Senator at that time (6634); that the object of the conference at that time was to get four or five Hopkins supporters to agree with others to vote for some one else; that the resaon Gov. Deneen wanted this done was that he did not really know whether he wanted the Senatorship or not; that he would like it, but was not just sure that he dared take it; that while he wanted it, he supposed that the newspapers—the Record-Herald, Tribune, and Daily News—would not let him take it. (6638–6639.)

Mr. Lundin testified that during these conferences Gov. Deneen said that the men with whom he had worked in past years had not done right by him; that if Senator Lorimer's friends and his friends should work together, there would be no question but that they would be the controlling element in the Republican Party in the State; that he thought that Senator Lorimer could afford better than any other man to take the senatorship; that it would injure him less, and, in fact, he said it might be a good solution of the deadlock to have Mr. Lorimer elected by Democratic votes.

History of Mr. Lorimer's candidacy.

There seemed to be no doubt in the mind of Gov. Deneen that Mr. Lorimer was strong enough in the Illinois Legislature to be elected Senator at any time, but Mr. Lorimer declined to become a candidate because the importance of establishing the great waterway from the Lakes to the Gulf was more to him than a seat in the United States Senate, and he felt he could render greater service to that great undertaking in the House than in the Senate. Mr. Shurtleff testified that it was for this reason that Mr. Lorimer refused until late in the session to become a candidate.

The conferences which were held between the governor and Mr. Lorimer attracted much attention and became the subject of comment in the public press, particularly for the reason that for years they had been regarded as political foes.

About this time in the session Col. John R. Thompson, Col. Chauncey Dewey, and Col. Copley, all members of the governor's staff and his warm personal and political friends, men who were influential leaders in the Republican Party, became active in their efforts to induce Mr. Lorimer to become a candidate for the Senate. As the deadlock continued and it became apparent that Mr. Lorimer was probably the only person upon whom the different factions could unite, he finally determined to become a candidate.

In addition to those last mentioned he had the support of Gov. Yates and Speaker Shurtleff, who had been urging him very strongly to accept Democratic votes and accept the election (4581). Many other prominent Republicans were anxious to support him, and he also developed strength among the Democratic members, but it was not until two or three weeks before the election, which occurred May 26, 1909,

that Mr. Lorimer's candidacy began to be seriously considered, and he thinks it was about the 10th or 12th of May when he determined to ascertain whether he could be elected. (Lorimer, 7584.) This substantially accords with the testimony of Gov. Deneen (1136–1137); Mr. Stringer, Democratic nominee for Senator (2276); Lee O'Neil Browne, Democratic minority leader of the house (4886); and Senator Hopkins (307), and his candidacy was first mentioned in the Chicago Tribune May 11, 1909. From that time forward Mr. Lorimer was willing to become a candidate, and be voted for in the legislature, provided he could be assured that he would be elected; otherwise he would not permit his name to be presented; prominent men and leaders in both parties then became active and worked together for his election.

When Mr. Lorimer went to his home in Chicago about a week prior to May 26 he was satisfied that he could be elected, and believed until Friday of that week that Gov. Deneen was giving him his loyal support. Meantime, while in Chicago, he heard it rumored that the governor was opposing him, and on Sunday night, upon reaching Springfield, this was confirmed, and conferring with some of his friends, among them Cols. Thompson and Dewey, Gov. Deneen's friends, he learned that the governor was trying to have the election put over (7432–7437). From that time he devoted himself to ascertaining whether he could be elected despite the governor's opposition, and on the morning of the 26th of May made public the fact of his candidacy and willingness to have his name presented to the joint assembly. And on that day, and on the ninety-fifth ballot, he was declared elected as a Senator of the United States from the State of Illinois.

Bipartisan combinations.

In relation to combination and bipartisan operations, which generally prevail in Illinois elections, the committee is impressed that the provision of the constitution of Illinois whereby minority representation is secured, which was prompted by a sense of justice and fairness and intended to promote the general good, in practical execution has the effect, more or less marked, of producing the very bipartisan combination and cooperation so much complained of. It is unjust to attribute any alleged unsatisfactory working out of a constitutional principle to any one man. The constitution provides:

"The house of representatives shall consist of three times the number of members of the senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of representatives aforesaid each qualified voter may cast as many votes for one candidate as there are representatives to be elected or may distribute the same or equal parts thereof among the candidates as he shall see fit, and the candidates highest in votes shall be declared elected." (R., (4536–4537.)

Representative Copley testified:

"We have a different constitution in this State. We have a minority representation, and you can get almost any sort of a fellow in the legislature from certain districts." (R., 4532.)

He elaborates this further by saying:

"Of course the constitutional provision allows a certain type of man to get into the legislature in larger numbers than would be the case if we did not have that minority provision." (R. 4534.)

It seems a voter can cumulate—he can cast one and a half votes for each of two candidates, one for each of three or three votes for one candidate (R.. 4534), and in consequence of this constitutional provision, in effect since 1870, at appears, as Mr. Copley says:

"And so in that way to elect three Republicans they must have more than two-thirds and divide equally. If they do not divide equally, one man can come in and get 20 per cent of the vote. In practice, usually 20 per cent of the vote, or a little more than 20 per cent, will elect, because there are Socialist and Labor candidates and Prohibition candidates. Consequently it is a pretty hard thing to keep them out of the legislature from these congested districts in Chicago." (4534.)

To attack Mr. Lorimer's election because of the bipartisan character of his support would be to attack the election of other members of this body, the regularity of which has never been brought in question.

Election logical result of conditions.

Taken altogether, the testimony indicates that Mr. Lorimer's election was the result of political conditions and not attributable to the corrupt use of money. The Democratic support which he received was the outcome of many different circum-

stances and conditions. During the two years prior to the election he had spoken in every part of the State, advocating the adoption of a constitutional amendment which enabled the people to appropriate $20,000,000 toward the construction of a deep waterway from Chicago to the Gulf of Mexico, for the establishment of which he had labored during his entire service in Congress. He had come into contact with theleading men of all parties and had been instrumental in creating a public sentiment sufficiently strong to accomplish that great result. In this work he had cooperated with a considerable number of the prominent Democrats of the State, and in some cases had established intimate personal relations with them. So strong was this element among the forces resulting in his election that it was mentioned in an article appearing in the Chicago Tribune on the morning following his election, as follows:

"The explanation generally made is that Lorimer is the exponent of the Lakes-to-the-Gulf waterway proposition, and that is the reason he received such a large number of Democratic votes."

All the evidence in the case tends to show a remarkable ability on the part of Mr. Lorimer to make friends among the membership of both political parties and attach them to his interests.

Homer Shaw, member of the house, a Democrat, a banker, and a man of high character, testifies that there was an organization of Democrats in the legislature who would not vote for Lorimer, of which he was the chairman; that they endeavored to hold Democrats in sufficient numbers to make impossible the election of Mr. Lorimer by Democratic votes; but that after two or three days of effort they found it impossible to do so. This organization was in existence for about a week before the election and was active in its efforts to increase its membership. Mr. Shaw testified that he talked with a great many Democrats who would not join the association, who gave various reasons for refusing to do so; he discovered that there were a large number of Chicago Democrats extremely friendly to Mr. Lorimer, so friendly that the members of the organization made no headway in talking party politics to them; that such Democrats seemed to have a personal friendship for Mr. Lorimer, which was controlling. Mr. Shaw further testifies that he knew from the start that Mr. Lorimer was the most formidable Republican who could be named, and that if any Republican could be elected by Democratic votes in the State of Illinois, it was William Lorimer.

The evidence clearly establishes a situation relative to the election under consideration which had no dependence whatever on corruption of any kind. What we mean is expressed in the testimony of a number of responsible witnesses heretofore mentioned and indicated further by Mr. Isley and Mr. Tippitt. There was no Republican in the State who stood as high with the Democrats as Mr. Lorimer, according to State Senator A. E. Isley, an attorney and a Democrat of Newton, Ill. (5527.)

Mr. Thomas Tippitt, for six terms a member of the Illinois General Assembly, and leader of one of the Democratic factions in the forty-sixth, composed of 26 Democrats, testified:

"My understanding is that three-fourths, probably, of the Democratic State central committee favored the election of Mr. Lorimer to the United States Senate. I think that is true." (4265.)

For weeks during the deadlock he was making earnest efforts to secure harmony in the Republican Party; he journeyed to Springfield almost every week because of his intense interest in the deep waterway, his purpose being to prevent the use and expenditure of the $20,000,000 appropriated by the State until an appropriation from the National Government could be secured for the same purpose, in order that the work might be successfully accomplished without loss or waste.

The policy advocated by Gov. Deneen was the expenditure of the $20,000,000, under conditions not necessary to be here discussed, without waiting for action on the part of the Government of the United States. The conflict in regard to these two propositions challenged the attention of the entire State, and the importance of its determination was such and Mr. Lorimer's interest in it was such that he traveled back and forth between Washington and Springfield for the sole purpose of aiding in the defeat of the one and the adoption of the other plan. During these visits to Springfield, as already appears in this report, conference after conference was held between him and Gov. Deneen after a political estrangement of six years, in an attempt to harmonize party politics. Nothing appears more clearly than the fact that one of the chief desires of Mr. Lorimer was that Gov. Deneen should be elected United States Senator, and it was not until the latter positively declined, for reasons clearly appearing in this record, to become a candidate, and until the deadlock had extended over a period of practically four months, and not until three members of Gov. Deneen's military staff, personal and political friends of his, had urged and importuned him to permit his name to be used in connection with the Senatorship, and Gov. Deneen

likewise personally had urged him, that Mr. Lorimer seriously considered the proposition.

Mr. Lorimer told many of his intimate friends that he did not want to go to the Senate, that he did not want to leave the House, and he cared so little about going to the Senate that he refused to allow his name to be used until after Gov. Deneen finally refused to be a candidate and there seemed to be no hope of uniting the different elements in the legislature on anyone else; he would not even then consent to have his name used if there was to be an extended controversy, and to ascertain whether such would be the case or whether he could be elected without such a controversy, his friends in both parties made the canvass which resulted in his election. With positive assurances that he could be elected that day, Mr. Lorimer testified before this committee that on the morning of his election, if Gov. Deneen would have taken the Senatorship, he would have supported him and not permitted his own name to go before the legislature, and this, after all Gov. Deneen had promised and failed to do, because he believed it would have been in the interest of harmony in the Republican Party in Illinois. (Lorimer, 7594–7595, 7738.)

The testimony taken together indicates that the election of Mr. Lorimer was the natural result of existing conditions and was willingly joined in by a large element in both parties.

The committee has presented in detail the various instances in which it has been claimed that money was corruptly paid to individuals to influence the election of Mr. Lorimer to the United States Senate, with the circumstances surrounding each, and in such a manner as to advise the Senate concerning all its salient features.

The committee patiently listened to a large number of witnesses, with equal patience have studied the testimony, and have carefully and, they think, judicially considered the same; it finds no evidence that in the election of William Lorimer as a Senator of the United States from the State of Illinois corrupt methods or practices were employed, and it is a fact that ought not to be overlooked or go unnoticed that nowhere in the entire mass of testimony is there any evidence showing that Mr. Lorimer, by word or by act, ever said or did anything in connection with his election by the Legislature of Illinois which can be justly criticized.

Personal character.

One thing stands out most conspicuously, this whole record considered, and that is that throughout the long deadlock and all the pressure, temptations, opportunities, strain, and excitement incident to the election of a Senator, notwithstanding the persistent effort made to fasten something of the kind on Mr. Lorimer, not one word was said or one thing done which in anywise reflected on him.

Not an indiscreet remark, not a suspicious suggestion, not an improper action or an impropriety on his part, in Springfield or elsewhere, during that contest has been testified to by a single witness. The fact is, the personal integrity, the habits, and life of Mr. Lorimer appear wholly exemplary and his personal character above reproach. His most relentless political enemies concede that. The Tribune, the morning after his election, editorially spoke of his "many merits" and "ability" (p. 1880).

Mr. Kohlsaat said (p. 429):

"From all I know, as I said before, his home life, his family life, is ideal. He has a beautiful family of children, which he has raised splendidly."

Mr. Lawrence B. Stringer, the Democratic candidate for governor in 1904 and the Democratic primary nominee for United States Senator in 1908, testified that he had often heard it said "that when Senator Lorimer made a promise you could rely upon it," and that he had never heard Mr. Lorimer's honesty and integrity as a man questioned, but, on the contrary, had "heard it spoken of very highly," and that is the general opinion among people who know him and has been for a great many years. (2327.) Other men of prominence in Illinois were charged with political treachery and bad faith. Mr. Lorimer is singularly free from such criticism.

Mr. Lorimer was first elected to Congress in 1894 from a normally Democratic district, and reelected six times. In eight campaigns he was defeated only once. Since he resigned from the House the district has returned to its Democratic allegiance.

In view of the suggestion as to the contribution of a fund to secure his election to the Senate, it is significant of his methods that in 1908 when a check was sent to him by Senator Hopkins, through Mr. Fred M. Blount, to be used in defraying his congressional campaign expenses, Senator Lorimer returned it with the following letter:

"CHICAGO, *November 2, 1908.*

"Hon. FRED M. BLOUNT,
"630–206 La Salle Street, Chicago, Ill.

"MY DEAR FRIEND: I received your communication, with check inclosed for $500. I wish to express my thanks to both you and Senator Hopkins for your great kindness.

"I have paid the total expense of my campaigns, both primary and election, without accepting a contribution from any person, although a great many have been tendered. I therefore feel that I can not accept yours.

"Assuring you that I appreciate the spirit in which it was sent, I am,

"Yours, very truly."

(Rec., 7393.)

The record shows that this letter was signed and forwarded by Mr. Lorimer.

Conclusion.

The record in this case is so long that we have felt it our duty to the Senate to present at unusual length our conclusions upon it, and this is the reason for the length of the report and the delay in presenting it.

We have sought to do justice by the people, by the Senate, and by Mr. Lorimer. The people are entitled to have the election of their representatives honestly conducted; the Senate is entitled to have its honor and integrity maintained by the election of its Members without corruption; and Mr. Lorimer is entitled to have the right to his seat determined in accordance with the law and the evidence. The Senate has once solemnly and deliberately passed upon the charges made against him. Its judgment, after a full investigation and extensive argument, was in his favor, and should stand unless new and convincing evidence is produced establishing corruption in his election. This rule is more liberal toward the Senate and the people than toward Mr. Lorimer, because if the judgment had been against him he would have been bound by it, and no amount of proof showing the injustice of the decision against him would secure its reversal and his reinstatement as a member of this body.

Absolutely no new and substantial evidence has been produced or discovered on this reinvestigation showing that he was elected by corruption, and we believe that all the rules of law, judicial procedure, and justice require that the former judgment of the Senate should be held to be conclusive and final.

If the Senate should hold, however, that its former judgment can be reconsidered and vacated, we submit for its consideration our conclusions on the charges made and the testimony adduced.

It is charged that Senator Lorimer was elected corruptly. This is the issue. Is this charge true or is it false? If true he should be denied a seat in this body; if not true we should so declare. The issue is to be determined by evidence and not by prejudice or popular opinion based on biased, imperfect, and distorted reports and suggestions. We have heard the evidence under oath; we have seen the witnesses as they testified; they have been fully cross-examined; their evidence has been carefully weighed; every suggestion of possible proof has been followed; and nothing has been left undone to ascertain the truth of the charges against Mr. Lorimer.

No personal guilt.

There is absolutely no evidence in all the testimony submitted intimating, suggesting, or charging that William Lorimer was personally guilty of any corrupt practices in securing his election, or that he had any knowledge of any such corrupt practices, or that he authorized anyone to employ corrupt practices in his election.

No corruption in his election.

We are convinced that no vote was secured for him by bribery; that whatever money White, Beckemeyer, Link, Holstlaw, or any other person received was not paid to him or them by anyone on Mr. Lorimer's behalf or in consideration of or to secure such vote or votes for him; that neither Edward Hines nor anyone else raised or contributed to a fund to be used to secure his election; that his election was the logical result of existing political conditions in the State of Illinois, and was free from any corrupt practice, and therefore we must find, and we do find, that William Lorimer's election was not brought about or influenced by corrupt methods and practices.

WM. P. DILLINGHAM.
ROBERT J. GAMBLE.
WESLEY L. JONES.
JOSEPH F. JOHNSTON.
DUNCAN V. FLETCHER.

(Cong. Rec., vol. 48, p. 6790.)

On the same day Mr. Lea, a member of the special committee of the Committee on Privileges and Elections, who were instructed under resolution of the Senate to

investigate whether in the election of William Lorimer as a Senator of the United States from the State of Illinois there were used or employed corrupt methods and practices, asked and obtained leave to submit the following views of the minority (S. Rept. No. 769, pt. 2):

VIEWS OF A MINORITY.

The undersigned, members of the committee appointed by Senate resolution adopted on June 7, 1911, to investigate whether or not corrupt practices and methods were employed in the election of William Lorimer to the United States Senate by the Legislature of Illinois, submit the following views:

The committee commenced the taking of testimony on June 20, 1911, at Washington, and continued its session there until August 9, 1911. The committee resumed its hearings in Chicago on October 10, 1911, continuing the same until November 22, 1911. It then adjourned to meet in Washington on December 5, 1911, at which time it resumed its sessions, and, with the exception of the Christmas holidays, sat continuously until February 9, 1912, when the hearing was concluded.

At the conclusion of its hearings on February 9, 1912, the committee made an order allowing counsel for Senator Lorimer to file a brief by March 1, 1912, on the plea of res adjudicata, which plea was formally entered by counsel for Senator Lorimer on the last day of the hearing. Counsel for Senator Lorimer was also given until March 15, 1912, to file a brief upon the facts of the case. Both of these briefs have been filed in compliance with this order and are ready to be transmitted to the Senate, together with the transcript of the evidence taken and abstracts of the testimony prepared by the attorneys for the committee.

On March 27, 1912, the committee met for the purpose of voting upon a report, and the following action was taken:

After disposing of some matters of regular business, Senator Jones offered the following resolution:

"That nothing has developed in or by this investigation that justifies a reversal of the solemn and deliberate judgment of the United States Senate rendered during the last session of the Sixty-first Congress holding valid the election of William Lorimer as a Senator of the United States."

Senator Kern offered the following resolution as a substitute:

"That in the opinion of the committee there were used and employed in the election of William Lorimer to the Senate of the United States corrupt methods and practices."

Senator Lea offered an amendment to be added to Senator Jones's resolution:

"But that said investigation by this committee shows that corrupt methods and practices were employed in the election of William Lorimer."

Senator Lea's amendment was lost by a vote of 5 to 3. Nays, Senators Dillingham, Gamble, Jones, Johnston, Fletcher; yeas, Senators Kenyon, Kern, and Lea.

Senator Lea made the following point of order:

"That the resolution offered by Senator Jones is not responsive to the resolution of the Senate appointing and instructing this committee in that the Senate only instructed this committee to investigate and report whether there were corrupt methods and practices used in the election of Senator Lorimer."

The chairman overruled this point of order. Senator Lea appealed from the decision of the chair, and Senator Jones moved to lay on the table the appeal of Senator Lea. This motion was carried by a vote of 4 to 3, as follows: Yeas, Senators Gamble, Jones, Johnston, Fletcher; nays, Senators Kenyon, Kern, and Lea.

Senator Kern's substitute resolution was then lost by a vote of 5 to 3: Nays, Senators Dillingham, Gamble, Jones, Johnston, Fletcher; yeas, Senators Kenyon, Kern, and Lea.

Senator Jones's resolution was adopted by a vote of 5 yeas, 3 nays. Yeas, Senators Dillingham, Gamble, Jones, Johnston, Fletcher; nays, Senators Kenyon, Kern, and Lea.

Senator Jones then offered the following resolution:

"There is no proof of the existence of any 'jack pot' or any other fund during the Forty-sixth General Assembly of the State of Illinois in connection with the election of Senator Lorimer other than the statements of White, Beckemeyer, Link, and Holstlaw that they were paid money after the election, and none of them except White claimed to have received such money for voting for Senator Lorimer."

Senator Kern moved to amend as follows:

"Inserting after the word 'Holstlaw,' in line 5, the words 'and certain circumstances corroborating said statements.'"

This amendment was lost by a vote of 5 to 3, as follows: Nays, Senators Dillingham Gamble, Jones, Johnston, and Fletcher; yeas, Senators Kenyon, Kern, and Lea.

Senator Fletcher offered the following amendment to Senator Jones's resolution, which was agreed to by Senator Jones:

"After the word 'claimed' insert the words 'nor does it appear otherwise.'"

And this resolution as amended was adopted by a vote of 5 to 3, as follows: Yeas, Senators Dillingham, Gamble, Jones, Johnston, and Fletcher; nays, Senators Kenyon, Kern, and Lea.

Senator Kern offered the following resolution:

"That in the opinion of this committee there was a fund distributed in the city of St. Louis to certain members of the Illinois Legislature who had voted for William Lorimer and also that Senator Broderick paid to Senator Holstlaw in the city of Chicago money on two occasions."

Senator Johnston offered to amend as follows:

"If any fund was distributed in Chicago or any other city, it was not to vote for Senator Lorimer."

After discussion Senator Lea offered the following resolution in lieu, which was accepted by Senator Kern:

"That in the opinion of this committee there was a fund distributed in the city of St. Louis on June 21, 1909, by Lee O'Neill Brown and on July 15, 1909, by Robert E. Wilson to certain members of the Illinois Legislature."

This resolution was adopted by a vote of 3 to 0, as follows: Yeas, Senators Kenyon, Kern, and Lea; not voting, Senators Dillingham, Gamble, Jones, Johnston, and Fletcher.

Senator Jones offered the following resolution:

"It is not proved that Edward Hines raised $100,000 or any other sum, or that he expended that or any other sum, or that he contributed any sum whatever to aid in or secure the election of William Lorimer to the United States Senate. The evidence is that he did not raise, contribute to, or expend said sum, or any sum of money whatsoever, to aid or assist improperly in the election of Senator Lorimer."

This resolution was adopted by a vote of 5 to 0: Yeas, Senators Dillingham, Gamble, Jones, Johnston, Fletcher; not voting, Senators Kenyon, Kern, and Lea.

Senator Gamble offered the following resolution:

"That in the opinion of this committee, this investigation does not show that there were used and employed in the election of William Lorimer to the Senate of the United States from the State of Illinois corrupt practices and methods."

This resolution was adopted by a vote of 5 to 3: Yeas, Senators Dillingham, Gamble, Jones, Johnston, and Fletcher; nays, Senators Kenyon, Kern, and Lea.

Senator Lea offered the following resolution:

"*Be it resolved*, That in the opinion of the committee this investigation has resulted in additional proof to that developed by the last investigation, that corrupt methods and practices were employed in the election of William Lorimer to the Senate of the United States which warrants a reversal of the former action of the Senate in declaring that the election of William Lorimer was valid, and that in the election of William Lorimer to the Senate of the United States corrupt methods and practices were employed, and that said election was invalid."

This resolution failed to pass by a vote of 5 to 3: Nays, Senators Dillingham, Gamble, Jones, Johnston, and Fletcher; yeas, Senators Kenyon, Kern, and Lea.

Senator Johnston offered the following resolution:

"That the testimony failed to show that Senator Lorimer himself used any corrupt practices or means, or had any knowledge if such were used."

This resolution was adopted by a vote of 5 to 0: Yeas, Senators Dillingham, Gamble, Jones, Johnston, and Fletcher; not voting, Senators Kenyon, Kern, and Lea.

The committee in making this investigation proceeded on the theory that its functions were similar to those of a grand jury and that it was vested with inquisitorial power. A great amount of evidence therefore was taken that is apparently not material and in the nature of hearsay. This was done in order that the committee might pursue to the end every possible channel of information and make the investigation as thorough as it was possible to make it. The work of the committee is evidenced by the fact that it has taken 8,588 pages of printed testimony in the examination of witnesses, and has been in session 18 weeks.

Without discussing in detail the evidence presented by the former committee investigating this same question, we believe that the evidence presented by this committee is broader and more far-reaching and establishes conclusively that at least 10 of the votes cast for William Lorimer on the 26th day of May, 1909, at the joint session of both houses of the General Assembly of Illinois, were corruptly cast, and the election of William Lorimer being obtained by corrupt methods and practices was therefore invalid.

An effort was made, as is shown by the report of the action of the committee on March 27, 1912, to rest the action of the committee in this case upon the plea of res adjudicata. We do not believe that such a plea is applicable or tenable in this case.

As we understand the procedure, the resolution relative to the second investigation of the election of Senator Lorimer was referred to the Committee on Privileges and Elections to report whether a new investigation was warranted, and that the committee in reporting the resolution ordering another investigation in fact reported that there was sufficient grounds for another investigation, and the Senate, in adopting this report of the Committee on Privileges and Elections and the resolution presented creating this committee, on June 7, 1911, ordered a new trial, and in ordering a new trial acted upon the question of res adjudicata—the plea of res adjudicata being such as can be made on the motion of the court or the tribunal acting as a court at any time—and that the committee appointed under the resolution adopted on June 7, 1912, should not, under the authority of its appointment, make any report upon the law involving the right of the Senate to reopen the case, but that said committee had only authority to make a report responsive to the resolution appointing and instructing the committee.

In election cases before the Senate a mistake is frequently made in drawing a comparison between such a trial and a criminal trial in court. Analogies are frequently misleading, and an analogy between the trial of an election case by the Senate and a criminal case is most misleading. The comparison, if drawn, should be between the trial of a Senate election case and a civil case before a court.

Subsection 1 of section 5 of Article I of the Constitution of the United States provides:

"Each House shall be the judge of the election returns and qualifications of its own Members."

So that no precedents or decisions of courts or other legislative bodies can have any but argumentative weight in the determination of an election case in either House of Congress.

The Senate is not bound by any precedents, and the only ones that are of any value in the determination of such a question are those which have been made by the Senate in determining similar cases heretofore.

It is submitted that there is no precedent of the Senate of the United States holding that a contested election case may not be reopened, and at least there are dicta to the contrary. The leading case is that of Senators Fitch, Bright, Lane, and McCarthy, of Indiana, of the Thirty-fourth and Thirty-fifth Congresses. (Election Cases, p. 244.) In that case, on June 12, 1858, a resolution that Fitch and Bright were entitled to their seats as Senators from Indiana was adopted.

Subsequently, in December, 1858, two other Senators were elected by the Legislature of Indiana, and a memorial was adopted by the senators and representatives in the Legislature of the State of Indiana representing that it was the wish and desire of the State that Lane and McCarthy be admitted to the seats in the Senate of the United States that were held by Fitch and Bright.

This memorial, like the resolution ordering a second investigation in the Lorimer case, was referred to the Committee on Privileges and Elections, and that committee, in an elaborate report, reviewed in detail the history of the case and the resolution which had been adopted in 1858 and asked to be discharged from the further consideration of the memorial of the Legislature of Indiana.

In that case it was not insisted that there was any new evidence or additional grounds which would warrant a reversal by the Senate of its former action, but the memorial amounted to an insistence that the Legislature of Indiana had the power to revise the decision of the Senate or, to state the same idea in terms of modern thought, that the State of Indiana had the power to recall its Senators.

Such seems to have been the idea of the Committee on Privileges and Elections that investigated the case, for it said:

"It may be conceded that the election (referring to the election of Lane and McCarthy) would have been valid and the claimants entitled to their seats had the Legislature of Indiana possessed the authority to revise the decision of the Senate of the United States; that Messrs. Fitch and Bright had been duly elected Senators from Indiana, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863.

"In the opinion of the committee, however, no such authority existed in the Legislature of Indiana."

While the language of the report and of the resolution may go further, such is mere dicta; as nothing was decided by the adoption of the resolution offered by the Committee on Privileges and Elections in accordance with its report, than that there being no vacancies in the Senate from the State of Indiana, the election of Lane and McCarthy was invalid.

If the Senate decided in this case what is insisted in the brief for Senator Lorimer that it did decide, then the decision has been overruled by subsequent cases in the Senate.

Another case in which it is insisted that the doctrine of res adjudicata was established is the case of Francis W. Sykes and George E. Spencer, decided by the Senate in the Forty-third and Forty-fourth Congresses. (Election Cases, 556.)

In point of fact, the Senate decided nothing relative to the case being reopened, the facts being that on May 28, 1874, the Senate adopted a resolution seating George E. Spencer and discharging the committee from further consideration of the memorial of Francis W. Sykes. On January 24, 1876, the Legislature of Alabama presented to the Senate a memorial of the State, praying that the seat in the United States Senate of George E. Spencer might be declared vacant. This memorial was referred to the Committee on Privileges and Elections, which reported that the case should not be reopened, and no action on this report was taken by the Senate.

In the case of David T. Corbin *v.* M. C. Butler (Senate Election Cases, 582), the facts are that in February and March, 1877, the separate credentials of Mr. Corbin and Mr. Butler were presented to the Senate and both referred to the Committee on Privileges and Elections.

On November 26, 1877, the Senate, by a resolution, discharged the Committee on Privileges and Elections from consideration of the credentials of M. C. Butler, of South Carolina, and on November 30 Mr. Butler was sworn as a Senator from the State of South Carolina, in accordance with the motion which had been determined in the affirmative—yeas, 29; nays, 28.

There was a final action by the Senate that M. C. Butler was entitled to his seat. Notwithstanding, on February 4, 1879, Senator Cameron, of Wisconsin, from the Committee on Privileges and Elections, submitted a report, accompanied by a resolution, that David T. Corbin had been duly elected a Senator for a term of six years.

To the committee's hearing of Mr. Corbin's petition, Senator Butler objected on the ground that the decision of the Senate on November 30, 1877, authorizing him (Butler) to be sworn, was res adjudicata. The majority of the committee overruled the plea. A minority of the committee, consisting of Senators Mellen and Salisbury, took the view that the former action of the Senate constituted res adjudicata.

The resolution reported by the committee, declaring David T. Corbin duly elected, was determined in the negative—yeas, 25; nays, 36. But the principle was established that a contested-election case, though finally decided in the Senate, could be reopened and reconsidered.

Again, in the case of Hon. Henry A. du Pont, of Delaware (Senate Election Cases, pp. 818–874), the question of the right of Mr. du Pont to his seat in the United States Senate was referred to the Committee on Privileges and Elections, which subsequently reported in favor of Mr. du Pont and accompanied the report by a resolution that he was entitled to his seat.

The resolution was amended so that it read that Henry A. du Pont was not entitled to a seat in the Senate and, as amended, was agreed to.

Subsequently thereto, at another session of the Fifty-fourth Congress, a memorial was presented from Mr. du Pont, asking that the question of the validity of his election be again considered and acted upon. This memorial was likewise referred to the Committee on Privileges and Elections, which was reported against a reopening of the case.

In discussing this report, Senator Hoar said:

"There has been an application on the part of Mr. du Pont—whom I respect personally, whom I eagerly desire should have a seat in this body, and who, I think, ought to have had one on the merits of his case—to reopen that case. No newly discovered evidence is suggested; no fraud or mistake is suggested. The reopening of the case would be merely a reconsideration of a question of constitutional law which this great constitutional court has decided once. That is all he asks, and that is all he would obtain if his prayer for a reopening of the case were granted."

Here we find inference from the statements of one of the ablest and most learned Senators who ever sat in this body—that if there has been newly discovered evidence or fraud or mistake, the Senate would have a right to reopen the case.

In the case of Spofford *v.* Kellogg, 557 to 589, Senate Contested Election Cases, the Committee on Privileges and Elections reported in favor of reopening the case formerly decided on the ground of newly discovered evidence, but this report was not acted upon by the Senate.

Summarizing these cases we find not a single one that has held that the Senate could not reopen a contested-election case on the ground of newly discovered evidence; but, on the contrary, we find statements in support of a report against reopening a

case, from which the inference can be fairly and logically drawn that if there had been newly discovered evidence the case should have been reopened, and an unacted-upon report by the Committee on Privileges and Elections in favor of reopening on the ground of newly discovered evidence a contested-election case that had been finally decided.

In this case the usual procedure was followed; the memorial from the Senate of the State of Illinois and a resolution providing for a reopening of the case were referred to the Committee on Privileges and Elections, and in this case the Committee on Privileges and Elections, as it did in the case of Spofford and Kellogg, voted in favor of reopening the case; and in accordance with the report of the committee the Senate adopted the resolution taking this sound view, and the case was thereupon reopened for a full and complete reinvestigation of the facts. When the Senate had thus voted the time for the plea of res adjudicata had finally passed.

Had the majority members of the investigating committee—all of them being distinguished lawyers—believed that the plea of res adjudicata would prevent a reconsideration of this case upon its merits; had they believed that neither this committee nor the Senate could consider the results of their labors, obtained at such enormous public cost, no matter what new or important might have been developed thereby, it is inconceivable that they would have sanctioned the expenditure of money that has been involved in the reinvestigation of this case and proceeded without right or jurisdiction.

In considering the evidence presented in this case, it must be borne in mind that the crime of bribery is distinct from nearly every other crime, in that both parties to it have the same incentive and desire, springing from the instinct of self-preservation, to conceal the crime. In nearly every other crime the person wronged or injured is influenced by motives of revenge or desire for reparation or satisfaction to assist the State in securing the facts and punishing the offender. But in bribery both the bribe giver and the bribe taker are equally guilty and equally desirous of concealing the truth and cheating justice. In nearly every case of bribery proof thereof must rest solely upon circumstantial evidence.

But in this case there are confessions by four men that their votes were secured by bribery, and their confessions are corroborated by strong circumstantial evidence.

If bribery can not be proved in the Senate by confessions of the bribe takers, corroborated by strong circumstantial evidence, then the conclusion is irresistible that only express contracts of bribery, duly authenticated by witnesses, can establish that crime to the satisfaction of the Senate of the United States.

We are of the opinion that the evidence in this investigation shows conclusively that the following votes for William Lorimer were obtained by corrupt methods: Charles A. White, H. J. C. Beckemeyer, Michael Link, Joseph S. Clark, Henry A. Shepherd, Charles Luke, D. W. Holstlaw.

As the vote of the bribe giver is equally corrupt as that of the bribe taker, we include the following votes: Lee O'Neil Browne, Robert E. Wilson, John Broderick.

In view of the proof showing that the 10 votes of the members set out above were obtained by corruption, circumstantial and other evidence show that the following votes were also obtained by corrupt methods and practices: W. C. Blair, Thomas Tippitt, Henry L. Wheelan, John H. De Wolf, Cyril R. Jandus.

It is impossible to quote from such a voluminous record any considerable part of the evidence upon which the above statements are based; but discussing briefly in their order the evidence relating to each of the votes as set out above, we find the following to be the facts:

Charles A. White.

Charles A. White stated under oath that he was promised money by Lee O'Neil Browne, minority leader, to vote for William Lorimer on May 26, 1909, and that, pursuant to that promise, he was paid $1,000 by Lee O'Neil Browne, as follows: $100 cash before the legislature adjourned; $50 on the 16th of June, and $850 on the 17th of June; and that he was subsequently paid by Robert E. Wilson, as the agent and representative of Lee O'Neil Browne, $900 on July 15, 1909, at the Southern Hotel in St. Louis.

White's testimony is corroborated by the following facts:

(1) By the fact that White was in debt at the end of the legislative session and had drawn all of his salary several months before, and that, nevertheless, on June 18 or 19, after White met Browne in Chicago, White had a large amount of money which he deposited in a department store in St. Louis, which deposit was testified to at one of the hearings by Thos. P. Kirkpatrick, the cashier of the department store, and which testimony was made a part of this record.

(2) White testified that immediately after the adjournment of the legislature in June, 1909, he wrote asking Browne for the balance of his Lorimer money, and the correspondence thereafter with Lee O'Neil Browne shows that Lee O'Neil Browne knew that White was short of funds at the adjournment of the legislature in June, 1909, and White expected money from him (Browne), as is shown by the following letter of Lee O'Neil Browne to Charles A. White, in answer to the letter of White asking for his money.

OTTAWA, ILL., *June 9, 1909.*

HON. CHARLES A. WHITE, *O'Fallon, Ill.*

MY DEAR CHARLIE: I did not get home until the night of Monday, June 7, when I found your letter awaiting me. I wish you had spoken to me of the matters contained in your letter before we left Springfield. It would have been comparatively easy for me at that time to have advised with you personally and properly. It is far more difficult now, and I would hardly know what to say to you without seeing you personally. In any event, unless you would care to see me before that time by coming here or meeting me in Chicago, I expect to see you and have a visit with you some time within the next two weeks. I shall be only too glad to advise with you along the line of the matters referred to, and suggest anything that may be appropriate and proper. You know where I stand, old man, and that I will go my length for you. Should you find it necessary to see me before the end of the next two weeks, you had better arrange to come to Chicago and meet me there. However, as matters stand, and in the way that I am tied up with business matters now, I would prefer to put off the meeting for the length of time I have stated. I want you to feel and realize that I am as good a friend as you have in the world, and that I am not only willing but ready to do anything in my power for you at any time. My best regards to you.

Very sincerely, your friend,

LEE O'NEIL BROWNE.

And by another letter, under date of June 13, 1909, which is as follows:

OTTAWA, ILL., *June 15, 1909.*

FRIEND CHARLES: Your letter did not reach me till too late to do any good. I was in Chicago, but could not have remained longer had I got your letter. Got home here this evening and am due in court to-morrow a. m. But, Charlie, I will be in Chicago Tuesday or Wednesday sure. (This is under your hat, though, for I do not want to be bothered by every job hunter in Chicago.) If you can wait, I'll do my best to see you. I'll be at the Briggs when there.

In haste,

BROWNE.

And that in spite of the fact that Browne knew White needed money at that time, yet after he had had his interview with White in Chicago on June 16 and 17, he wrote, saying, among other things:

"Perhaps, however, you had better wait and save the money for the next campaign."

Showing thereby that Browne knew White had money at that time; and by the letter which Browne wrote to White on July 16, 1909, the day after Wilson paid White $900 more in St. Louis, according to White's testimony, in which Browne said, among other things:

"I did not dare to attempt the trip. I hope everything is all right with you and satisfactory and that you are happy and fairly propsperous."

(3) That White, with at least five other members of the legislature, met Wilson in St. Louis on July 15, 1909, in response to telegrams from Wilson, and that no satisfactory reason for this meeting was ever given, and that several of the members of the legislature meeting Wilson were shortly thereafter proved to have had a large amount of currency in their possession, chiefly in bills of large denominations.

(4) By the threats of White to blackmail Browne and Lorimer, which were made in August, 1909, to friends of Browne, and which were doubtless communicated to Browne, and by the thinly veiled threats of exposure by White in a letter to Browne of October 20, 1909, in which he stated, according to his testimony, he knew Lorimer and Browne were under no obligations to him, since he had received his part of the Lorimer and jack-pot money, and the fact that thereafter Browne and Senator Lorimer both tried to secure positions paying satisfactory salaries to White. For if White had had no knowledge that would be injurious to Lorimer or Browne, he could not have blackmailed them successfully, and there would have been no reason to obtain the position that was secured for him by Senator Lorimer, through Lee O'Neil Browne, after these threats, or no reason to try to placate White. On the contrary, innocent men would indignantly have refused to have anything else to do with such a blackmailer.

H. J. C. Beckemeyer.

Mr. Beckemeyer testified that he was paid $1,000 by Lee O'Neil Browne at St. Louis, at the Southern Hotel, on June 21, 1909, and that Mr. Browne, in paying him the $1,000, said: "This is the Lorimer money," and that there would be some more in the future, and that he was paid $900 additional in St. Louis at the same hotel on July 15, 1909, by Robert E. Wilson, Browne's agent, and that on both of these trips to St. Louis he met other members of the legislature, to wit, Henry A. Shepherd, Michael Link, Joseph S. Clark, Charles Luke, and, on the last trip, Charles A. White.

This confession is corroborated by the fact that Beckemeyer subsequent thereto, on the 7th day of August, 1909, deposited five $100 bills in the Commercial Trust Co. of St. Louis, and that he was identified at the trust company by a Mr. Gray, and which is corroborated by Mr. Gray.

Beckemeyer's testimony is further corroborated by the testimony of Shepherd, White, Link, and Clark, to the extent of establishing that they saw Beckemeyer in St. Louis on the days named, and by the testimony of Browne and Wilson admitting that they met Beckemeyer in St. Louis on the days named, and by the further fact that Beckemeyer attempted to deny, when he was first before the grand jury, that he had ever been to St. Louis; by his actions when the report became current that White was to make an exposure of the members of the legislature who voted for Lorimer, and by the letter which Wilson and Beckemeyer agreed at their conference in Springfield in April, 1910, relative to the White exposure, should be written so as to give an excuse for the trip to St. Louis when Wilson was there on July 15, 1909. The letter is as follows:

CHICAGO, *June 26, 1909.*

Hon. H. J. C. BECKEMEYER,
Carlisle, Ill.

FRIEND BECKEMEYER: Doc. Allison was speaking to me regarding getting up a banquet for Lee in his home town, Ottawa, and asked that I take matter up with some of the boys. I expect to go to St. Louis in the near future in connection with our submerged land committee, and will advise you in advance as to when I will be there, and I would like you to meet me.

With best wishes to you, I am,

Very truly, yours,

ROBERT E. WILSON.

The agreement for this letter to be written and antedated nearly a year, the telephone messages from Wilson to Beckemeyer to meet him in Springfield on April 21, 1910, the registering of Beckemeyer at the hotel in Springfield, where he went for that conference with Wilson, under the assumed name of J. Daugherty, marked both Beckemeyer and Wilson at that time as criminals who were fearing that their crime would be detected, who were preparing evidence to protect themselves, and who were afraid of everybody and everything; all of which corroborates Beckemeyer's story and, establishing its truth, proves the corruption of both Beckemeyer and Wilson. The long-distance telephone message from Wilson for Browne to Beckemeyer to keep his lips sealed as soon as Browne heard of White and Tierney's visit to Beckemeyer is another link in the chain of evidence corroborating Beckemeyer.

Michael Link.

Michael Link testified before the former investigating committee of the Senate, and his testimony by agreement was put in this record, that he received $1,000 from Browne at the Southern Hotel in St. Louis on June 21, 1909, and $900 from Robert E. Wilson, Browne's agent, at the Southern Hotel, in St. Louis, on July 15, 1909; that he had gone there on both occasions in response to a letter or telegram from Browne or Wilson. This testimony is corroborated by the testimony of other members of the legislature that they saw Link in St. Louis on the two occasions mentioned by him, and further by the fact that he originally denied, before the grand jury, even having gone to St. Louis, and stated that he had committed perjury because he did not desire to incriminate himself.

Joseph A. Clark.

If the confessions of White, Beckemeyer, and Link are true, and other corroborating evidence makes it impossible to deny their truthfulness, then Clark's vote was also corrupt, as he was one of the Democratic members of the legislature who voted for Lorimer, and who was summoned by Browne and Wilson to meet them in St. Louis on June 21 and July 15, 1909, respectively, and who did meet them there on those

dates, with other members of the legislature who admitted receiving "Lorimer money," or Browne and Wilson would have to be regarded as summoning an innocent man to witness the consummation of the crime of bribery between Browne and Wilson, on the one hand, and White, Beckemeyer, and Link on the other.

The whole record makes it impossible to believe that Clark did not also receive the sum of $1,000 from Lee O'Neil Browne on June 21, 1909, at St. Louis, and on July 15, 1909, $900 from Robert E. Wilson, even in the face of the fact that Clark absolutely denied that he received any money from anyone at anytime.

The record shows that Link, Beckemeyer, White, and Luke all had large sums of money after their conference at St. Louis; and with confessions by Beckemeyer, White, and Link, corroborated by circumstantial evidence establishing this, it is impossible to take any other view of the case than that Clark also received similar sums of money upon his visit to St. Louis.

Henry A. Shephard.

Henry A. Shephard was a banker and a Democratic representative in the legislature of 1909. He lived at Jerseyville, Ill. Shephard claimed that Mr. Lorimer gave him a distinct promise that a certain man should not be appointed as postmaster at Jerseyville, and that this was the only consideration which moved him to vote for Lorimer.

The record, however, shows that Shephard went to St. Louis on June 21, 1909, and met Browne there with Link, Beckemeyer, Clark, and Luke; that he went to St. Louis again on July 15, 1909, and met Robert E. Wilson there, the above-named representative also being present in St. Louis on that day, as well as Charles A. White. Shephard was notified in advance both by Browne and Wilson to meet them there at those times.

Shephard's testimony is full of contradictions. At one of the former hearings he testified that he went to his bank box at the Mercantile Trust Co. in St. Louis before he saw Robert Wilson. This record discloses that Shephard went to the Southern Hotel and met Wilson and that after his interview with Wilson he went to his safety deposit box in the Mercantile Trust Co. This is borne out by the records of the Trust Co. in that they show the hour at which Shephard went into the vault, which is subsequent to the time he testified he had his interview with Wilson; nor did he deny at these hearings that his visit to the bank box was subsequent to his interview with Wilson. He attempts to explain both visits to St. Louis on the flimsy pretext of getting packing for his automobile. The fact of his being present on both of those occasions when others admitted that they received money, the visit to his bank box immediately after his interview with Wilson, coupled with the statement by Beckemeyer that Shephard was given one of the larger bills because he was a banker and could pass it more easily, with Shephard's contradictions upon the stand, with his communication with Browne and Wilson immediately before the exposure of White was made but after the visit of White and Tierney to Shephard, and with his registering in Chicago under an assumed name upon his trip there when he saw Browne and Wilson just before White's exposure was published, are sufficient to warrant the conclusion that he was one of those who received money for the purpose of voting for Senator Lorimer.

Charles Luke.

Charles Luke, a Democratic member of the general assembly of 1909 and a member of the Browne faction, went to St. Louis for the purpose of meeting Browne on June 21, 1909, and Wilson on July 15, 1909, in response to a telegram from Browne and Wilson. Luke died before any of the investigations in this case began, and his testimony is therefore not in any of the records; but his wife testified that about the time of his visit to St. Louis in July, 1909, he had $950 in large bills. These facts, coupled with the statements that he made to various people as to there being money in the senatorial election beginning with the time when he evidently expected to get money by causing a band of Democrats to vote for Hopkins, and the statements made to White as to a "jack pot" in the legislature, corroborated by the fact that other members of the legislature who were in St. Louis on these two occasions admitted receiving money, warrants the conclusion that Luke also was one of the receivers of "Lorimer money" as the result of casting his vote for Lorimer.

Luke, Clark, Link, Beckemeyer, Shephard, and White must all stand together as innocent men or fall together as guilty. Link, Beckemeyer, and White confess, and circumstances and their own actions establish the truth of their confession. While Clark and Shephard deny their guilt, their attempts to explain their presence in St. Louis in Browne and Wilson's room at the Southern Hotel upon the occasions when the confessed crimes of bribery were being committed; their attitude upon the wit-

ness stand; their efforts to conceal their movements and identity while they were going about conferring with Browne and Wilson after it had become known that White was going to make an exposure; their contradictions and other circumstantial evidence make them fall with Beckemeyer, Link, and White. Luke's record is the same as Clark's and Shephard's, except there is no testimony by him in any record.

D. W. Holstlaw.

D. W. Holstlaw testified that he was told by Senator Broderick before he voted for Senator Lorimer that there was $2,500 in it for him, and that, while he would have voted for Lorimer anyhow, subsequently thereto he was told by Broderick that he would be notified when he was to come to Chicago; and on June 15, 1910, he received a letter from Senator Broderick asking him to meet him in Chicago; that he wired Mr. Broderick that he would meet him there, and on the next day arrived in Chicago and went out to Broderick's saloon; that Broderick gave him $2,500 in currency, and that he took the money to the State Bank in Chicago, introduced himself to the president of the bank, who caused Newton, the chief clerk, to make out a deposit slip, in duplicate, placing this amount to the credit of the Holstlaw Bank in Iuka, Ill., the Chicago correspondent of which was the State Bank; that again, in August, 1909, he was notified by Broderick to come to Chicago, and that he went to Chicago and received $700 from Broderick, which he likewise deposited in the same manner at the State Bank in Chicago.

Holstlaw's testimony is corroborated by the testimony of the president, the chief clerk, and another official of the State Bank of Chicago, who testified that Mr. Holstlaw, on the dates mentioned in his testimony, deposited $2,500 and $700 in currency, respectively; and by an examination of the books by the committee's expert accountant.

This investigation has resulted in removing all doubts as to the correctness of Holstlaw's testimony and confessions, in that the misspelling of the Holstlaw name on the duplicate deposit slip, which was made much of in the last investigation, has been cleared up and shown to have been written by the chief clerk of the bank in Chicago instead of by Holstlaw.

The record also discloses the letters and correspondence between Broderick and Holstlaw asking Holstlaw to come to Chicago, which are of much value, inasmuch as Broderick denied that he ever sent for Holstlaw to come to Chicago to see him.

Lee O'Neil Browne.

Lee O'Neil Browne was the majority leader of the Democrats in the legislature of 1909. There is no dispute that Browne was in St. Louis on June 21, 1909, and his correspondence shows that he had intended going to St. Louis on July 15, 1909, for the purpose of meeting certain Democratic members of the legislature who voted for Senator Lorimer.

It can not be seriously questioned that Wilson and Browne upon the occasions of these two trips to St. Louis did distribute money to certain members of the legislature. This fact being admitted as a result of an investigation, it only remains to determine for what purpose this money was distributed. Three members of the legislature who met Browne and Wilson in Chicago and St. Louis testified that they received money, and two of them that it was "Lorimer money."

The visit to St. Louis, and the other one planned but not carried out, with the confessions of Beckemeyer, White, and Link, established that these three and others were bribed to vote for Lorimer, and that Browne was the man who bribed them and the man who paid them. There is no doubt also that Browne was one of the chief managers of Lorimer's campaign, and that, with Speaker Shurtleff and Senator Lorimer, the campaign was planned and carried to a successful conclusion. That Browne was in the business of buying votes to elect Lorimer is further evidenced by the fact that Browne unsuccessfully solicited Meyers, a Democratic member of the legislature—a man of high standing—to vote for Lorimer, and said to him: "There is some good State jobs to give away yet and plenty of the ready necessary."

Robert E. Wilson.

The same principle that applies to Browne applies with equal force to Robert E. Wilson. The two are linked absolutely together, and as the vote of the bribe giver is equally corrupt with that of the bribe taker, Wilson's vote stands as putrid as those of White, Beckemeyer, and Link, who confessed. As has been shown in the summary of the evidence of those members of the legislature who went to St. Louis, Robert E.

Wilson was the man who made the trip to that city on July 15, 1909, for the purpose of distributing money to certain members of the legislature who had voted for Lorimer.

The explanation that Wilson gave upon the stand as a reason for his trip to St. Louis is far-fetched and is of no force when considered with the statements of Beckemeyer that this excuse was made by Wilson after White's exposure was threatened, when Wilson was going about the State meeting the members of the legislature to whom he had given money; and that in furtherance of this plan of making evidence for the defense, Wilson had written a letter in regard to the St. Louis trip to the members of the legislature who met him there, antedating it nearly a year. On the contrary, this evidence discloses that Wilson was preparing a defense at that time by false statements in which he was getting other members of the legislature to acquiesce, which is inconsistent with the idea that Wilson was guiltless.

Wilson's attitude when the first investigation was had in Chicago, in 1910, when he left this country, going to Canada and registering there under an assumed name and staying out of the country until after the investigation in Chicago was finished, is another circumstance tending to prove his guilt and negativing the idea of innocence.

John Broderick.

Broderick stands upon the same footing as Browne and Wilson. The confession of Holstlaw, corroborated by other evidence, establishes that Broderick promised Holstlaw $2,500 for voting for Lorimer; that in pursuance of this promise, and before the legislature adjourned, Broderick told Holstlaw he would notify him when Holstlaw should come to Chicago; that thereafter, on June 16, Holstlaw received a letter from Broderick telling him to come to Chicago the next day; that Holstlaw thereafter went to Chicago, arriving there on the 17th of June, going straight to Broderick's saloon, where he was paid $2,500 in currency, which money was deposited, as has been shown heretofore, by Holstlaw in the State Bank of Chicago; that thereafter Broderick wrote another letter to Holstlaw stating that he would like to see him in Chicago not later than 4 p. m., Saturday, August 28, and that again Holstlaw went directly to Chicago, and upon his arrival there went to Broderick's saloon, where he received $700, which he likewise deposited in the State Bank in Chicago.

Broderick's attitude on the stand was a brazen attempt to deceive the committee. He testified first that he did not know how Holstlaw happened to come to Chicago, that he had not invited him there and was much surprised to see him the day of his arrival; but after his letter was produced asking Holstlaw to come to Chicago to see him Broderick admitted writing the letter. There can be no doubt from this record that Holstlaw was bribed and voted for Lorimer, and that Broderick was the bribe giver.

William C. Blair.

William C. Blair was a Democratic member of the legislature, residing at Mount Vernon, Ill. He is a lawyer, greatly dissipated, appearing more than once before the committee in a state of intoxication—once to such an extent that he was ordered from the witness stand.

Mr. Blair voted for the Democratic candidate for United States Senator on every ballot up to the last, with one exception, when he cast a complimentary vote for one Murray. On the last ballot he voted for Lorimer.

A few days prior to the election of Lorimer he told A. C. Tanner, a grocer of Mount Vernon, that he was thinking of voting for Lorimer and that it meant a great deal to him.

Benjamin F. Moore, sheriff of Wabash County, Ill., had a conversation with Blair the night before the senatorial election, in which Blair proclaimed his loyalty to Stringer, the Democratic candidate. Soon after the election Blair talked with Mr. Moore on the subject and told him that he (Blair) would have been very foolish to have voted for Stringer and let all of the Lorimer money go by him and not get his part of it.

In the month of July, 1909, about the 20th, Blair attended a baseball game at Centralia, Ill., was under the influence of liquor and exhibited a roll of bills in the presence of several witnesses, Mr. Tanner testifying that he observed in the roll at least eleven $100 bills.

As Blair was in debt, owing about $2,000, as he says, with a mortgage of $1,300 on his home, impecunious and insolvent, the display of this large sum of money excited considerable comment. In answer to Mr. Tanner's inquiry as to where he got the money, Blair said he was in consultation with a client about an important case, and had gotten a portion of his fee from him; that he had been at Olney, Ill., and had come directly from Olney to Centralia that day, the day of the baseball game.

It will be remembered that Olney was the home of Thomas Tippitt, the leader of the so-called Tippitt faction to which Blair belonged. Tippitt and Blair lived in the same senatorial district.

Blair in his testimony before the committee undertook to account for his possession of the roll of $100 bills exhibited by him at the baseball game. He first testified that in the summer of 1909 he had four or five $100 bills in his possession. He afterwards gave the number of $100 bills as five, which he said he had put in the custody of his wife, who kept them in a closet at their home. A little later he testified that his best recollection was that he must have had six or eight $100 bills, and that he believed he took as many as eight $100 bills with him to the baseball game.

A little further along in his testimony, when recalled to the stand, he said that his best recollection was that he had from $600 to $1,100 with him at the baseball game.

His explanations as to where he got the money were confused and contradictory. His salary as member of the legislature was $2,000 per annum.

He testified first that he drew $400 on his salary early in the session, in January, and received the balance at the close of the session, about June 4; that the State treasurer paid him $1,400 about that date—a day or two before he started home—part of it in $100 bills; that when he got home he gave his wife $800, mostly in $100 bills, and paid out the other $600 on his debts; that his wife kept this money until he took it out of the closet on the day of the baseball game.

The books of the treasurer of state showed that Blair had drawn all his salary before the 20th of February; and the books of the Ham National Bank, of Mount Vernon, and the canceled warrants on the State treasury showed that Blair had deposited the last salary warrants, amounting to over $1,300, on February 12 and February 22, in the Ham National Bank, and that it was all checked out very soon thereafter, leaving an overdraft of $1.40, which was not paid until July 7 following.

Mr. Blair's financial condition on July 20, when he says he took the roll of $100 bills from his closet, was described by him briefly as follows:

"The bank was threatening to sue me for two hundred and odd dollars. I owed the Ham National Bank some four hundred and odd dollars, and I owed the Jefferson State Bank some money—between $100 and $200—and I owed the Third National Bank some $200 or over, and I owed store bills there."

This was in addition to the $1,300 mortgage on his home, which had been running for five years still unpaid. He afterwards testified that his debts outside of the mortgage would run nearly $2,000.

When confronted with the books of the State treasurer and the bank, showing conclusively that his statement as to having drawn this money on his salary account was utterly false, Mr. Blair became confused and was unable to account for a single one of the several $100 bills which he admits that he exhibited at the baseball game.

The attention of Senators is invited to the testimony of this man, after he was thus shown to be a willful falsifier, for a striking example of the most stupid, bungling piece of perjury ever resorted to by a corruptionist in a futile attempt to cover his tracks and hide his infamy.

But where did Blair get the money? It will be remembered that Thomas Tippitt was the leader of one of the Democratic factions in the legislature, and Lee O'Neil Browne the leader of the other. Both voted for Lorimer on the last ballot. Each was leading his followers to Lorimer. It will also be remembered that Robert E. Wilson, Browne's agent on account of the latter's inability to act in person, paid the second installment of the corruption money to Browne's southern Illinois followers on the 15th of July.

We find Mr. Blair visiting Olney, the home of Thomas Tippitt, on the 19th of July, without any explanation for the visit. The evidence shows that Blair and Tippitt were together there on that day. Blair left Olney and went directly to Centralia, where he exhibited at least $1,100 in $100 bills—bills of the same denomination in which Browne's southern Illinois followers were paid in St. Louis. He is unable to explain where he obtained the money. He committed deliberate perjury when attempting to explain, and then broke down utterly in his further attempts at explanation. But this is not all.

Both Blair and Tippitt denied that they had met in Olney in July. Blair swore that he had not been in Olney.

Yet he was confronted with the hotel register, showing that he was at Olney that day, and the local newspaper chronicled his presence there that day. Mr. Rowland, a reputable editor and lawyer, testified that he saw him there that morning inquiring for Thomas Tippitt, and Judge John A. McNeil, a highly reputable lawyer and ex-county judge, saw Tippitt and Blair meet in Olney on the street in the morning about that time in July and walk off together.

The facts that Blair falsely denied being in Olney at all during that month and that Tippitt and Blair both felt called upon to deny that they had seen each other in Olney are particularly significant and throw much light on the question as to where Blair got the money.

Thomas Tippitt.

The preceding discussion of Blair's vote, in view of the confessions of other members of the Legislature of Illinois and the proof of their corruption in voting for Senator Lorimer, establishes that Blair's vote was corruptly cast for Lorimer and that he received his share of the corruption fund from Thomas Tippitt. The bribe giver being equally guilty with the bribe taker, Tippitt's vote for Lorimer under this view was as corrupt as that of Blair.

John H. De Wolf.

John H. De Wolf was a Democratic member, a farmer, residing at Canton, who voted for Lorimer on the last ballot. It was De Wolf, according to White's testimony, who on the day before the senatorial election asked him if he had been up to the trough yet, adding with an oath, "Well, I have already been up to the trough and got mine."

In explaining this De Wolf testified that while he did not remember it he might have said to White, "Have you been up to the trough?" But if he did he meant to inquire if White had been up to the bar, as he often used the word "trough" in referring to the bar.

Ex-Senator Hopkins and others testified as to the rumor that a plan was on foot among certain Democratic members at one time to sell enough votes to insure Hopkins's election.

So much credence was given to this report that Roger Sullivan came down from Chicago to head off the movement.

De Wolf testified that he and some others devised this plan as a joke, one of his purposes, as he says, being to have some one telegraph Roger Sullivan, and he would thereby be induced to come down to Springfield and buy the members some nice, black cigars.

This jocular individual bought 62 acres of land in August, 1909, and paid $600 of the purchase money in bills of a large denomination.

In accounting for his possession of these bills he testified that he kept them in a Bible at his home and had so kept them for three months or longer.

He had a checking account at the bank; does not remember when or the circumstances under which he placed the money in the Holy Book, and did not remember where he got it. His efforts to explain the possession of this money were grotesquely ludicrous.

Henry L. Wheelan.

Henry L. Wheelan is an insurance and real estate agent, residing at Rock Island. He was the Democratic representative from that county, and on the last ballot voted for Lorimer.

His vote had been solicited some time before by one Hughes, a business associate of Mr. Lorimer, in the contracting business, and also by McCarthy & Walsh, of Davenport, Iowa, friends of Lorimer, and also contractors. These men deny that they resorted to anything but moral suasion in the effort to procure Wheelan's vote.

In the fall of 1909 Wheelan purchased real estate and paid at least $1,000 of the purchase price in $100 bills.

He says he borrowed three of these bills from one Cox, a stonecutter and ex-policeman, who told him that he had that amount "planted," and that he borrowed seven $100 bills from a lawyer of the name of Scott; both loans being without security, Wheelan having no property save that which he was purchasing.

Cox testified that while he had a bank account, he had been carrying these three $100 bills around on his person for two or three months to conceal the fact from his wife.

The lawyer, Scott, testified that he also had an account in a bank across the street from his office, but that he had been carrying the $700 in bills in his pocket for a week or two weeks before he loaned it to Wheelan.

The efforts of Cox and Scott to explain where they respectively obtained the money were strikingly similar to those of Blair and De Wolf, hereinbefore referred to.

Cyril R. Jandus.

Mr. Jandus is a typical Chicago ward politician, and has trained with the gang for a long time.

He is a Democrat, represented a Chicago district in the State Senate, and voted for Lorimer on the last ballot. According to his testimony, he was an habitué of Senator John Broderick's saloon, played poker, and, when not engaged in politics or poker, practiced law.

Mr. Jandus was in Broderick's saloon on the occasion of the first of Senator Holstlaw's visits there and was one of Broderick's witnesses.

The bipartisan Chicago machine has provided him with a position in the county clerk's office, which he now holds.

Jandus also was buying property soon after the election of Senator Lorimer, paying out considerable sums of money therefor. He testified that he had about $5,300 in large bills which he kept in a tin box in his office vault, which was accessible to other occupants of the office; that he had been accumulating this money for a long time, half of it being in $100 bills. He was unable to inform the committee as to where he had procured any one of these bills.

He had a bank account, and why he kept this large sum in his office, which was occupied by four other person, was not explained.

His testimony as to the sources from which he might have derived part of the money is of such character as to place him in the class with Blair, De Wolf, and Wheelan.

Another important fact developed by this investigation was that no third-degree or improper methods were used in examining the members of the legislature as witnesses before the grand juries in Cook and Sangamon Counties. District Attorneys Wayman and Burke testified that no improper methods were used and no witnesses were terrorized or forced through fear to give testimony that was false, and there is no evidence that successfully rebuts this testimony.

In view of these facts, sufficient votes having been corrupted, it is not necessary for us to show either Senator Lorimer's connection with or guilty knowledge of the corruption, nor is it necessary for us to trace the source of the corruption fund. But we can not conclude our statement to the Senate without making the observation that Senator Lorimer's hand was the guiding force in shaping the action of the Legislature of Illinois in 1909 from soon after its organization until the day of his election, and that he was in such close consultation with Speaker Shurtleff and minority leader Lee O'Neil Browne as to justify the belief that these men were his agents and to warrant our holding him bound by their actions.

The agency of these men is so thoroughly established that Senator Lorimer could reap no reward by virtue of their wrongful action without being equally guilty and responsible for their wrongdoing.

The relations between Senator Lorimer and Lee O'Neil Browne are established by Senator Lorimer's own testimony, as well as Browne's, in which Senator Lorimer stated that he felt the criminal actions brought against Browne were on account of Browne's relations with him, and that, therefore, he was under moral obligation to do as he did—furnish Browne with money with which to defend himself, irrespective of whether Browne was ever able to refund the money thus advanced. The testimony upon this point is as follows:

"Senator LORIMER. Not exactly, Judge, but somewhere in the neighborhood of $8,000 or $10,000. I am not sure of the exact amount.

"Mr. HANECY. And did you loan it to him at different times and in different amounts?

"Senator LORIMER. Why, yes. I will tell you how that came about, Judge. He came to see me at the bank, and was talking about the White matter.

"Mr. HANECY. The matter of Charles A. White?

"Senator LORIMER. Yes. I asked him about his financial condition, and he said that he had a good practice and made all the money he needed, but that he had no money saved up, and he said that he did not have money enough to employ the lawyers he thought necessary to conduct his case, and I told him I would let him have some money; but he said that he did not know when I would get it back, and if he died soon I would never get it back. I told him that was all right; that this fight was really a fight on me and not on him; that they did not care anything about him; what they were trying to do was to get me out of my seat in the Senate. So I loaned him the money from time to time as he asked for it, and I think somewhere in the neighborhood of $10,000.

"Mr. HANECY. That is, you told him the fight that was being made on him by the State's attorney and the Tribune in Chicago was for the purpose of convicting or discrediting him and thereby unseating you?

"Senator LORIMER. Yes. The real purpose of the fight on Lee O'Neil Browne was then, and is now, to unseat me.

"Mr. HANECY. These fights on Browne have been carried on and won by Browne in every trial and contest that have been made against him?

"Senator. LORIMER. Yes.

"Senator KERN. Did you take his note for this money?

"Senator LORIMER. I did not.

"Senator KERN. What account did you keep of it?

"Senator LORIMER. I do not know whether I have checks for it or not, Senator.

"Senator KERN. In what form was it paid?

"Senator LORIMER. I say I do not know. He always came to the bank, and I do not know whether I drew checks to my own order and got the money for him or gave him checks and he got the money himself. I do not recall.

"Senator KERN. Did you make a charge of it?

"Senator LORIMER. It is not very much of an account at that. I have always considered that if Lee O'Neil Browne was never able to pay me that money, it was money which I ought to have contributed to help him in the contest. It was my fight and not his.

"Senator KERN. You kept no account of it at all?

"Senator LORIMER. I think I could tell how much it was by looking over my affairs at home.

"Senator KERN. No; that is not it. I am asking you whether you kept any account of it.

"Senator LORIMER. Do you mean that I kept books of it? I did not.

"Senator KERN. You made no entry on any book of the amount you advanced him?

"Senator LORIMER. No; I did not. * * *

"Senator KERN. Has Mr. Browne paid you any of the sum which you advanced him?

"Senator LORIMER. No; he has not, and from what I know of his financial condition just now, I do not think he will do so within a very short time, because he called on me at the bank the other day and told me that he was very much in debt on account of his trials, and that he would not be able to give me any money for a considerable time. That is, he came to me to find out whether I insisted on his paying me back or whether he should pay the other debts that he owes, and I told him to pay the other debts.

"Senator KERN. Do you expect the return of this money?

"Senator LORIMER. I do."

While there is conflicting testimony in regard to any money being furnished by Edward Hines for the purpose of electing William Lorimer, we believe that the evidence shows conclusively that the interest of Edward Hines in the election William Lorimer was more than the ordinary interest of a citizen desiring the election of a particular candidate.

The attitude of Mr. Hines upon the witness stand, his furnishing money to one of the material witnesses in his behalf, Charles P. McGowan, beyond the expenses incurred by McGowan in coming to Washington to testify, and his attempting to induce by the payment of money, a telephone operator at the New Willard Hotel to furnish copies of messages sent by the Burns agency, which had formerly been in the employ of the committee, established Mr. Hines's character as one that looked upon everything and everybody as being purchasable, and the only question of doubt in his mind being the amount of money necessary to purchase this or that person.

The fact that neither Mr. Hines's books nor the books of the Hines Lumber Co. show the collection or disbursement of any corruption fund does not establish that no such fund was collected or disbursed; for it is inconceivable that a man of even Mr. Hines's indifference to such methods would be bold enough to make a permanent record of such a crime upon his books or those of his company.

The undisputed facts, however, do show that when Mr. Hines left Washington, on May 25, 1909, armed, as he says, with the commands of leaders Aldrich and Penrose to the Legislature of Illinois to elect William Lorimer—for the purpose of going directly to Springfield, Ill., to assist in the election of William Lorimer—that he was met at the train in Chicago by his brother-in-law and confidential agent, C. F. Wiehe, who imparted information to him that caused his direct journey to Springfield to be abandoned, and instead of going directly to Springfield, Mr. Hines went directly to his bank, the Continental Commercial National Bank, and after a conference with the president of the bank, telephoned to Mr. Lorimer, and later telephoned again, to either Mr. Lorimer or some one else in Springfield interested in Lorimer's election.

At this point the evidence is conflicting. Mr. Hines, his employees and associates in business, whom he has introduced as corroborating witnesses, insist that the telephone conversation related only to messages which Mr Hines was bearing as a courier from the Republican leaders at Washington to the Republican bosses in Springfield. Although why Mr. Hines should take the long trip from Washington to Chicago for the purpose of telephoning from Chicago to Springfield messages that might have been telephoned as well and more quickly from Washington to Springfield has never been satisfactorily explained by Mr. Hines or any of his employee-witnesses, while

it is testified to by other witnesses, one of whom, Wirt Cook, admitted personal animosity and hostility toward Hines—and whose testimony must be weighted with this fact in mind—that Hines's telephone message to Springfield was for the purpose of advising those directing Mr. Lorimer's campaign at Springfield that all of the money necessary to elect Mr. Lorimer was available.

This testimony, if true, would explain the unexpected interruption of the journey from Washington to Springfield at Chicago, the visit to the bank before telephoning Lorimer at Springfield, and the subsequent request of Hines to Funk to contribute $10,000 to the $100,000 fund to put Lorimer over.

The fact that Mr. Hines did telephone to Springfield relative to the election of Lorimer immediately after his visit to his bank is admitted by Mr. Hines, the difference in the proof being as to the purpose of the telephone communication. It is at least a remarkable coincidence that the election of Senator Lorimer, which had been doubtful up to that time, followed almost immediately after Hines's visit to his bank and his telephone message to Springfield—a coincidence that is illuminated by the statement of Wirt Cook that Hines, in his message to Springfield, promised all the money required to elect Lorimer.

The visit of Mr. Hines to his bank prior to this telephone conversation gives color and additional weight to the statements of the witnesses who testified that Mr. Hines's telephonic messages to Springfield promised funds for the purpose of electing Senator Lorimer. Such a purpose is further corroborated by the testimony of Clarence Funk and W. M. Burgess, the former testifying that Hines asked him to subscribe on behalf of his company, the International Harvester Co., the sum of $10,000 to reimburse those who had put Senator Lorimer over, and the latter who testified that C. F. Wiehe, Hines's brother-in-law and confidential representative, stated that he had subscribed $10,000 toward the fund to elect Lorimer.

Mr. Hines denies absolutely the testimony of the witness Funk, but the motive which Mr. Hines and Senator Lorimer attempt to ascribe as the reason for Funk committing the crime of perjury is too far-fetched to be tenable and too ridiculous and absurd to lessen the force of Funk's testimony, and no effort is made to establish any motive on the part of Burgess, who appears on the record as an absolutely disinterested witness. Burgess's testimony, however, is contradicted by several persons either connected in business with the Edward Hines Lumber Co. or receiving benefits therefrom and by one Charles P. McGowan. The effect of McGowan's testimony, however, is destroyed by his admission, corroborated by Wiehe, that after his testimony he received $300 in addition to the amount advanced for his expenses for the losses which McGowan had suffered in his business on account of his absence while testifying in behalf of Hines, and by McGowan's statements and letters to a detective of the Burns detective agency, stating that he had committed perjury for the Hines crowd and was going to receive a large sum therefor. One of McGowan's letters to the detective Bailey, which McGowan admits to have written, although he attempts to explain as a joke, is as follows:

ELORA, ONTARIO, *November 19, 1911.*

A. C. BAILEY, Esq.,
1607 Fifth Avenue, Pittsburgh, Pa.

MY DEAR ART.: Your very kind letter received some days ago, and I note you say you are all business. For myself, eating, sleeping, and smoking comprise my daily duties at present. A day or so after my return home the Hines people sent me a telegram asking me to meet one of them in Toronto. I presume they wanted some more affidavits or something, so I wired them they had better come to Elora. By God, they would have been shown what forced hospitality was! The old shotgun would have been loaded with a couple of Peters No. 2. I made them come across at that—not all I expected, though—and I had a hell of a time getting it, too. Had to threaten him with all kinds of exposure.

I was sorry I did not see you the afternoon I left, but hope we will meet again in the near future. I do not know just now what my plans will be for next year. Father is talking very seriously of buying a flour mill for my brother and myself. What kind of a miller would I make, do you think?

Let me hear from you as often as you can spare the time to write, and if you are in this vicinity any time, run up; I will always be glad to see you.

Yours, etc.,

CHAS. McGOWAN.
McG.

P. S.—Give my best to your brother.

We believe the testimony of Clarence Funk and W. M. Burgess to be true. This conclusion is strengthened by consideration of Hines's actions during the grand jury investigations, when he tried to get Cook and O'Brien out of the jurisdiction of the grand jury and by his suspicious and questionable actions during this investiga-

tion. In conclusion we hold that Hines was an accessory to the corruption that resulted in the election of William Lorimer to the Senate.

Believing that the confessions of the members of the legislature, strengthened by corroborating circumstances and by other evidence relating to the members of the legislature who did not confess, establish conclusively not only that at least 10 votes were purchased for the purpose of electing William Lorimer to the Senate but that the record reeks and teems with evidence of a general scheme of corruption, we have no hesitancy in stating that the investigation establishes, beyond contradiction, that the election of William Lorimer was obtained by corrupt means and was therefore invalid, and we submit the following resolution:

"*Resolved*, That corrupt methods and practices were employed in the election of William Lorimer to the Senate of the United States from the State of Illinois, and that his election was therefore invalid."

WM. S. KENYON.
JNO. W. KERN.
LUKE LEA.

(Cong. Rec., vol. 48, p. 6790.)

On the same day, May 20, 1912, Mr. Lea submitted the following resolution (S. Res. 315), which was ordered to lie on the table:

"*Resolved*, That corrupt methods and practices were employed in the election of William Lorimer to the Senate of the United States from the State of Illinois, and that his election was therefore invalid." (Cong. Rec., vol. 48, p. 6790.)

The report of the committee of the Senate, the views of the minority, and the resolution of Mr. Lea were discussed and debated in the Senate, June 4, 1912 (Cong. Rec., vol. 48, pp. 7594–7597); June 5, 1912 (ibid., pp. 7700–7706); June 7, 1912 (ibid., pp. 7775–7787); June 8, 1912 (ibid., pp. 7845–7848); July 6, 1912 (ibid., pp. 8671–8682); July 8, 1912 (ibid., pp. 8685–8696); July 9, 1912 (ibid., pp. 8723–8774); July 10, 1912 (ibid., pp. 8812–8848); July 11, 1912 (ibid., pp. 8882–8901); July 12, 1912 (ibid., pp. 8936–8949); and July 13, 1912 (ibid., pp. 8968–8987).

The following extended speeches and statements favoring the resolution of Mr. Lea and opposing the report of the committee were made by Mr. Kern (Cong. Rec., vol. 48, pp. 7594–7597, 7700–7706, 7775–7787, and 7845–7848); Mr. Myers (ibid., pp. 8677–8682); Mr. Lea (ibid., pp. 8884–8888); and Mr. Reed (ibid., pp. 8888–8892).

The following extended speeches and statements upholding the report of the committee and opposing the resolution of Mr. Lea were made by Mr. Dillingham (Cong. Rec., vol. 48, pp. 8726–8774); Mr. McCumber (ibid., pp. 8671-8677); Mr. Fletcher (ibid., pp. 8685–8696, 8723–8726); Mr. Johnston of Alabama (ibid., pp. 8812–8815); Mr. Jones (ibid., pp. 8815–8848); Mr. Thornton (ibid., pp. 8882–8884); and Mr. Tillman (ibid., pp. 8986–8987).

Mr. Lorimer made prepared statements before the Senate on July 11, 1912 (Cong. Rec., vol. 48, pp. 8892–8901); July 12, 1912 (ibid., pp. 8936–8949); and July 13, 1912 (ibid., pp. 8968–8986).

SATURDAY, JULY 13, 1912.

Mr. Lea's resolution (S. Res. 315), submitted on May 20, 1912, was adopted by the Senate, a roll call thereon resulting in the following vote:

Yeas—Messrs. Ashurst, Bacon, Borah, Bourne, Briggs, Bristow, Brown, Bryan, Burton, Chamberlain, Clapp, Clarke of Arkansas, Crawford, Cullom, Cummins, Curtis, Dixon, Fall, Gardner, Gore, Gronna, Hitchcock, Johnson of Maine, Kenyon, Kern, La Follette, Lea, Lodge, Martin of Virginia, Martine of New Jersey, Myers, Nelson, Newlands, O'Gorman, Overman, Page, Poindexter, Pomerene, Rayner, Reed, Root, Sanders, Shively, Simmons, Smith of Arizona, Smith of Michigan, Smith of Georgia, Smith of South Carolina, Stone, Sutherland, Swanson, Townsend, Watson, Williams, Works—55.

Nays—Messrs. Bailey, Bradley, Brandegee, Burnham, Catron, Clark of Wyoming, Crane, Dillingham, Fletcher, Foster, Gallinger, Gamble, Guggenheim, Johnston of Alabama, Jones, Lippitt, McCumber, Oliver, Paynter, Penrose, Perkins, Richardson, Smith of Maryland, Smoot, Stephenson, Thornton, Tillman, Wetmore—28.

SATURDAY, AUGUST 10, 1912.

Mr. Johnston of Alabama (for Mr. Dillingham), for the committee to investigate the election of William Lorimer, submitted an amendment to the deficiency appropriation bill (H. R. 25970) proposing to pay Mr. Lorimer $35,000 toward counsel fees and other necessary expenses incurred by him in two investigations in the defense of his title to his seat in the Senate as a Senator from the State of Illinois, which was referred to the Committee on Appropriations. (Cong. Rec., vol. 48, p. 10643.)

(The Sixty-second Congress, second session, adjourned without any action being taken by the Senate Committee on Appropriations on this proposed amendment to the deficiency appropriation bill.)

[Sixty-second Congress, first and second sessions.]

ISAAC STEPHENSON,

Of Wisconsin.

The credentials of Isaac Stephenson, certifying to his election as a Senator of the United States from the State of Wisconsin for the term commencing March 4, 1909, were presented in the Senate on March 15, 1909, on which day the said Isaac Stephenson took his seat. More than 15 months later, on the 30th of June, 1911, a communication from the secretary of state of the State of Wisconsin was laid before the Senate, transmitting a certified copy of a joint resolution adopted by the legislature of that State (see S. Doc. 312, 62d, 2d, p. 2) relating to the primary and general election of 1908, and the election of United States Senator in 1908 in that State. This communication was referred to the Committee on Privileges and Elections, together with accompanying documents.

On August 15, 1911, the Senate authorized the Committee on Privileges and Elections to investigate certain charges preferred by the Legislature of Wisconsin and to report to the Senate whether in the election of Isaac Stephenson as a Senator of the United States there were used corrupt methods or practices.

On February 12, 1912, the committee reported that, having given full consideration to the law, the testimony, and all of the facts and circumstances brought to its notice, it found that the charges preferred against Isaac Stephenson had not been sustained, and that his election was not procured by corrupt methods or practices. Attached to the report of the committee, in support of the same, are the views of one Senator and the joint views of two others in which the various questions relating to charges of corruption in connection with the proceedings of the legislature affecting the election, and those growing out of the primary election at which the nomination was secured, are taken up. With an admitted expenditure of over $107,000 in connection with the primary election, the discussion in the above-mentioned views, and the debates on the floor of the Senate, dealt not only with the allegations of corruption in the expenditure of money in connection with the primary and with the question of the aggregate amount of the expenditure, but also with the question of the proceedings of the primary election as affecting the validity of an election by the legislature. A minority of the committee filed their views subsequently, to which was attached a resolution declaring that said Isaac Stephenson was not duly and legally elected to a seat in the Senate.

The case was debated in the Senate at various times during the months of February and March, 1912, and on the 27th of the latter month the committee report declaring Isaac Stephenson entitled to a seat in the Senate was adopted by a vote of 40 to 34, the amendment declaring Isaac Stephenson not duly and legally elected having failed of adoption on the day previous by a vote of 27 to 29.

The history of this case here given consists of a statement of the proceedings of the Senate in the case as published in the Congressional Record, the report of the Committee on Privileges and Elections, with accompanying views of individual members of the committee, the views of a minority of the committee, a statement of the days on which the question was debated in the Senate with reference to the record of the same as published in the Congressional Record, reference to the speeches and statements of different Senators on either side of the case as found in the Congressional Record, the vote on the amendment declaring that Isaac Stephenson was not duly elected, and the final vote on the motion in support of the committee report that he was entitled to his seat.

[Sixty-first Congress, first session.]

MONDAY, MARCH 15, 1909.

Mr. La Follette presented the credentials of Isaac Stephenson, elected a Senator by the Legislature of the State of Wisconsin for the term commencing March 4, 1909; which were read and placed on file.

Mr. Stephenson appeared, and the oath prescribed by law having been administered to him by the Vice President, he took his seat in the Senate. (Cong. Rec., vol. 44, p. 16.)

[Sixty-second Congress, first session.]

FRIDAY, JUNE 30, 1911.

The Vice President laid before the Senate a communication from the secretary of state of the State of Wisconsin, transmitting a certified copy of joint resolution 58 adopted by the legislature of that State, relating to the primary and general election of 1908 and the election of United States Senator in 1908 in that State, together with a copy of volumes 1 and 2 of the Wisconsin senatorial investigation, which, on motion of Mr. Heyburn, was, with the accompanying documents, referred to the Committee on Privileges and Elections. (Cong. Rec., vol. 47, p. 2599.)

SATURDAY, AUGUST 12, 1911.

Mr. Dillingham, from the Committee on Privileges and Elections, reported the following resolution (S. Res. 136), which was referred to the Committee to Audit and Control the Contingent Expenses of the Senate:

"*Resolved*, That the Senate Committee on Privileges and Elections, or any subcommittee thereof, be authorized and directed to investigate certain charges preferred

by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and to report to the Senate whether in the election of said Isaac Stephenson as a Senator of the United States from the said State of Wisconsin there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the recess of the Senate, to hold its session at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee." (Cong. Rec., vol. 47, p. 3860.)

TUESDAY, AUGUST 15, 1911.

Mr. Briggs, from the Committee to Audit and Control the Contingent Expenses of the Senate, to whom was referred the resolution reported by Mr. Dillingham from the Committee on Privileges and Elections on August 12, 1911, directing the Committee on Privileges and Elections to investigate certain charges relative to the election of Isaac Stephenson, reported it without amendment.

The Senate proceeded, by unanimous consent, to consider the said resolution, and agreed thereto. (Cong. Rec., vol. 47, p. 3938.)

[Sixty-second Congress, second session.]

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Dillingham (chairman), Gamble, Heyburn, Clapp, Sutherland, Bradley, Jones, Oliver, Kenyon, Paynter, Johnston, Fletcher, Kern, Lea, and Pomerene.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 12, 1912.—Ordered to be printed.

Mr. Heyburn, from the Committee on Privileges and Elections, submitted the following report (Rept. No. 349) to accompany S. Res. 136:

The Committee on Privileges and Elections, to whom was referred certain charges preferred by the Legislature of the State of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, with instructions to report to the Senate whether in the election of said Isaac Stephenson as a Senator of the United States from the State of Wisconsin there were used or employed corrupt methods or prac-tices, have had the same under consideration and submit the following report:

On August 15, 1911, the Senate adopted the following resolution:

"*Resolved*, That the Senate Committee on Privileges and Elections or any subcommittee thereof be authorized and directed to investigate certain charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and report to the Senate whether in the election of said Isaac Stephenson, as a Senator of the United States from the said State of Wisconsin there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the recess of the Senate, to hold its session at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee."

Pursuant to the authority given by said resolution the Committee on Privileges and Elections appointed a subcommittee consisting of Mr. Heyburn, chairman, Mr. Sutherland, Mr. Bradley, Mr. Paynter, and Mr. Pomerene, with full powers to investigate said charges.

On January 20, 1912, the subcommittee reported to the full committee as follows:

In the matter of the investigation of the charges against Isaac Stephenson, a Senator of the United States from the State of Wisconsin.

To the honorable the Committee on Privileges and Electionst of the United States Senate:

Your subcommittee proceeded pursuant to the terms of its appointment to investigate the above-mentioned charges and in pursuance of said duty met in the city of Washington and, having organized, proceeded to adopt a plan for holding such investigation.

It was agreed by your subcommittee that the investigation should commence on October 2, 1911, at the city of Milwaukee, in the State of Wisconsin.

Accordingly your subcommittee met at the city of Milwaukee on the above-mentioned date, all parties in interest being present. Hon. Charles E. Littlefield, W. E. Black, and H. A. J. Upham, Esqs., appeared as counsel for Senator Stephenson.

The governor and the attorney general of the State of Wisconsin were notified by the chairman of your subcommittee of the time and place of the hearing and were invited to indicate to the committee whether or not they desired to be present and participate in any manner in such investigation. The governor of Wisconsin, speaking for the State, informed your subcommittee that no one on behalf of the State would appear at such investigation.

Your subcommittee then proceeded to the examination of witnesses and documents, which examination occupied 25 days, during which time 124 witnesses were sworn, 35 affidavits received, and 2,100 pages of printed testimony taken, which testimony, affidavits, and exhibits are herewith submitted as a part of the report of your subcommittee.

Your subcommittee has given the fullest consideration to all the testimony introduced and has considered its weight and effect under the rules pertaining to the investigation and is of the opinion that the charges preferred against Senator Isaac Stephenson have not been sustained, and your subcommittee finds that the election of said Isaac Stephenson as a Senator of the United States from the State of Wisconsin was not procured by corrupt methods or practices in said election of Isaac Stephenson.

W. B. Heyburn, *Chairman.*
George Sutherland.
W. O. Bradley.
Atlee Pomerene.

Mr. Heyburn, chairman of the subcommittee, submitted a statement of his views in support of the conclusions reached, and on the request of members of the committee further consideration of the matter was postponed to February 3, 1912, on which date a further postponement was had to February 10, 1912, with the understanding that any member of the committee might file a statement of his views to accompany the final report of the committee, and that a vote might be taken on that date.

On February 10, 1912, the Committee on Privileges and Elections met in regular session and received a statement of the views of Mr. Pomerene and Mr. Sutherland in support of the report of the subcommittee, and proceeded to the consideration of the report of the subcommittee together with the views expressed by the members thereof upon a full record of the testimony and proceedings in the case.

On motion it was ordered that the report of the subcommittee be adopted and that said subcommittee be discharged.

Whereupon it was ordered that Mr. Heyburn be instructed to report the actions of the committee to the Senate, together with a transcript of testimony and of all the proceedings of the subcommittee, including the address of Hon. Charles E. Littlefield before the whole committee, and also the individual views presented by members of the committee. Leave was given to file a minority report by those dissenting from the conclusions reached.

Wherefore your committee, having given full consideration to the law and to the testimony and to all of the facts and circumstances brought to its notice, does find that the charges preferred against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not sustained, and your committee further finds that the election of said Isaac Stephenson as a Senator of the United States was not procured by corrupt methods or practices.

Wm. P. Dillingham.
Robert J. Gamble.
W. B. Heyburn.
Geo. Sutherland.
George T. Oliver.
Jos. F. Johnston.
Duncan U. Fletcher.
Atlee Pomerene.
W. O. Bradley.

VIEWS OF MR. HEYBURN IN SUPPORT OF THE REPORT OF THE COMMITTEE.

The subcommittee having reported to the whole committee in favor of Isaac Stephenson, I desire to submit herewith the reasons which actuated me in arriving at that conclusion:

Jurisdiction.

On August 15, 1911, the United States Senate adopted the following resolution:

"*Resolved*, That the Senate Committee on Privileges and Elections or any subcommittee thereof be authorized and directed to investigate certain charges preferred by

the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and report to the Senate whether in the election of said Isaac Stephenson, as a Senator of the United States from the said State of Wisconsin there were used or employed corrupt methods or practices; that said committee or subcommittee be authorized to sit during the recess of the Senate, to hold its session at such place or places as it shall deem most convenient for the purposes of the investigation, to employ stenographers, to send for persons and papers, and to administer oaths; and that the expenses of the inquiry shall be paid from the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee."

Pursuant to the authority given by said resolution the Committee on Privileges and Elections appointed a subcommittee consisting of Senators Heyburn, Sutherland, Bradley, Paynter, and Pomerene, with full powers "to investigate said charges preferred by the Legislature of Wisconsin relating to the election of Isaac Stephenson, a Senator from the State of Wisconsin."

Meeting of subcommittee.

In performance of said duty the subcommittee met at Milwaukee, Wis., on October 2, 1911, in the Federal Building, a quorum of said subcommittee being present.

The chairman announced that the subcommittee would recognize a duly authorized representative of the State of Wisconsin, in view of the fact that the State had submitted through its governor to the Senate of the United States the charges to be investigated. No one appearing, the chairman then instructed the secretary of the subcommittee to communicate with the governor and attorney general of the State and advise them that the committee was in session in Milwaukee for the purpose of investigating the charges aforesaid, and to inquire whether or not the State desired to be represented at the hearing, and, pursuant to such instruction, the secretary sent the following communication to the governor:

MILWAUKEE, WIS., *October 2, 1911.*

Hon. FRANCIS E. MCGOVERN,
Governor of Wisconsin, Madison, Wis.:

A subcommittee of the Committee on Privileges and Elections of the United States Senate, duly appointed, with instructions to investigate the election of Isaac Stephenson as a Senator of the United States from the State of Wisconsin, as recommended by the Legislature of Wisconsin as provided in joint resolution 58 of said legislature, has entered upon the investigation in the Federal Building, in the city of Milwaukee. As the State appears to be unrepresented by counsel, you are requested to advise the committee whether or not it is the desire of the State to be represented by counsel before this committee; and if so, designate in writing such person to represent the State.

W. B. HEYBURN, *Chairman.*

To which communication the governor replied as follows:

EXECUTIVE CHAMBER,
Madison, Wis., October 3, 1911.

Hon. W. B. HEYBURN,
Chairman Subcommittee of the United States Senate
Committee on Privileges and Elections, Milwaukee, Wis.

MY DEAR SIR: In reply to your telegram of yesterday, in which you request me to advise your committee "whether or not it is the desire of the State to be represented by counsel" before your subcommittee, permit me to say that I find there is very serious doubt that I have any power to act in the matter. Joint resolution 58, to which you refer, confers no such authority. It simply requests the United States Senate "to investigate the manner, means, and methods by and through which Isaac Stephenson secured his election to the United States Senate," recommends to the district attorney of Dane County that prosecutions be commenced against all persons shown to have committed perjury in the Senatorial inquiry in this city, and suggests that prosecutions be commenced in other counties of the State for such violations of the corrupt-practices or bribery statutes as the evidence may justify.

In the absence of any specific authority conferred by this joint resolution the only other possible source is chapter 268 of the laws of Wisconsin for the year 1911. Careful consideration of this statute leaves me in doubt as to whether it confers power upon me to employ at the expense of the State counsel to attend the investigation your subcommittee is now conducting. Nor can I see that much good is likely to come from such employment. Your invitation comes so late as practically to preclude the possibility of anyone whom I might select rendering any real service to

your committee or materially assisting in the investigation now in progress. That investigation has already begun. The transactions to be inquired into are numerous and involved, as appears from the fact that the testimony already taken occupied many months of the time of committees of the State legislature and now fills a number of large volumes of printed reports. To be of service counsel for the State should have been employed months ago. I say this with no feeling of personal responsibility in the matter for the reason that until your telegram came yesterday there was no ground for anticipating that the appearance of an attorney for the State at this hearing would be acceptable to your committee. Indeed, more than a week ago, under date of September 25, the Associated Press quoted you as having expressed yourself as chairman of the subcommittee as follows: "The State of Wisconsin will not have an attorney in the investigation of the election of Isaac Stephenson by the United States Senate committee. This hearing is under the jurisdiction of the United States Senate, which does not recognize the State as a party to the investigation. This is an investigation, not a trial."

An additional reason why I should not avail myself of your invitation at this time is furnished by the practice of other committees charged with duties similar to yours. So far as I know no State has been represented by counsel at any of these investigations. The work has been done either by the members of the committee alone or by counsel of their own choosing. At any rate, the responsibility for a thorough, searching inquiry is upon your subcommittee acting as the agent of the United States Senate in determining a question relative to the "election, returns, and qualifications" of one of its own Members. Neither the State of Wisconsin nor its legislatnre desires to assume the rôle of prosecutor or to sustain any other relation to this investigation than that of petitioner for a thorough, fearless, and impartial inquiry.

For the present, therefore, I shall take no action concerning the matter mentioned in your telegram. Assuring you, however, of my appreciation of your consideration in extending the invitation, I am,

Very truly, yours,

FRANCIS E. McGOVERN.

The chairman inquired whether or not counsel were present to represent Mr. Stephenson. Whereupon Hon. Charles E. Littlefield, Mr. W. E. Black, and Mr. H. A. J. Upham appeared on his behalf and were recognized by the committee.

The joint resolution and specific charges certified to the United States Senate by the governor of Wisconsin were then read. (Transcript, pp. 4 and 5.)

Before entering upon the examination of witnesses by the committee Hon. Charles E. Littlefield, of counsel for Mr. Stephenson, requested leave to make a statement, which leave was granted. (Transcript, pp. 6–23.)

The subcommittee then proceeded to the examination of witnesses and documents, which examination occupied 25 days, during which time 116 witnesses were sworn and examined, 36 affidavits received, and upward of 2,100 pages of printed testimony taken, which testimony, affidavits, and exhibits are herewith offered as a part of the report of the subcommittee.

The subcommittee was directed to investigate certain charges preferred by the Legislature of Wisconsin against Mr. Stephenson, These charges were set forth in the communication of the governor of Wisconsin, and the papers accompanying the same, certified to the United States Senate, among which was the joint resolution adopted by the Legislature of Wisconsin on June 26, 1911, which is found on page 2 of the transcript.

The charges referred to in the resolution under which the subcommittee acted are as follows:

Specific charges.

"1. That Isaac Stephenson, of Marinette, Wis., now United States Senator and a candidate for reelection, did, as such candidate for reelection, give to one E. A. Edmonds, of the city of Appleton, Wis., an elector of the State of Wisconsin and said city of Appleton, a valuable thing, to wit, a sum of money in excess of $106,000, and approximating the sum of $250,000, as a consideration for some act to be done by said E. A. Edmonds in relation to the primary election held on the 1st day of September, 1908, which consideration was paid prior to said primary election, and that said Isaac Stephenson was at the time of such payment a candidate for the Republican nomination for United States Senator at such primary, and did by such acts as above set forth violate section 4543b of the statutes.

"2. That said Isaac Stephenson did, prior to said primary, pay to said Edmonds above-mentioned sums with the design that said Edmonds should pay to other electors of this State, out of said sums above mentioned and other sums of money received by said Edmonds from said Isaac Stephenson, prior to said primary, sums ranging from

$5 per day to $1,000 in bulk as a consideration for some act to be done in relation to said primary by said electors for said Isaac Stephenson as such candidate, in violation of said section.

"3. That with full knowledge and with instructions from said Isaac Stephenson, as to how and for what purposes said sums were to be expended, said sums were so paid as above stated to said Edmonds by said Isaac Stephenson, and that said sums were paid as above stated for the purposes above stated and also for the purpose of bribing and corrupting a sufficient number of the electors of the State of Wisconsin to encompass the nomination of said Isaac Stephenson at said primary for the office of United States Senator.

"4. That in pursuance of the purposes and design above stated said Isaac Stephenson did, by and through his agents, prior to said primary, pay to one U. C. Keller, of Sauk County, an elector of this State, the sum of $300 as a consideration for some act to be done by said Keller for said Stephenson preliminary to said primary, corruptly and unlawfully.

"5. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to one Hambright, of Racine, Wis., large sums of money as a consideration for some act to be done by said Hambright for said Stephenson preliminary to said primary, said Hambright being then an elector of this State, corruptly and unlawfully.

"6. That in further pursuance of the purposes and design above stated said Isaac Stephenson did, by and through his agents, prior to said primary, pay to one Roy Morse, of Fond du Lac, Wis., then an elector of this State, the sums of $1,000 as a consideration for some act to be done by said Morse for said Isaac Stephenson preliminary to said primary, and corruptly and unlawfully.

"7. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, paid to divers persons, then electors of the county of Grant, Wis., ranging from $5 per day and upward, as a consideration for some act to be done by said several electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

"8. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to said primary, did pay to divers persons who were at such time electors in this State a consideration for some act to be done for said Isaac Stephenson by such electors preliminary to such primary, corruptly and unlawfully.

"9. That in further pursuance of such purposes and designs said Isaac Stephenson, by and through his agents, prior to said primary, did pay to electors of this State, who were of a different political opinion and who held to other political principles than those of the Republican Party, more particularly Democrats, sums of money as a consideration for some act to be done by such electors for said Isaac Stephenson preliminary to said primary, corruptly and unlawfully.

"10. That in further pursuance of such purposes and design said Isaac Stephenson, by and through his agents, prior to such primary, did offer to pay to Edward Pollock, of Lancaster, Wis., certain sums of money, as editor of the Teller, a newspaper published in said city of Lancaster, Wis., and to other editors of newspapers who were at such time electors of this State, and for the purpose of purchasing the editorial support of such editors and as a consideration of something to be done relating to such primary, corruptly and unlawfully.

"11. That said Isaac Stephenson did, prior to such primary, by and through his agents, promise and agree to pay to one Lester Tilton, a then resident and elector of this State, and residing at the city of Neillsville, Wis., a sum in excess of $500 to procure or aid in procuring the nomination of said Lester Tilton to the assembly of this State from Clark County, and did offer to give to said Lester Tilton a sum in excess of $500 if said Lester Tilton would become a candidate for the assembly from said Clark County if said Lester Tilton would support said Isaac Stephenson for the office of United States Senator, all of which is in violation of sections 4542b and 4543b of the statutes.

"12. That said Isaac Stephenson did, by and through his agents, give and promise and pay or agree to pay to other electors of this State sums of money to procure or aid in procuring the nomination of such electors to the senate and assembly of this State other than those electors residing in the district where said Isaac Stephenson resides.

"13. That E. M. Heyzer and Max Sells, prior to said primary, being at such time employees of the Chicago & North Western Railway Co., a corporation doing business in this State, did contribute and agree to contribute free services as such employees for the purpose to defeat the candidacy of former Assemblyman E. F. Nelson, from the district embracing Florence, Forest, and Langlade Counties, for the nomination for assemblyman from said district, all of which was done with the knowledge and consent and under the direction of said Isaac Stephenson, his agents and employees, contrary to chapter 492, laws of 1905.

"14. That in further pursuance of the purposes and design about set forth said Isaac Stephenson, by and through his agents, did, in addition to paying certain sums as above set forth, offer and agree to pay to electors of this State, prior to said primary, a premium or bonus to those who in his employ carried their respective precincts in such primary for said Isaac Stephenson as such candidate.

"15. That said Isaac Stephenson, if claiming an election by virtue of receiving a plurality of votes at such primary, then said Isaac Stephenson has violated chapter 502 of the laws of 1905 by failing and neglecting to file his expense account as provided by said chapter.

"16. Charging generally the primary nomination or election of said Isaac Stephenson was obtained by the use of large sums of money corruptly and illegally, by the violation of sections 4542b, 4543b, and 4478b of the statutes relating to illegal voting, bribery, and corruption, and other laws above set forth relating to elections and primary elections."

John J. Blaine, a State senator, who made the said 16 specific charges, which constituted the basis of the legislative investigation, was examined in detail as to each of such charges and failed to sustain any of them, either by his own testimony or by reference to the testimony of others. The charges were made on information and belief according to his own testimony. He seemed upon examination to have no information upon which any belief as to their truth could be based.

An inspection of his testimony (transcript, p. 592, etc.) will fully justify the conclusion of the subcommittee that such charges were not sustained.

These charges were investigated by two legislative committees; first, by a joint committee which submitted a report which was not finally acted upon; second, by a committee of three members of the State senate, only one member of which was a member of the legislature when the report of that committee was made.

The time within which the joint legislative committee might take testimony and report was limited by the legislature to expire on the 13th day of April, 1909, and on that day the said committee met and adopted a resolution that each member make an outline of his proposed report and submit it at a later day for discussion before the committee.

Said committee then adjourned subject to the call of the chairman of the senate or assembly committee.

This ended the work of the joint investigating committee.

The State senate, acting independently of the assembly and in view of the expiration of the time within which the joint committee might finish its work, adopted a resolution on March 25, 1909, authorizing the president of the senate to appoint a committee consisting of three members to complete the investigation that had been carried on by the joint committee and to "further fully, fairly, and thoroughly investigate the campaign and election of Isaac Stephenson as a United States Senator, and the campaign and election of members of the legislature so far as their election in any way pertains to or affects the election of Isaac Stephenson as a United States Senator."

Specific questions presented for consideration.

In the order of their importance the duties of the subcommittee may be classified as follows:

First. To investigate the proceedings by the legislature, including the actions of Senator Stephenson and those representing him, during the session of the legislature.

Second. To investigate the campaign and election of members of the legislature so far as their election in any way pertains to or affects the election of Isaac Stephenson as a United States Senator.

Third. The primary election and the campaign.

Election of a Senator by the legislature.

The law providing for the election of Senators by the legislature is as follows, being chapter 1, title 2, of the Revised Statutes of the United States:

"SEC. 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organizing thereof, proceed to elect a Senator in Congress.

"SEC. 15. Such election shall be conducted in the following manner: Each house shall openly, by a viva voce vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for who receives a majority of the whole number of votes cast in each house shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At

twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a viva voce vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature and shall take at least one vote until a Senator is elected.

"SEC. 16. (Relates to filling vacancies.)

"SEC. 17. (Also relates to the filling of vacancies.)

"SEC. 18. It shall be the duty of the executive of the State from which a Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States.

"SEC. 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State."

Proceedings in the legislature.

The Forty-ninth Legislature of Wisconsin consisted of 33 senators and 100 assemblymen, and convened at the capitol at Madison on January 13, 1909, at 12 o'clock m.

On Thursday, January 14, 1909, the organizing of both houses was complete, and the assembly adjourned until Tuesday, January 19, at 10 o'clock.

The senate organized on January 13, 1909, and on January 14 Senator Husting introduced joint resolution 3, providing for the investigation of the primary election, which was laid over until the next session, and the senate adjourned until Tuesday, January 19, at 10 o'clock a. m.

On Tuesday, January 26, the senate considered joint resolution 3, and a substitute was introduced by Senator Blaine. (Senate Journal, pp. 72–77.) This substitute contains the specific charges.

On January 26, 1909, a vote was taken on the election of United States Senator, each house voting separately.

In the senate the total number of votes cast was 17. Mr. Stephenson received 12 votes, Brown 4, Rummel 1. (Senate Journal, pp. 78–79.)

On the same day, January 26, upon the call of the roll in the assembly, the total number of votes cast for Senator was 84. Mr. Stephenson received 60, Neal Brown 16, Jacob Rummel 3, S. A. Cook 2, H. A. Cooper 1, J. H. Stout 1, and John J. Esch 1, which result was announced by the speaker. (Assembly Journal, pp. 74–75.)

On Wednesday, January 27, resolutions were introduced in the senate, among others joint resolution 8, being an arraignment of the United States Senate and a demand for its abolition, introduced by Senator Gaylord. (Senate journal, p. 86.) It was referred to the committee on Federal relations. This is mentioned in passing only to show the temper of the legislature on the day of the first joint ballot for United States Senator.

At 12 o'clock noon of January 27, 1909, the two houses met in joint convention. The lieutenant governor, presiding, stated:

"Gentlemen of the joint convention, you are assembled here for the purpose of expressing your choice for United States Senator. In order to comply with the Federal law the clerk of the senate and the clerk of the assembly will read from the journal of each house, respectively, the proceedings of the preceding day with reference to the election of a United States Senator."

The senate journal (p. 94) and the assembly journal (p. 80) record as follows:

"The chief clerk of the senate read the journal of the senate of January 26, 1909, and the chief clerk of the assembly read the journal of the assembly of January 26, 1909.

"The president then said: 'The clerk will call the roll. As your names are called you will arise from your seats and announce the candidate of your choice.'"

Senator Hudnall said:

"I rise to protest against any other proceedings being taken in the joint assembly at this time except the announcement of the presiding officer that Hon. Isaac Stephenson is elected to the United States Senate for the term commencing March 4, 1909. I do that for the reason that it appears from the journal of the senate that the total number of votes cast for persons were 17, of which Isaac Stephenson received 12, Neal Brown 4, Jacob Rummel 1, and the journal of the assembly shows that of the members who

voted for persons there were 60 for Stephenson, 10 for Brown, and 3 for Jacob Rummel; and it further appears from both journals of senate and assembly that Isaac Stephenson received a majority of all the votes cast in each house.

"It devolves then upon the president of this joint assembly to declare Isaac Stephenson duly elected to the United States Senate, and then the duty devolves upon the president of the senate and speaker of the assembly to certify his election to the governor and to the secretary of state, and they to certify his election to the United States Senate. Any other proceeding is out of order and nugatory."

Senator Hudnall stated that he made this statement as a protest and as a point of order. The president held the point of order not well taken and held that Senator Hudnall was out of order in his protest.

The presiding officer then directed the nomination of candidates, and the joint assembly proceeded to vote for a United States Senator. There were 131 votes cast, of which Isaac Stephenson received 65, and the presiding officer announced that "it appears from the records of the convention that no person has received a majority of the votes cast for United States Senator." Whereupon the joint convention dissolved.

On no other day until the 4th of March, 1909, did anyone receive a majority of the votes cast in joint assembly. On that day (the 4th of March) upon the twenty-fourth ballot of the joint assembly there were 123 votes cast of which Isaac Stephenson received 63. Whereupon the chairman of the joint assembly announced the election of Isaac Stephenson, and the joint assembly adjourned sine die.

At each session of the joint assembly the question as to whether any vote in the joint assembly was necessary was raised by protest against such proceedings upon the grounds that Mr. Stephenson having received a majority of the votes cast in each house voting separately, no other or further duty remained for the joint assembly than that of reading the journals of the two houses of the proceedings in each relative to the election of a United States Senator on the day previous. These journals were read and the fact disclosed that in each house Mr. Stephenson had received a majority of all the votes cast. It remained only that "he shall be declared duly elected Senator." The statute does not prescribe who shall declare the person receiving a majority of the votes in each house elected Senator, nor in what form such declaration shall be made.

From the reading of the law it would seem that when the two houses voting separately each gave Mr. Stephenson a clear majority and having met in joint session on the day following the vote in the separate houses, the journal of the proceedings of the two houses voting separately being read in joint convention and the result announced, the election was completed; the mere failure to declare him elected could not in any way defeat the will of the two houses as expressed in their separate votes.

The failure to make a specific declaration of his election was not vital. The action of the governor and secretary of state in deferring the certificate of his election or in misstating the time of his election could not affect that election.

If we are correct in assuming that the election of Isaac Stephenson was accomplished when the record of the two houses was read and announced in the joint assembly, then the failure or delay of the executive officers to perform their duty could in no way defeat his election as of the date of the meeting of the first joint assembly.

Acts of bribery charged.

Charges of bribery in the interest of Mr. Stephenson's election had been freely made both before the subcommittee and before the legislative investigating committee. Not one of these charges has been sustained by the testimony.

The word "bribery" has been applied to many acts that do not constitute bribery.

The procurement of advertising space or editorial comment in the newspapers upon the payment of money by or on behalf of a candidate for office can not under any construction of law be held to be bribery.

The procurement of the services of men to speak either publicly or personally on behalf of any candidate, or to canvas the electorate on his behalf, is not bribery under any reasonable construction of the law.

If the testimony were true that money was offered to Assemblyman Leuch to go upon the floor and vote for the purpose of effecting a quorum it would not constitute bribery. It was the duty of such member to go upon the floor and vote.

The charge of an attempt to bribe H. R. Pestalozzi utterly failed of proof before your committee.

The charge of unlawful dealings with the Milwaukee Free Press utterly failed of proof. It was conceded that Mr. Stephenson owned a controlling interest in that paper and he was certainly entitled to have its support and to sustain his interest in it.

Bribery.

The law of Wisconsin relative[1] to bribery is as follows:

"SEC. 39. *Bribery of signers to petitions, etc.*—1. Any person who shall offer, or with knowledge of the same permit any person to offer for his benefit, any bribe to a voter to induce him to sign any * * * nomination paper * * * and any person who shall accept any such bribe or promise of gain of any kind in the nature of a bribe as consideration for signing the same, whether such bribe or promise of gain in the nature of a bribe be offered or accepted before or after such signing, or any candidate who shall knowingly cause a nomination paper, or papers, to be signed in his behalf by more than the maximum number of qualified electors provided for his district by subdivision 5 of section 11–5 of this act, shall be guilty of a misdemeanor and upon trial and conviction thereof be punished by fine of not less than $25 nor more than $500 or by imprisonment in the county jail of not less than 10 days or more than 6 months, or by both such fine and imprisonment.

"*Penalties: Caucus and general election laws applicable.*—2. Any act declared an offense by the general laws of this State concerning caucuses and elections shall also, in like case, be an offense in primaries and shall be punished in the same form and manner as therein provided, and all the penalties and provisions of the law as to such caucuses and elections, except as herein otherwise provided, shall apply in such case with equal force and to the same extent as though fully set forth in this act.

"SEC. 40. *General election law: applicable (secs. 11–25).*—The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections.

"SEC. 263. *Bribery at elections (sec. 4478).*—The following persons shall be deemed guilty of bribery at elections:

"1. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give, or lend, or offer, promise or promise to procure or endeavor to procure any money or valuable consideration, to or for any voter, to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or do any such act as aforesaid, corruptly, on account of such voter having voted or refrained from voting at any election.

"2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or endeavor to procure any office, place of employment, public or private, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce such voter to vote or refrain from voting, or do any such act as aforesaid, corruptly, on account of any voter having voted or refrained from voting at any election.

"3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavor to procure the election of any person to a public office, or the vote of any voter at any election.

"4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure, or engage, promise or endeavor to procure the election of any person to a public office or the vote of any voter at any election.

"5. Every person who shall advance or pay or cause to be paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money wholly or in part expended in bribery at any election.

"*Penalty.*—And any person so offending shall be punished by imprisonment in the State prison for a term of not less than six months nor more than two years: *Provided*, That the foregoing shall not be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses authorized by law and bona fide incurred at or concerning any election.

"SEC. 264 (sec. 4478a). The following persons shall also be deemed guilty of bribery at elections:

"1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money

[1] Reference is to "Election Laws of Wisconsin," published by J. A. Frear, secretary of state, 1908.

gift, loan, or valuable consideration, office, place of employment, public or private, for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election.

"2. Every person who shall, after any election, directly or indirectly, by himself or by any other person in his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; and any voter or other person so offending shall be punished by imprisonment in the county jail not less than one month nor more than one year.

"SEC. 266. *Office obtained by bribery, vacant (sec. 4481).*—Any person who shall obtain any office or shall have been elected to any office at any election, at which election he shall have induced or procured any elector to vote for him for such office by bribery, shall be disqualified from holding said office, and he shall be ousted therefrom, and said office shall be deemed and held vacant, to be filled by election or appointment as other vacancies, according to law.

"SEC. 294. *Bribery at caucus or convention (sec. 4479).*—Any person being, or seeking to be, a candidate for any office at any election authorized by law who shall give, or promise to give, to any elector or other person any money or thing of value or any pecuniary advantage or benefit for the purpose of inducing or influencing such elector or other person to vote for him in any convention or meeting of the people held for the purpose of nominating any person or persons to be voted for at any such election to make him the nominee of any such convention or meeting and the candidate to be voted for for any office at such election, or who shall so give or promise any such thing to any such person for the purpose of inducing or influencing any person to sign any nomination paper which seeks to have him nominated as a candidate for any office to be so voted for; and any such elector or other person who shall ask, solicit, or receive any money or thing of value or any pecuniary advantage or benefit from such candidate as a consideration or inducement for his vote at any such convention or meeting of the people, or his signature to any such paper, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

"SEC. 296. *Bribery in connection with caucus (sec. 4542b).*—Every person who, by bribery or corrupt or unlawful means, prevents or attempts to prevent any voter from attending or voting at any preliminary meeting or caucus mentioned in sections 11a to 11i, or who shall give or offer to give any valuable thing or bribe to any officer, inspector, or delegate whose office is therein created, or who shall give or offer to give any valuable thing or bribe to an elector as a consideration for some act to be done in relation to such preliminary meeting, caucus, or convention, or who shall interfere with or in any manner disturb any preliminary meeting, caucus, or convention held under said provisions shall be punished as provided in section 4542a.

"SEC. 298. *Bribery of voter; disturbance at caucus or convention.*—Every person who, by bribery or corrupt or unlawful means, prevents or attempts to prevent any voter from attending or voting at any caucus mentioned in this act, or who shall give or offer to give any valuable thing or bribe to any officer, inspector, or delegate whose office is created by this act, or who shall give or offer to give any valuable thing or bribe to any elector as a consideration for some act to be done in relation to such caucus or convention, or who shall interfere with or in any manner disturb any caucus or convention held under the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished in the manner hereinafter provided." (Ch. 341, 1899.)

Charges of corruption in the legislature.

On page 2271 of the report of the State senate investigating committee an attempt is made to summarize the corruption alleged to exist in connection with the election by the legislature, and the first objection is that Mr. Stephenson was elected by the legislature by a majority of three votes while the charges of corruption against him were being investigated by the legislature. This charge seems hardly worthy of serious consideration. It was admitted that he was elected by the legislature, and there is no law or rule that would invalidate the election because of the pendency of these charges. That was a matter for the members of the legislature to consider in determining whether or not they would vote for him.

Absent members on March 4.

The next charge is that the election of Mr. Stephenson was made possible by three members, who, it is claimed, at the instigation of Mr. Stephenson's managers and agents, absented themselves from the joint assembly when it became known that their presence would prevent the election of Mr. Stephenson, and it was charged that

the absence of these three members had been procured by fraudulent or wrongful means by or on behalf of Mr. Stephenson. It was the only charge of corruption in connection with the election of Mr. Stephenson by the legislature worthy of consideration.

The result of the vote on March 4 consequent upon the absence of these three members is made plain in the testimony of Richard J. White (p. 1324) and by an examination of the journal of the joint assembly on March 4. On that day the total number of votes cast was 123, of which Isaac Stephenson received 63.

The members of the legislature whose absence from the chamber on March 4 was questioned were Messrs. Farrell, Ramsey, and Towne.

On March 3 Farrell voted for Neal Brown, Ramsey voted for George W. Peck, and Towne did not vote at all.

On March 2 Farrell and Ramsey voted for Neal Brown, and Towne voted for Lucknow.

On March 1 neither Farrell, Ramsey, nor Towne voted at all.

On February 27 Ramsey voted for Wall, Farrell voted for Neal Brown, and Towne did not vote at all.

On February 26 Towne voted for Thomas A. Stewart; neither Farrell nor Ramsey seem to have voted.

These instances are cited to show that on the face of the transaction there was nothing unusual in the absence of either of the three absentees on March 4, and nothing in their absence to raise the presumption of corruption therein.

It is true that had these three members been present and voted the total vote would have been 126, and the 63 votes received by Mr. Stephenson would not have elected, but the evidence clearly establishes the fact that Mr. Ramsey, one of the three absentees, was paired with Mr. Fenelon and that such pairs had been universally recognized, so that Mr. Ramsey can not be said to have been absent for any corrupt purpose, nor would have his absence from the joint assembly affect the result of the vote. Being paired, he could not have voted. In that event, had Farrell and Towne been present the total vote would have been 125, of which Mr. Stephenson received 63. Sixty-three would have been a majority and would have elected Mr. Stephenson, so that the absence of Farrell and Towne did not affect the result of the election, and it can not therefore be said that the election was brought about through corrupt practices so far as the absence of Farrell and Towne was concerned.

It is not charged that any other member who voted for Mr. Stephenson did so either from corrupt motives or actions on his own part or that he was procured to do so by any corrupt action on the part of any person in the interest of Mr. Stephenson.

The votes cast for Mr. Stephenson were those that had been consistently supporting him throughout the contest. There was no change in his favor upon which any presumption of corrpution could be based.

Does the evidence show or tend to show that there were corrupt measures or unlawful methods adopted to secure the absence of either Farrell or Towne?

There has been much sensational testimony introduced before the subcommittee, which was heard largely because such testimony had been received by the legislative investigating committee for the purpose of showing bribery or corrupt methods in connection with the absence of Ramsey, Farrell, and Towne. It was not shown that any money had been traced to either of these men from any source in connection with the matter; but it was claimed that a fund had been raised to be used for corrupt purposes, and that, on the assumption that such fund had been raised, it must at least in part have been used to bring about the absence of these three members of the legislature.

It was claimed that Senator Stephenson had entered into an arrangement with Edward Hines and R. J. Shields for using money for corrupt purposes to be furnished by Mr. Stephenson, and much hearsay testimony was introduced for the purpose of establishing such fact. There can be no question but what the effort to establish any such charge utterly failed. There was no evidence upon which any reasonable conclusion that such corruption fund had been either raised or used could be based.

The charge as to a meeting between the three absentees or some of them and Mr. Regan and Mr. Puelicher at the Plankington House in Milwaukee centered about the testimony taken before the legislative investigating committee of a witness, Frank T. Wagner, who was utterly discredited both at the legislative investigation and by testimony introduced before the subcommittee. It was shown that he is now under sentence in the penitentiary for perjury for having testified to seeing these men in the Plankington Hotel and hearing a conversation upon which the charge that they had entered into a corrupt bargain at that time rested. All the testimony in regard to such a transaction fell to the ground, and was so manifestly without foundation as to call for no consideration except its dismissal.

Charge of bribery of other members.

There seems to have been some remark on the part of Mr. Damochowski and Mr. Lyons as to the tender of money being made them in connection with this election, but on the witness stand they both stated that whatever statements they made in that regard were made in jest and that there was no foundation in truth for them.

Some sensational testimony was introduced in regard to statements made by Mr. R. J. Shields as to having received money or handled money in the interest of Mr. Stephenson in a corrupt manner in dealing with members of the legislature, and members of the senate legislative investigating committee had gone to the office of a certain attorney in Chicago and there met Mr. Wirt Cook, of Duluth, Minn., who recited to them some hearsay statements as to conversations and acts which were fully investigated by the subcommittee and found to be entirely without foundation.

We may therefore safely dismiss the charges of corruption in connection with the action of the legislature in electing Mr. Stephenson, whether such election is held to have been on January 26 or on March 4, 1909.

General campaign and election.

It appears that Mr. Stephenson contributed $2,000 to the Republican State central committee. Against this contribution no legitimate objection can be urged. It was not in violation of any law nor for other than general election purposes.

It was also shown by testimony that Mr. Stephenson before the primary gave money to C. C. Wellensgard, Levi H. Bancroft, and Thomas Reynolds, who were candidates for the legislature. These men testified that they used the money in the interest of Mr. Stephenson at the direct primaries. If we eliminate Mr. Stephenson from the direct primaries the contributions which he made to these candidates for nomination and election to the legislature would be in violation of no law. It appears from the testimony that they were at the time voluntary and ardent supporters of Mr. Stephenson regardless of any money which they may have received or which may have been placed in their hands by him for any purpose.

There is not sufficient evidence upon which to base a charge of bribery or any other charge that would affect the validity of the election of Mr. Stephenson in either of these cases.

Direct primary.

The subcommittee, in determining the scope of the investigation, was confronted with the question as to how far, if at all, the charges affecting the candidacy of Isaac Stephenson before the direct primary should be considered.

The State legislative committee had directed its attention principally to the direct primary and the conduct of the candidates therein.

It was doubtless competent for the legislature to provide for direct primaries for the nomination of candidates for the legislature and to place legal restrictions about them to secure the integrity of their elections, but, as herein elsewhere more fully stated, it is not competent for the legislature to provide for the nomination of candidates for the United States Senate at direct primaries.

The status of Mr. Stephenson at such primaries is not comparable to that of candidates for the legislature or for any State office.

The language of the resolution under which the subcommittee acted directs it to report whether "in the election of Isaac Stephenson there were used or employed corrupt methods or practices," and the language of the last paragraph of section 1 of the resolution, bringing the matter to the attention of the United States Senate, strictly construed, refers only to the election.

When we speak of the election of a United States Senator under existing constitutional and legislative provisions we contemplate only the election by the legislature of the State. There is as yet no recognition to be given extra-legislative proceedings in the nature of what is termed "direct primaries," no such method of selection being recognized by any law of the United States.

The subcommittee has, however, brought to the attention of the Senate in the record of its proceedings all the facts obtainable relating to the conduct of the primary. Should it be the judgment of the Senate that such facts are irrelevant, then the consideration would be limited to matters concerning the election of members of the legislature, and the acts and conduct of members of the legislature and candidates in relation to the election of a Senator by the legislature.

The direct primary, legally speaking, is no part of an election of a United States Senator. The duty of an election of a Senator does not under any law rest with the electorate, but is vested by the Constitution solely in the legislature. The legisla-

ture electing had no existence until after the general election. The nomination of such members at the primary vested in the nominees not even an inchoate status. A State may give force and effect to a direct primary law providing for the nomination of candidates for State or minor offices to be elected under the laws of the State, but the legislature has no power to regulate in any manner or to any extent the election of a United States Senator, and there is no such proceeding known under any law of the United States as the nomination of a candidate for the United States Senate.

The question arises, Can any act in contravention of a law that is absolutely void work a forfeiture of any right to an office vested through the compliance with the Constitution and laws of the United States? Did the proceedings preceding and at the direct primary relative to a choice for United States Senator amount to more than a "straw vote"?

The mere fact that the Legislature of Wisconsin had undertaken to include a senatorial selection within the provisions of its direct-primary law, in the absence of power to so legislate, could not affect the validity of an election by the legislature made pursuant to national law; this must be obvious from the fact that the legislature was not in duty bound to elect anyone or consider anyone a candidate for election because of the action of the direct primary. It might have ignored such action altogether, and its having done so would not in any way affect the validity of its action.

There is no law of the United States recognizing such a thing as "candidacy" for the United States Senate, and no legal status is given to the frame of mind constituting an intention on the part of a man or his friends that he become a candidate before the legislature.

The question also arises as to the period when a man can be charged with responsibility for his acts so as to affect the validity of his subsequent election by the legislature.

It frequently occurs that none of the men who are avowed candidates are chosen. The matter rests solely with the legislature, and under existing laws one legislature can not dictate the rule governing a subsequent legislature in the manner of its procedure relative to matters resting entirely within its discretion.

It would be entirely within the power of a legislature, charged with the responsibility of electing a United States Senator, before proceeding to elect a Senator, to repeal any legislation enacted by a previous legislature which placed a limit upon or directed its action.

It seems from this consideration of the question we must conclude that the direct-primary proceedings can not be held to affect the validity of an election by the legislature.

Failure to file proper expense account.

The fifteenth specific charge is based upon the failure or neglect of Isaac Stephenson to make and file an expense account under the laws of Wisconsin. This requirement is under section 270 of the election laws which provides that every person who shall be a candidate before any convention or at any primary or election to fill an office for which a nomination paper or certificate of nomination may be filed, shall, within 30 days after the election held to fill such office, make out and file with the officer empowered by law to issue the certificate of election to such office or place, a statement in writing, etc., and that any person failing to comply with this section shall be punished by fine of not less than $25 or more than $500. This being a penal statute, the validity of an election could not be affected by the failure to comply with it.

General comment.

The rule adopted by the several candidates for said office seems to have been unanimous in regard to filing expense accounts.

Senator Stephenson's expense account was $107,793.05.

S. A. Cook's expense account was $42,293.29.

William H. Hatton's expense account was $26,413.

Francis E. McGovern's expenditure was $11,063.88.

Neal Brown's expense account was $1,075.87.

The total expenditures of all candidates for the office of United States Senator before the primary election was about $225,000.

Less than one-half of the voters at the general election voted at the primary. The total vote cast in the Republican primaries for the nomination of United States Senator was 182,915, being 81 per cent of the total primary vote cast by all political parties for Senator.

The total vote cast in the Democratic Party for United States Senator was 37,479, or about 17 per cent of the total primary vote of all parties cast for Senator, and about 23 per cent of the total Democratic vote cast for governor at the general election.

Mr. Stephenson, a Republican candidate, received 56,909 votes.
Mr. Cook, a Republican candidate, received 47,825 votes.
Mr. McGovern, a Republican candidate, received 42,631 votes.
Mr. Hatton, a Republican candidate, received 35,552 votes.
Mr. Brown, a Democratic candidate, received 24,937 votes.
Mr. Hoyt, a Democratic candidate, received 12,227 votes.
Mr. Rummel, Social Democratic candidate, received 4,047 votes.

On the basis of the total vote received by each senatorial candidate and the total cost of each candidate's campaign:

Mr. Stephenson spent $1.89 for every vote cast for him.
Mr. Cook spent $0.88 for every vote cast for him.
Mr. Hatton spent $0.85 for every vote cast for him.
Mr. McGovern spent $0.26 for every vote cast for him.
Mr. Brown spent $0.42 for every vote cast for him.
Mr. Hoyt spent $0.16 for every vote cast for him.

And there was spent in behalf of Mr. Rummel, the Socialist Democratic candidate, about $1 per vote.

Were it possible to hold that Mr. Stephenson was subject to the same restrictions under the laws of Wisconsin as a candidate for a State office, we would feel compelled to enter more fully upon the nature and character of the expenditures made by him and on his behalf during the primary campaign.

The amount of money expended by Mr. Stephenson, Mr. Cook, Mr. Hatton, and Mr. McGovern in the primary campaign was so extravagant and the expenditures made by and on behalf of these gentlemen were made with such reckless disregard of propriety as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of Government, which contemplated the selection of candidates by the electors and not the selection of the electors by the candidate.

Regardless of any statute requiring that strict accounts be kept of money expended by and on behalf of candidates, a candidate and every man representing him should know that public opinion would expect the parties to place and maintain themselves in a position so that if any of their acts were questioned they could justify such acts to the extent of giving every detail in regard thereto.

While I do not believe that the law of Wisconsin could constitute any man a candidate or place him in the position of and under the responsibilities of a candidate for an office over which the State had no control and which was not to be filled under any law of the State, yet I feel impelled to critizise the acts of those in charge of the expenditure of the money of men who are called candidates for the Senate, and especially of Mr. Stephenson, in the irresponsible and reckless manner in which they disbursed the money furnished them by Mr. Stephenson during the period of the primary campaign.

The failure to keep detailed accounts, the destruction of memoranda, the shifting of records and papers concerning the campaign from one place to another, the adoption of mysterious methods and roundabout ways in regard to matters that might just as well have been performed in open daylight in the presence of the people, would go far toward creating the impression that there was some occasion for Mr. Stephenson's representatives to avoid candor and to obscure conditions.

The subcommitte has gone carefully through all of the letters and correspondence which had been in the hands of Mr. Stephenson and his managers and which had been shifted from Milwaukee to Marinette and from Marinette to points in Michigan, and back again, under most unusual and mysterious circumstances. These letters are not out of the ordinary political correspondence of campaign managers and citizens whose votes, influence, or services are solicited in behalf of a candidate.

The letters transmitting and acknowledging the receipt of money have been considered separately from those giving information in regard to political conditions and instructions in regard to how political work shall be done. There is nothing in the letters transmitting or acknowledging the receipt of money that would seem to add anything to the information given by witnesses in explaining these expenditures so far as they could explain them. The subcommittee has not thought it necessary to print this correspondence, which is in evidence and might be held to constitute a part of the record of the investigation. In our judgment, it would add nothing in the way of assistance to the committee in ascertaining the facts necessary and proper to be considered in connection with the investigation.

Were a candidate for a State office in Wisconsin to conduct a campaign in the manner in which the campaign of Mr. Stephenson, and of other men who sought election to the United States Senate, were conducted, it would be very difficult to justify such conduct under the laws of the State.

The joint senatorial primary investigating committee in its report (submitted Mar. 18, 1910, but never acted upon), after reviewing the testimony, says:

"Your committee believes that the Republican senatorial candidates and their managers did not deliberately plan to violate the law, but in their desire to win these candidates, particularly Stephenson, Cook, and Hatton, conducted their campaigns with the idea of getting results, and men were hired and money spent, and State officials and employees and members of the legislature were used without much regard to propriety. All of the Republican candidates probably spent all they could afford and the amount spent by the different candidates was probably limited more by their ability to spend than their appreciation of the moral effect of the expenditure of such large sums of money to secure the nomination."

This committee evidently looked upon the result of the direct primary as shown by the vote cast therein for each of the men who sought election to the United States Senate as constituting a legal nomination. I entertain a different view of that matter and look upon the primary nomination as a mere expression of a choice without legal effect, and do not recognize such expression as binding upon the legislature.

Conclusion.

The testimony clearly shows that the candidates felt compelled to spend more money than they wanted to spend. The pressure upon them from those who were undertaking to manage their campaigns seems to have been very great and persistent, but I can find nothing in the testimony nor in the circumstances or conditions surrounding the senatorial contest which resulted in the election of Mr. Stephenson that in my judgment would justify the committee in recommending that the seat be vacated, or that he be declared not legally elected to the United States Senate; and therefore I recommend that the Senate find that the charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, are not true, and that Isaac Stephenson be acquitted of such charges.

W. B. HEYBURN.

VIEWS OF MR. POMERENE AND MR. SUTHERLAND.

The Senate Committee on Privileges and Elections authorized and directed its subcommittee "to investigate certain charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and to report whether 'there was used or employed corrupt methods or practices' in his election."

Without intending to specifically enumerate the charges made or to review in extenso the evidence in support or in refutation thereof, it will be sufficient for our purpose to classify the charges and evidence pertaining thereto, as follows:

First, those connected with the proceedings of the legislature affecting the election; and,

Second, those growing out of the primary election.

Proceedings of the legislature.

Each house, pursuant to the Federal statute, convened for the election of the United States Senator on January 26, 1909. The senate consisted of 33 members and the assembly of 100 members. Thirty-three members of the senate were present, and, before balloting, passed a resolution providing that "any senator who does not wish to vote for a candidate may vote by answering 'present.'" The roll was called, and 17 senators voted for candidates, 12 of whom voted for Isaac Stephenson. The 16 other senators simply voted "present." In other words, a quorum, in the language of the statute, voted for "one person for Senator in Congress," and of this quorum Isaac Stephenson received a majority. While the vote "present" of the 16 senators was in accordance with the resolution passed, we do not believe it could either add to or detract from the requirements of the statute. All members, no doubt, should have voted for "some person," but 16 voted "present," which was equivalent to a blank vote.

In the language of the majority of the committee in Ransom *v.* Abbott, "Senate Election Cases," page 400, "The vote must be for a person, not a blank—in fact, not for a myth, but for a person."

Without intending to review the authorities it is clearly established that "votes knowingly cast for a candidate who can not possibly exercise the function of the office if elected are thrown away." (State ex rel. Bancroft *v.* Frear, 144 Wis., 87.) And,

if this be true, it must follow that a mere vote of "present" is nothing more than a vote for "no person," or, in other words, a "blank," and should not, therefore, be counted in determining whether Senator Stephenson received a majority of the quorum of those who voted for "one person for Senator," and thereby complied with the letter and spirit of the statute.

For other authorities bearing upon this proposition see Sawyer *v.* Makie, 149 Mass., 269; "Cooley on Constitution Limitations," 932, Note 1; Rushville Gas Co. *v.* Rushville, 6 L. R. A., 315; Hopkins *v.* Duluth, 81 Minn., 189; and Commonwealth *v.* Cluley, 56 Pa. St., 270.

On the same day in the assembly 82 votes out of the 100 assemblymen were cast, and Isaac Stephenson received 60 out of the 82 votes. He, therefore, received, in our judgment, "a majority of the whole number of votes cast in each house." The vote thus cast was entered upon the journal of the senate and of the house. In conformity with the provisions of the Federal statute, the members of the two houses convened at 12 o'clock noon, on the day following, in joint assembly. The journal of each house was read, and showed the result of the balloting on the previous day in each house separately, as hereinbefore stated. Having received a majority of all of the votes cast in each house, it was the duty of the presiding officer to declare Senator Stephenson duly elected. This was purely a ministerial duty, and the mere fact that he failed to perform that duty could not, under any legal principle, undo that which was legally done in the separate and joint sessions, and, except for this failure of the presiding officer, was completely done.

Instead of declaring the result, over the protest of Senator Hudnall, a ballot was ordered and taken on that day and on each succeeding day until and including the 4th day of March, 1909. Prior to March 4 no one in any of the sessions received a majority of the votes cast. On March 4 there were 123 votes cast, of which Isaac Stephenson received 63, and he was then declared duly elected.

Charges of corruption in action of general assembly.

Charges of corruption were made to the effect that—

(*a*) Assemblyman Leuch was offered money to go upon the floor and vote for the purpose of effecting a quorum;

(*b*) That Assemblyman Joseph Damochowski had been offered $1,500 for his vote; and

(*c*) That Assemblymen Farrel, Ramsey, and Towne absented themselves from the joint session of the joint assembly on March 4 through corrupt influences.

Charge as to Assemblyman Leuch.

He testified that David H. Davies, on March 1, 1909, said: "I have authority to tell you that you can have anything you want if you will stay in the joint convention to-day and vote." Mr. Davies denied having any such conversation, and swore that he neither authorized nor was in a position to pay or promise Mr. Leuch anything whatsoever. Whether this conversation occurred or not, there is no evidence connecting it directly with Senator Stephenson, or even indirectly through any authorized agent.

Charge as to Assemblyman Damochowski.

There was testimony to the effect that Joseph A. Damochowski had said to several parties that he had been offered $1,500 for his vote in the assembly. He admitted that he had so stated upon several occasions, but in explanation thereof said that any statements he made to that effect were in jest, and that no such offer was in fact made. Outside of these admitted statements, there was no evidence either that any bribe had been offered to or received by him, and no evidence tending to connect Senator Stephenson or his managers with this alleged attempt to bribe.

Members absenting themselves on March 4.

On March 4, 123 members of the joint assembly were present and voting. Sixty-three members being a majority of those voting, cast their ballots for Mr. Stephenson, and, having for the first time received a majority of those voting in the joint session, he was duly declared elected.

We think it is fair to say that the record shows that an effort was made by some of the friends of Mr. Stephenson either to pair some of those who were opposed to Stephenson's election with those who were absent and favorable to his election, or to secure the absence of those who were opposed to his election, for the purpose of reducing

the number who might be in the joint session and voting, and thereby enable those who were favorable to his election to have a majority of the votes cast.

Richard J. White, a friend of Mr. Stephenson, succeeded in pairing Ramsey, a Democrat, who was opposed to Stephenson's election, with Mr. Fenelon, who was a supporter of Mr. Stephenson and because of sickness was not able to attend the session.

Towne, a Democrat, left the chamber just before the voting began and was taken into a cloakroom by C. C. Wayland, one of Mr. Stephenson's lieutenants, and there held in conversation while the balloting was going on, and we have no doubt that Wayland purposely detained him, and Towne—to say the least—was indifferent about the situation.

Farrel left the assembly room before the roll was called and went to a café for luncheon, and did not return until sometime after the result of the election had been declared. The absence of Towne and Farrel while the joint assembly was in session is not consistent with their duties as assemblymen, nor is their explanation satisfactory. But, whatever the facts may be, there is no evidence in the record, nor any obtainable, so far as the committee knows, which would justify the conclusion that the absence of any of these three men was secured by corrupt means. It was necessary for Ramsey, Farrel, and Towne all to have been present and voting in order to prevent Stephenson from having a majority vote in the session. The other seven absentees were satisfactorily accounted for, and no suspicion, so far as we know, attaches to them.

We therefore conclude:

First, that the election in fact occurred on January 26, 1909; and

Second, that there is no evidence justifying the conclusion that corrupt "methods or practices" were employed in securing the vote on March 4, 1909, even if it should be held that the election took place on March 4.

Primary election irregularities.

Senator Stephenson's account filed with the secretary of state shows that there was expended by him and through his committee in connection with the primary election $107,793.05. He received 56,909 votes, which cost him $1.89 for every vote cast.

These expenditures, for the purpose of this report, may be divided into the following classes:

First, moneys paid out to persons employed by him or in his behalf to circulate nomination papers in order to get the number of signatures required by the Wisconsin statutes before his name could be placed upon the ticket.

Second, moneys paid out as follows:

(*a*) to newspapers for political advertising;

(*b*) for editorial support;

(*c*) for lithographs, campaign material, postage, telephone, telegraph, and express charges;

(*d*) office expenses, including rent, clerk hire, and assistants.

Third, payment for services of speakers, hall rent, music, and for men devoting their time and efforts in cultivating Stephenson sentiment throughout the State;

Fourth, moneys expended for workers at the polls, and for conveyances and services in getting out the voters;

Fifth, for drinks and cigars;

Sixth, money given to C. C. Wellensgard, L. L. Bancroft, and Thomas Reynolds, who were candidates for the legislature, to be used by them in the interest of Senator Stephenson;

Seventh, money paid to the game warden, John W. Stone, for use in the Senator's campaign;

Eighth, $2,000 contributed by Senator Stephenson to the State campaign committee for general election purposes; and

Ninth, expenses incurred during the session of the general assembly in opening and maintaining headquarters at Madison from the beginning of the session until after March 4, 1909, and for hotel bills and traveling expenses.

No part of the contribution to the general campaign committee or the expenses incident to the headquarters during the session of the general assembly were ever reported to the secretary of state.

The above we believe to fairly represent the different classes of expenditure, which were disclosed by the evidence.

There was no evidence before the committee from which it could be fairly concluded that any of this money was expended for "corrupt methods or practices," unless those recited are to be construed as corrupt under the provisions of the Wisconsin statutes.

Management of the campaign.

The testimony showed that Senator Stephenson had on deposit in the Marshall & Illsley Bank $50,000, which was used in the campaign, with other added as required. His campaign was in charge of E. A. Edmonds, J. H. Puelicher, and Rodney Sackett.

There are 71 counties in the State and 2,200 election precincts. The method of the managers was to employ a lieutenant or campaign manager in each of the counties. In several instances one man had charge of a number of counties. Arrangements were made with these managers by which sums of money would be placed in their hands varying from $100 or several hundred dollars to several thousand dollars. In some instances the manager was not given, and would not accept, compensation for his services. In others definite arrangements were made for the amount of compensation the manager was to receive, and in many cases the manager would determine and retain for himself such sum or sums as he deemed proper. It is quite clear that a very substantial part of the money expended in the organization of the several counties never went beyond the pockets of those who received it. The money expended by these managers, so far as the testimony discloses, was for one or more or all of the purposes above described.

Wisconsin election statutes.

The Wisconsin statutes defining election offenses are fully set forth on pages 10, 11, and 12 of the views submitted by Senator Heyburn, chairman of the subcommittee, and it will not be necessary, therefore, to insert them here.

Application of the law to the facts—Nomination papers.

Before a candidate for office is entitled to have his name placed upon the ticket at a primary, the Wisconsin statute requires that petitions or nomination papers shall be filed, signed by at least 1 per cent of the voters of his party in at least each of six counties in the State, and in the aggregate not less than 1 per cent nor more than 10 per cent of the total vote of his party in the State.

The testimony shows that Senator Stephenson hired and paid men to circulate his nomination papers in order to get the required number of signatures, but there was no evidence showing that any money was paid, in the language of the statute, to induce anyone to sign his nomination papers, and we do not think it was seriously claimed by those who were interested in the instigation of these proceedings that any money was unlawfully expended for this purpose.

Expenditures of money during the primary campaign.

Was it a violation of the statute to pay out money for political advertising in the newspapers, or for editorial support, or for lithographs, campaign material, or for telegraph, telephone, or express charges, or for office expenses, including rent and hire of assistants, or for the hiring of speakers, halls, rent, music, and for men devoting their time and efforts in cultivating Stephenson sentiment throughout the State, or to pay workers at the polls, or for conveyances and services in getting out the voters, or for money for drinks and cigars given in a social way during the campaign?

A careful examination of the bribery statutes of Wisconsin will indicate clearly that the expenditures of money of the character recited only comes within the inhibitions thereof, when they are made corruptly, unless section 298 forbids it. This section reads:

"Every person who, by bribery or corrupt or unlawful means, prevents or attempts to prevent any voter from attending or voting at any caucus mentioned in this act, or who shall give or offer to give any valuable thing or bribe to any officer, inspector, or delegate, whose office is created by this act, or who shall give or offer to give any valuable thing or bribe to any elector as a consideration for some act to be done in relation to such caucus or convention * * * shall be deemed guilty of a misdemeanor, etc."

None of these expenditures can come within any of the provisions of this section, unless it be a violation of this language: "or who shall give or offer to give any valuable thing or bribe to any elector as a consideration for some act to be done in relation to such caucus or convention."

It should be stated that by sections 39 and 40 of the election laws of Wisconsin the criminal penalties applying to a caucus and elections are made applicable to primary elections.

If the words "to give any valuable thing" are to be given a comprehensive and literal interpretation, and to prohibit the giving or offering of "any valuable thing," "as a consideration for some act" to be done, it would not have been necessary to write into the statute the words "or bribe," because the former expression would include the latter. The purpose of the statute is evidently to prohibit corrupt giving.

"Words of a general import in the statute are limited by words of restricted import immediately following and relating to the same subject." (36 Cyc., 1119, Nance *v.* Southern R. R. Co., 149 N. C., 366.)

"In interpreting a statute, where the language is of doubtful meaning, the court will reject an interpretation which would make the statute harsh, oppressive, inequitable, or unduly restrictive of primary private rights." (Nance *v.* Southern R. R. Co., 149 N. C., 366.) To the same effect, State ex rel. *v.* Jackson, 168 Indiana, 389.

Again, section 4543–C requires the filing of accounts of expenditures of a candidate. This must contemplate that there are expenditures which can not in any wise be regarded as a violation of the Wisconsin laws. If a literal interpretation is to be given to the words, "any valuable thing * * * as a consideration for some act to be done," and some expenditures be prohibited, whether morally corrupt or incorrupt, would the legislature require the candidate to convict himself by filing an account? This is a criminal statute, and it must be strictly construed against the State and in favor of the defendant when charged with its violation.

Applying these rules, therefore, it would seem that the statute prohibited the giving of any valuable thing corruptly or in the nature of a bribe.

We have no sympathy whatever with the expenditure of money in excessive amounts, whether in a senatorial or any other political campaign. That an expenditure of $107,793.05 is an excessive amount to be spent in the candidacy of the office of United States Senator, which pays a salary for six years' service amounting to $45,000, goes without question; that it is demoralizing and should be prevented can not be denied; that some of this money might have been spent corruptly may, for the sake of the argument, be conceded, but it is not sufficient that possible or even probable corruption or bribery exists. The evidence must show it, and this case, like all other cases, must be determined from the facts as they are disclosed in the trial and under the law as it then existed. The committee, proceeding upon the assumption that the expenditure of so large a sum of money required the fullest investigation and explanation, probed every rumor and followed every clue which was brought to its attention, with the result that no evidence was discovered which would justify the conclusion that any of this sum of money was corruptly or illegally spent.

At the time of this primary there was no statute, either State or National, limiting the amount of expenditures. There is no judicial or legislative decision, so far as we are advised, limiting the amount which may be legally expended. Can we, in the face of the fact that the Congress of the United States and the General Assembly of the State of Wisconsin prior to this election failed to limit election expenditures, now arbitrarily determine that because this sum was spent it was illegally and fraudulently expended, and therefore vacate the Senator's seat? Can it be said that the expenditure of such a sum is in contravention of a public policy which must be given the force and effect of a statute? If so, where does public policy draw the line between what shall be a legal and an illegal amount? The situation is unfortunate, but the Congress and the State legislature are to blame for not having limited the expenses by statute. Laws can not be enforced retroactively, and surely this case must be decided in accordance with what the law then was and not in accordance with what the law ought to be. Since that election the State of Wisconsin has limited the amount of expenditure in a senatorial campaign to $7,500 and the Federal Government has limited it to $10,000.

Effect of the primary law.

It is strenuously argued on behalf of Senator Stephenson that even if the primary law of Wisconsin was violated its provisions are unconstitutional, because section 3 of Article I of the Federal Constitution provides that Senators shall be chosen by the legislature and because section 4 gives Congress the right to prescribe the time and manner of holding elections for Senators, and that this power has been exercised by the Congress in the manner prescribed by sections 14 and 15 of the Revised Statutes of the United States.

The Wisconsin primary law, in substance, provides (chap. 451, Laws of 1903) as follows:

"Party candidates for the office of United States Senator shall be nominated as other State officers. (Subdivision 3 of sec. 2.) Nomination papers for candidates for the

office of United States Senator shall be filed in the office of the Secretary of State. (Subdivision 1 of sec. 6.) The person receiving the greatest number of votes at the primary as the candidate of the party for the office voted for shall be the candidate of that party for such office (subdivision 1, sec. 18), and the secretary of state is required to publish in the official State paper a statement of the result of the canvass of the primary as soon as the same is certified to him."

These are all of the requirements found in the Wisconsin law pertaining to the nomination of party candidates for the office of United States Senators.

May the people of a sovereign State not provide for a method of expressing their sentiment in the selection of a Senator who shall represent that State in the United States Senate? May they not petition in such form and manner as to them may seem proper? And if it is their desire to so petition, may they not prescribe the method of petitioning so as to make the result of this petition, whether it be in the form of a letter to the members of the general assembly or in the form of a primary, an honest expression of their views?

The constitutionality of the above provisions of the Wisconsin law was passed upon by the supreme court of that State in the case of State ex rel. Van Alstine *v.* Frear (142 Wisc., 320). On page 349 Barnes, J., in delivering the opinion of the majority of the court, says:

"Our constitutions, State and National, guarantee the right of petition. Every citizen of the State has the right to petition the legislature asking that the candidate of his choice be elected United States Senator. Every citizen of a senatorial or assembly district has the right to petition his local representative to the same effect. The lawmaker is thus advised of public sentiment, a potent factor for him to consider in connection with other matters in arriving at a conclusion. Wherein does the primary nomination for United States Senator differ from the exercise of the right of petition? The legislative candidate is thereby informed of something that he has the right to know and of something that it is his duty to heed. He may not regard the verdict at the polls as obligatory, but should treat it as advisory. Moral suasion may be a perfectly legitimate agency to employ even in the election of a United States Senator. That the electors in the exercise of their guaranteed right of petition might do in substance and effect what they now do at the primaries hardly admits of controversy. The framers of the Constitution could not have supposed that there was any impropriety in the people advising their representatives of how they desired them to vote on the senatorship, else an exception would have been incorporated in the clause guaranteeing the right of petition, restricting its application to matters other than the election of United States Senators."

It will be conceded that while the result of a primary election, under the present constitutional provisions, could not control the State senators and representatives in their choice of an United States Senator, would not an expression of the will of the people at a primary election have great weight with their representatives in casting their votes? And if this be so, ought not the primary election held to declare this choice be carefully guarded by suitable penalties? We have no hesitancy in saying that if the evidence disclosed the use of corrupt methods at the primaries, it would affect the result of the election by the general assembly, and the Senate would be justified in taking cognizance of that fact and unseating any Senator who was thus delinquent.

Moneys given to candidates for the legislature.

The testimony disclosed that Senator Stephenson, before the primary, gave money to C. C. Wellensgard, L. H. Bancroft, and Thomas Reynolds, who were then candidates for the legislature. They did not live in the same district or county with Mr. Stephenson. They were his personal friends. The money was given them to be used in behalf of Senator Stephenson for the nomination as the Republican candidate for Senator.

It may be said that this money was probably used by these men to further their own interests, as well as to further the interests of Mr. Stephenson. But whether it was so used or not, there is no evidence that it was so used or that it was given to them for that purpose.

On the contrary, the affirmative and uncontradicted testimony is all to the effect that this money was used strictly in the interest of Mr. Stephenson and none of it to further the interest of any of the legislative candidates.

Money paid to Game Warden John W. Stone.

Mr. Stephenson's campaign managers gave to John W. Stone, the game warden of the State, $2,849.50 for campaign purposes. This was distributed among a number of

the deputy game wardens; he retained some portion of it himself, and in testifying before the legislative committee falsely stated the amount he had paid out.

Section 990–28 (sec. 28, ch. 363, 1905) provides:

"No officer, agent, clerk, or employee under the government of the State shall directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution, or political service, whether voluntary or involuntary, for any political purpose whatever from any officer, agent, clerk, or employee of the State."

This statute makes it an offense for any officer, agent, clerk, or employee under the government of the State to solicit or receive any assessment, subscription, or contribution, or political service from any officer, agent, clerk, or employee of the State. It is clear that this statute was not violated by Senator Stephenson, since he was not an officer, agent, clerk, or employee of the State. Moreover, the statute makes it an offense on the part of the recipient of the fund only. No offense is committed by the donor. It is true, the money should not have been paid to the game warden, and the giving of it does not show that fine discrimination which ought to be characteristic of men who are engaged in a campaign of this character. No law was violated by the donor, and this election can not be declared illegal because this expenditure was made.

Filing of accounts.

Section 4543–C of the revised statutes of Wisconsin requires the making out, and filing with the secretary of state, a statement in writing, subscribed and sworn to by the candidate "setting forth in detail each item in excess of five dollars in money, or property contributed, disbursed, expended, or promised by him, and to the best of his knowledge and belief by any other person or persons for him, or in his behalf, wholly or in part in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other person at said election, the dates when, and the persons to whom, and the purpose for which all said sums were paid, expended, or promised by such candidates in any sum or sums whatever."

No account whatever was filed of the amount contributed by Mr. Stephenson to the State campaign committee, nor of the amount expended during the session of the general assembly. The account which was filed of the expenses incurred in connection with the primary did not comply with the law in that it lumped the expenses; gave the names of but very few of the persons to whom money was paid; did not give the dates when expended, nor as fully as contemplated by the statutes the purposes for which expended. The account as filed was approved by the general counsel of Mr. Stephenson without any examination of the statute, and simply because it conformed with certain accounts, which had been filed by prominent candidates for other offices. A careful examination of this account justifies the belief that it was purposely drawn so as to give to the public as little information as possible.

The penalty for failing to comply with this statute is a fine only, and it does not provide for the forfeiture of the office. If it did, the statute to that extent would be unconstitutional, but Mr. Stephenson, because of his failure to file a proper account, has violated the statute and is subject to a fine. However, he must be absolved from any moral delinquency, because in the preparation and filing of his account he consulted with counsel, and followed their advice, and if it was not properly done they were to blame rather than he.

In addition to this, the validity of the election which had already taken place could not be affected by the failure to thereafter perform some act enjoined by the State statute. The election was already an accomplished fact and its validity must be determined by the facts theretofore or then existing. Anything done thereafter can not be regarded as a substantive ground for invalidating the election. Its only evidential value would be in reflecting light upon or as giving color to the preexisting facts.

After a careful consideration of all the evidence and the law, we had no hesitancy in joining in the report presented by the subcommittee.

We heartily approve these words of Senator Heyburn:

"The amount of money spent by Mr. Stephenson, Mr. Cook, Mr. Hatton, and Mr. McGovern in the primary campaign was so extravagant, and the expenditures made by and on behalf of these gentlemen were made with such reckless disregard of propriety, as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of Government, which contem-

plated the selection of candidates by the electors and not the selection of the electors by the candidate.

"Regardless of any statute requiring that strict accounts be kept of money expended by and on behalf of candidates, a candidate and every man representing him should know that public opinion would expect the parties to place and maintain themselves in a position so that if any of their acts were questioned they could justify such acts to the extent of giving every detail in regard thereto.

"While I do not believe that the law of Wisconsin could constitute any man a candidate or place him in the position of and under the responsibilities of a candidate for an office over which the State had no control and which was not to be filled under any law of the State, yet I feel impelled to criticize the acts of those in charge of the expenditure of money of men who are called candidates for the Senate, and especially of Mr. Stephenson, in the irresponsible and reckless manner in which they disbursed the money furnished them by Mr. Stephenson during the period of the primary campaign.

"The failure to keep detailed accounts, the destruction of memoranda, the shifting of records and papers concerning the campaign from one place to another, the adoption of mysterious methods and roundabout ways in regard to matters that might just as well have been performed in open daylight in the presence of people, would go far toward creating the impression that there was some occasion for Mr. Stephenson's representatives to avoid candor and to obscure conditions."

While we have no doubt as to the correctness of the subcommittee's finding, we do not want it to be understood that we question the propriety of filing charges challenging the validity of the election or of the making demand for an investigation either by the General Assembly of Wisconsin or by the United States Senate.

An enormous sum of money had been expended. Messrs. Edmunds and Sacket, who were in charge of the campaign as Mr. Stephenson's managers, knew of the statute requiring the filing of an account of their expenditures. They destroyed all original records of accounts, though they kept what purported to be copies. They grouped these items and amounts in such a way that they gave no knowledge whatever to the public except the totals of each class of expenditures. The account was not filed until the last moment permitted by the statute.

Mr. Puelicher, a banker, acted as treasurer. He did not open an account as depositors usually do. He received remittances, kept private memoranda, paid out cash, and made disbursements of these funds, but kept no record thereof upon the bank's books. No other customer's funds, either before or since, were received or disbursed in a similar way. There was an air of mystery about the entire affair.

After the investigation by the committee of the general assembly was started Mr. Stephenson's local counsel had such records and correspondence as had not already been destroyed moved out of the State for the purpose of keeping them beyond the jurisdiction of the general assembly.

It may be said in passing, however, that the accounts were kept on card indexes, and Mr. Sacket gives as a reason for destroying them that they were made with lead pencil in many cases, and the writing was practically obliterated, so that he made copies and then destroyed the originals (record, p. 161) because they were cumbersome and inconvenient (p. 523). And it may be further said that there seems to have been no substantial reason for moving the correspondence out of the State. It was all before the committee, and an examination failed to disclose anything of an inculpatory or improper character which would render any concealment necessary.

Can there be any wonder that the public became suspicious and the members of the general assembly, out of a decent sense of self-respect, should demand a thorough investigation?

If Mr. Stephenson has been put to great expense and trouble, it is due, first, to the reckless expenditure of this large sum of money, and, second, to the studied and mysterious efforts of his managers and local attorneys to conceal the facts, up to and during the investigation before the joint committee of the general assembly, and the separate committee of the State senate.

But out of all this scandal and trouble much good has come. Public sentiment was aroused. The unlimited use of money has been condemned, and stringent corrupt-practices acts have been adopted, both by the General Assembly of the State of Wisconsin and by the Congress of the United States.

ATLEE POMERENE.
GEO. SUTHERLAND.

(Cong. Rec., vol. 48, pp. 1946–1953.)

VIEWS OF THE MINORITY.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 19, 1912.—Ordered to be printed.

Mr. Jones (for himself, Mr. Clapp, Mr. Kenyon, Mr. Kern, and Mr. Lea), from the Committee on Privileges and Elections, submitted the following views of the minority (Rept. No. 349, pt. 2), to accompany Senate resolution 136:

In the primary election at which Mr. Stephenson was nominated for Senator pursuant to the Wisconsin law, the candidates expended the following sums:

Neal Brown	$1,075.87
Francis E. McGovern	11,063.88
William H. Hatton	26,413.00
S. A. Cook	42,293.29
Senator Stephenson	107,793.05

In all, about $225,000 on the part of candidates for the Senate alone.

Referring to these expenditures, the majority report says:

"The amount of money expended by Mr. Stephenson, Mr. Cook, Mr. Hatton, and Mr. McGovern in the primary campaign was so extravagant and the expenditures made by and on behalf of these gentlemen were made with such reckless disregard of propriety as to justify the sharpest criticism. Such expenditures were in violation of the fundamental principles underlying our system of government, which contemplated the selection of candidates by the electors and not the selection of electors by the candidate."

We concur in this statement, and it justifies us in opposing the conclusion of the majority. How a seat in the Senate can be secured "in violation of the fundamental principles underlying our system of government," with the evidence showing the use of such a large sum of money, and not be tainted by corrupt methods and practices we are unable to comprehend. The question now squarely before the Senate is whether or not methods and practices "in violation of the fundamental principles underlying our system of government" shall be denounced by our words and approved by our votes.

The majority report also says:

"Were a candidate for a State office in Wisconsin to conduct a campaign in the manner in which the campaign of Mr. Stephenson and of other men who sought election to the United States Senate were conducted, it would be very difficult to justify such conduct under the laws of the State."

This statement we indorse. It warrants our opposition to the conclusion of the majority. If it would be difficult to justify a campaign like this by a candidate for a State office, why is it not equally difficult to justify it on the part of Senator Stephenson? He was not compelled to go into the primary. He elected to do so, and he should be held to the same degree of accountability as any other candidate in that primary.

If he used methods—and the majority says he did—that it would be difficult to justify in behalf of a State candidate, then it is equally difficult for the Senate to justify such conduct on the part of a candidate for a seat in this body and preserve its integrity and honor. In our judgment it can not do it.

Admitted facts.

The following may be taken as admitted facts in this case: Three men were selected as managers by Senator Stephenson; money was placed in their hands from time to time as called for to the amount of over $107,000; they were not asked how they expended it, nor for what purpose; no accounting was requested; they paid it out in various sums to different individuals in different wards, precincts, and counties; large sums were paid to different individuals holding official positions, and to individuals recognized to be leaders, and to others of prominence in different organizations; no directions were given to these men how the money should be expended; no reports were required and no knowledge obtained as to how they spent the money or for what purpose; men were hired for the ostensible purpose of going over the country talking Stephenson and creating Stephenson sentiment; men, whose occupations led them into different sections of the country, were paid large sums of money for talking for Stephenson on their travels; men were paid three, five, and ten dollars per day to be at the polls on election day, or to haul voters to the polls; large sums were paid leaders in different wards and precincts to look after their wards and precincts; hundreds of

dollars were spent for treating to cigars, liquors, meals, etc., as much as $135 in one day by one man; money was paid to candidates for the legislature, at least three of whom were nominated and elected; detailed expenditures were not kept; memoranda were destroyed; records and papers concerning the campaign were shifted from one place to another; mysterious methods and roundabout ways were employed; original records were destroyed; items and amounts were grouped in such a way as to give no knowledge to the public except the amount of each class of expenditures; a banker acted as treasurer; no account was opened as is usually done by depositors; remittances were received, private memoranda kept, cash disbursements of funds made, but no record was kept on the bank's books, and when the committee of the general assembly started to investigate local counsel for Mr. Stephenson had such records and correspondence as had not already been destroyed moved out of the State, for the purpose of keeping them beyond the jurisdiction of the general assembly.

All this is admitted, and we feel that we have a right to assume from these admitted facts and actions that corrupt methods and practices were used in connection with said primary election. To hold otherwise is to establish a precedent that would authorize an expenditure of hundreds of thousands of dollars to debauch the electorate in order to secure a seat in this body. To do this is to notify the world that we are careless as to whether or not seats in this body are to be bought and sold as so much merchandise to the man with the largest purse. To do so is to say to the man of millions eager for place, power, and honor, "Spend as much of your millions as you please to secure a seat here and no question will be made if you claim it was expended within the law." As was said by Senator Hoar and Senator Frye, in regard to the facts before them in the Payne case, "No more fatal blow can be struck at the Senate or at the purity and permanence of the republican Government itself than the establishment of this precedent."

The expenditure of such a sum of money at a primary election on behalf of one candidate in itself shocks the judgment and conscience of honest men generally, and disbursed as disclosed by the record in this case is conclusive proof of corrupt methods and practices.

The primary.

The power to inquire into the practices and methods employed in the primary election is questioned. The majority in this case find that we have this power, and with that conclusion we agree. In this we are fully sustained by principle and precedent, and by the terms of the resolution under which the committee acted, which authorized and directed the committee "to investigate certain charges preferred by the Legislature of Wisconsin against Isaac Stephenson, a Senator of the United States from the State of Wisconsin, and report to the Senate whether in the election of said Isaac Stephenson as a Senator of the United States from the said State of Wisconsin there were used corrupt methods and practices." The charges preferred by the Legislature of Wisconsin affected not only the election by the legislature itself, but also the primary election.

It appears by the record that several candidates for the legislature announced during their candidacy that, if elected, they would vote for the candidate for Senator receiving the highest vote at the primary. If the primary choice was secured by corrupt methods and practices, would not the vote in the legislature secured thereby be corrupt, however innocent the member casting it? Several members of the legislature announced when they voted for Stephenson that they did so solely because he was the primary choice. If the primary was carried by corrupt methods and practices, these votes were corrupt, though honestly cast, and if the Senate can not inquire into such corrupt methods and practices, then the power given to us to judge of elections of our Members is a mere shadow. That we have this power is in accord not only with reason and justice, but is sustained by precedent.

The case of Mr. Caldwell, found at page 429, Senate Election Cases, is in point. In this case an arrangement was made by Mr. Caldwell with Thomas Carney under which Mr. Carney agreed not to be a candidate for United States Senator before the Legislature of Kansas and should give his influence and support for Mr. Caldwell. Mr. Caldwell was to pay him $15,000. Mr. Carney was not a candidate before the legislature and did use his influence to secure the election of Mr. Caldwell. Was such an arrangement corrupt? The committee said:

"It was an attempt to buy the votes of the members of the legislature, not by bribing them directly, but through the manipulations of another. The purchase money was not to go to them, but to Mr. Carney, who was to sell and deliver them without their knowledge. That Mr. Caldwell did procure the votes of members of the legislature, friends of Mr. Carney, ignorant of the fact that Mr. Carney was making merchandise of his political character and influence and of their friendship for him, for which he was to receive a large sum of money, the evidence leaves no reasonable doubt.

"Buying off opposing candidates, and in that way securing the votes of all or the most of their friends, is in effect buying the office. It recognizes candidacy for office as a merchantable commodity—a thing having a money value—and is as destructive to the purity and freedom of elections as the direct bribery of members of the legislature."

When candidates for the legislature announce that they will vote for the choice of the primary for Senator, then to buy or corrupt the primary is to buy the member of the legislature; and if it was corrupt to buy off a candidate for the Senate and thereby secure the votes of his friends, it is also corrupt to buy the primary and thereby secure the votes of those who announce that they will be controlled by the primary; and if the Senate can go outside of the proceedings of the legislature and investigate corruption in preventing men from being candidates for the Senate before the legislature, then it can certainly investigate methods and proceedings in the primary.

In the Payne case (Senate Election Cases, p. 711) three of the committee of seven say:

"We, in our conclusion, made no distinction between the use of fraud, corruption, or bribery in a caucus vote or in the legislative vote for a Senator. Although a caucus, or what proceeds in it, has no constitutional or legal relation to the election of a Senator, yet by the habit of political parties, the stage of determination as to who is to be elected Senator, and the influences, proper or improper, that produce that determination, is that which precedes and is concluded in the caucus. So far as the question of personal delinquency or turpitude is concerned, no moral distinction should be made between corrupt proceedings in caucus and those in the legislature. How far any such distinction would need to be insisted upon in any case, on the question of unseating a Senator, where he himself was not affected with any personal misconduct or complicity with the misconduct of others, we have no occasion, in the immediate case or attitude of the subject, to consider or suggest."

Senators Hoar and Frye, in the same case, in their minority views at page 715, say:

"If B, C, and D have promised to vote as A shall vote, if A be corrupted, four votes are gained by the process, although B, C, and D be innocent. In looking, therefore, to see whether an election by the legislature was procured or effected by bribery, it may be very important to discover whether that bribery procured the nomination of a caucus whose action a majority of the legislature were bound in honor to support."

John W. Stone.

John W. Stone was State game warden and had many deputies acting under him. Their position gave them an influence they would not have as individuals, and their duties required them to travel over the State. It was desirable to have their active support. Senator Stephenson personally directed that $2,500 be turned over to Stone. This was done without any specific directions as to its use, and the money was distributed over the State where and in the manner that it was thought would do the most good. While this action may not be a direct violation of the letter of any State law, in our judgment it was a corrupt practice.

Extracts from testimony.

We submit the following extracts from the testimony as illustrative of the methods and practices pursued in the distribution of this large sum of money for campaign purposes:

Primary—Stephenson would fix no limit, but said go on and conduct the campaign, etc.

Mr. EDMONDS. In my talk with Senator Stephenson I wanted to learn from him the amount of money he expected to expend. He seemed to think that too much money was being expended. I endeavored to have him fix an amount, so that we would not exceed it. This he declined to do, and I endeavored to show him the difficulty of conducting a campaign without knowing how much I might be allowed to expend; but I was not able to get him to state, and he said to go on and conduct the campaign—"use your best ability in conducting it," and left it in that way.

Senator Stephenson.

Senator POMERENE. Did they advise you from time to time as to how they were expending this money?

Senator STEPHENSON. Not as a rule; no, sir.

Senator POMERENE. Did you ask for any report from them from time to time as to how they were expending this money?

Senator STEPHENSON. No, sir. I had confidence in Mr. Edmonds and Mr. Puelicher and my bankers, and I have yet.

Senator POMERENE. Referring to this letter of August 4, it was made known to you that to carry out Mr. Edmonds's plan he needed more money?

Senator STEPHENSON. Yes, sir.

Senator POMERENE. Did you at that time take up with him the matter as to the amount which you felt disposed to put into the campaign?

Senator STEPHENSON. I can not say as to that. We telephoned some. I think I was in the headquarters only twice, and not to exceed an hour altogether, during the entire campaign. I was not in Milwaukee but about three times.

Senator POMERENE. In other words, we are to understand, then, that you left the entire management of this campaign to your campaign managers, and about all you did was to furnish the sinews of war?

Senator STEPHENSON. Yes.

Two thousand five hundred dollars paid to Stone, game warden.

The CHAIRMAN. We will pass that. Now we come to another item, "Cash to J. W. Stone, $2,500." Who was Mr. Stone?

Mr. EDMONDS. Mr. Stone was game warden of Wisconsin.

The CHAIRMAN. Did you know him personally before the payment of this $2,500?

Mr. EDMONDS. Yes; I had met him.

The CHAIRMAN. Or at the time?

Mr. EDMONDS. I had met him.

The CHAIRMAN. You paid him the money, did you not, in cash?

Mr. EDMONDS. Through my instructions.

The CHAIRMAN. Did you not pay it to him in cash yourself?

Mr. EDMONDS. No.

The CHAIRMAN. Who did?

Mr. EDMONDS. Mr. Sacket says he did.

The CHAIRMAN. Mr. Sacket paid it in cash. Where did he get the cash? Did you give it to him?

Mr. EDMONDS. No; I did not have the cash.

The CHAIRMAN. Mr. Sacket had no cash in the campaign, did he?

Mr. EDMONDS. Mr. Sacket could get the cashier's check from the bank.

The CHAIRMAN. He had to get it from you, or on your credit?

Mr. EDMONDS. Sure; I told them to give it to him.

The CHAIRMAN. Then you did tell him to get it?

Mr. EDMONDS. Certainly.

The CHAIRMAN. Let us see if we can get at a candid statement of the occasion of the payment of this $2,500 to the State game warden. You know all about it, do you not?

Mr. EDMONDS. About his getting the money?

The CHAIRMAN. You know all the details of that game-warden proposition, do you not?

Mr. EDMONDS. Yes.

The CHAIRMAN. The matter has been investigated in such a way as to fix it in your mind, has it not?

Mr. EDMONDS. It was not necessary, because I remembered the details.

The CHAIRMAN. Remembered it all?

Mr. EDMONDS. No, sir; there were some things I did not remember, but some details I remember.

The CHAIRMAN. I would hardly expect to receive a reply if you do not know in regard to Mr. Stone.

Mr. EDMONDS. Yes, sir.

The CHAIRMAN. For what purpose was $2,500 paid to Mr. Stone?

Mr. EDMONDS. For the purpose of getting his assistance in helping to nominate Senator Stephenson.

The CHAIRMAN. What kind of assistance?

Mr. EDMONDS. Such kind as he could give, in his best judgment.

Stone money paid under agreement with Stephenson.

Senator SUTHERLAND. When was it you gave Mr. Stone the $2,500, before or after this conversation?

Mr. EDMONDS. After.

Senator SUTHERLAND. After?

Mr. EDMONDS. That is, I think the same day, as I recall.

Senator SUTHERLAND. How did you fix the amount of $2,500?

Mr. EDMONDS. My recollection is that either Senator Stephenson informed me or else Mr. Stone informed me that that was the amount to be paid him.

Senator SUTHERLAND. Which was it?

Mr. EDMONDS. I can not recall now.

Senator SUTHERLAND. Did you make the arrangement or did Mr. Stephenson make it?

Mr. EDMONDS. My present recollection is that Mr. Stephenson made the agreement with Mr. Stone; Mr. Stone had seen him.

Senator SUTHERLAND. For the $2,500?

Mr. EDMONDS. But as to just how far that went, I am not positive now. I do not want to do Mr. Stephenson an injustice by saying that he made it if Mr. Stone reported that that was the amount agreed upon when we talked.

Senator SUTHERLAND. Then I understand you to say that you do not know why it was $2,500 rather than some other sum?

Mr. EDMONDS. Except that that was the amount that Mr. Stone thought was advisable to put in his hands, that he could use to advantage, or because of the information received from Senator Stephenson; which I am not sure.

Senator SUTHERLAND. Did you not exercise any judgment yourself as to what amount should be paid?

Mr. EDMONDS. In that particular case, no, sir.

Primary—Money to members of the legislature—Game Warden Stone—Stephenson told.

The CHAIRMAN. What were the instructions and what was the transaction?

Mr. EDMONDS. I think Senator Stephenson telephoned me or sent word through Mr. Stone to give him $2,500.

The CHAIRMAN. To give you $2,500?

Mr. EDMONDS. To give him $2,500.

The CHAIRMAN. To give Stone $2,500?

Mr. EDMONDS. Yes, sir.

The CHAIRMAN. For what did you give it to him?

Mr. EDMONDS. I did not give it to him.

The CHAIRMAN. You did not?

Mr. EDMONDS. No.

The CHAIRMAN. Where did Mr. Stone get the $2,500?

Mr. EDMONDS. I assume from the bank—a cashier's check.

The CHAIRMAN. Did you give him an order?

Mr. EDMONDS. That is my recollection, though I am not positive.

The CHAIRMAN. That you gave him an order on the bank?

Mr. EDMONDS. I think so. That may have been one of the $5,000 items. I have not seen my check book for two years.

Game Warden Stone got $2,500 by direction of Stephenson; was to use at own election.

The CHAIRMAN. Was it to be expended by you, or were you authorized to pay it out to others, to be expended by them?

Mr. STONE. I was to use it at my own discretion.

The CHAIRMAN. Were you at liberty, then, as you understood the transaction, to handle all that money yourself?

Mr. STONE. Yes, sir.

The CHAIRMAN. According to your discretion?

Mr. STONE. Yes.

The CHAIRMAN. No limitations were placed upon you, whatever, as to the manner of expenditure, were they?

Mr. STONE. No; I think not.

Manager Edmonds's description of "organization" methods.

The CHAIRMAN. Now, what do you mean by "organize" when you use the term in connection with the payment of this money?

Mr. EDMONDS. I mean that the man employed by me to look after Dane County and get out the vote—the largest possible vote—for Senator Stephenson was given latitude, usually guided by his judgment alone, as to what was to be done (p. 77).

The CHAIRMAN. Particularize the word "organize" and tell me what constituted organization.

Mr. EDMONDS. My idea in a county that was thoroughly organized would be in the first place to get out the advertising that we sent to the county—have it fully

distributed and posted, and after that was done he was to put in his full time going around the county, and he was paid for his services going around the county and interesting men of influence in the different localities to interest their friends so as to get out a full vote for Senator Stephenson election day. In some instances still further organizing, if in their judgment that was wise, by getting out the vote, by hiring teams, etc., for getting men to the polls (p. 78).

Purpose for which money was paid.

The CHAIRMAN. The second charge is as follows:

"That said Isaac Stephenson did, prior to said primary, pay to said Edmonds, above mentioned, sums with the design that said Edmonds should pay to other electors of this State, out of said sums above mentioned and other sums of money received by said Edmonds from said Isaac Stephenson, prior to said primary, sums ranging from $5 per day to $1,000, in bulk, as a consideration for some act to be done in relation to said primary by said electors for said Isaac Stephenson as such candidate, in violation of said section."

Is that statement true?

Mr. EDMONDS. No, sir.

The CHAIRMAN. Wherein is it not true?

Mr. EDMONDS. It is a pretty long statement. One of the things that appeals to me as not being true is that neither of those sums is in violation of the law.

The CHAIRMAN. Then we will waive that last statement, "in violation of said section." Did he give you those sums, or any of them, to pay to other electors of the State?

Mr. EDMONDS. To other electors of the State?

The CHAIRMAN. Yes.

Mr. EDMONDS. Yes; I should say that he understood that in his payment of the money.

The CHAIRMAN. Then the statement of facts, aside from the final clause, "in violation of said section," is substantially correct, is it?

Mr. EDMONDS. There are a good many items in there enumerated, but I should say it is substantially correct.

Senator SUTHERLAND. You have had charge of large expenditures of money, have you, in a business way?

Mr. EDMONDS. Quite large; yes, sir.

Senator SUTHERLAND. You have employed many agents whose duty it was to expend money?

Mr. EDMONDS. In some instances; yes, sir. Usually, however, in the management of a business, the work is done from the office, and the management of such business as I conducted was done by me, in the expenditure of money.

Senator SUTHERLAND. Is it in accordance with your business training and experience and habits to hand over to your agent a large sum of money, $500 or $1,000, and have him expend it without keeping an account of what he expends it for or without having him render an account to you of the expenditures?

Mr. EDMONDS. I do not think so.

Senator SUTHERLAND. That is not in accordance with business methods, at any rate?

Mr. EDMONDS. No, sir.

Senator SUTHERLAND. Was there any reason why you could not request these various political agents to keep an account of their expenditures?

Mr. EDMONDS. The only reason I could give is that I have never heard of it being done. Custom, I should say, governed that.

No memoranda as to money paid.

Mr. EDMONDS. I do not know.

The CHAIRMAN. Who should know, under the system that obtained in the headquarters?

Mr. EDMONDS. Mr. Sacket should know.

The CHAIRMAN. Did you make any memoranda when you gave instructions for the payment of money to these various people, or any of them, as to the services they were to perform in consideration of receiving this money?

Mr. EDMONDS. No, sir; no written statement; no, sir.

The CHAIRMAN. You say you did not?

Mr. EDMONDS. No written statement; no, sir.

The CHAIRMAN. Did you make any memoranda at any time in regard to the purposes for which the money you ordered paid was to be used?

Mr. EDMONDS. I do not recall any.

The CHAIRMAN. Endeavor to recall it now, Mr. Edmonds.

Mr. EDMONDS. Yes, sir; I will.

The CHAIRMAN. Can you recall any instance in which you made a memorandum as to the purpose for which the money was paid, either by you or under your instructions, during this campaign?

Mr. EDMONDS. I can not recall any instance; no, sir.

The CHAIRMAN. You have no books of account in which such items will appear?

Mr. EDMONDS. Absolutely not.

The CHAIRMAN. You made no record either in a book or otherwise as to the purpose for which you paid or directed that money to be paid during the campaign?

Mr. EDMONDS. To the very best of my recollection, none.

The CHAIRMAN. Why did you not?

Mr. EDMONDS. I did not feel it was necessary.

The CHAIRMAN. Were you acquainted with the provisions of the statutes of the State of Wisconsin with reference to the filing of an expense account by those who were candidates for nomination or election?

Mr. EDMONDS. Yes; I think so; reasonably well.

The CHAIRMAN. Are we to understand that, with that knowledge, you did not make any attempt to lay the foundation for compliance with that law in the expenditure or payment of the large sums of money that you disbursed during the campaign?

Mr. EDMONDS. I did not, because it was done by another person in the office.

The CHAIRMAN. Who?

Mr. EDMONDS. Mr. Sacket.

The CHAIRMAN. Suppose it transpired that it was not done by Mr. Sacket, then did Mr. Sacket disobey any instructions which you had given?

Mr. EDMONDS. No, sir; Mr. Sacket had his instructions from others before I came and took charge.

The CHAIRMAN. You were the manager of the campaign, were you not? That was the term used as to yourself?

Mr. EDMONDS. That is the term that has been given me; yes, sir.

The CHAIRMAN. It was the designation at that time, was it not?

Mr. EDMONDS. I think so.

The CHAIRMAN. How did you regard yourself in that respect?

Mr. EDMONDS. I think I regarded myself as manager of the campaign.

The CHAIRMAN. And so regarding yourself, you made no attempt to lay the foundation for making a statement that would comply with the law in the event it became necessary to file an expense account?

Mr. EDMONDS. No, sir. Owing to the conditions that existed when I went there, I felt that that was being done and so continued during my service.

One hundred dollars sent to a newspaper man at Wausau.

The CHAIRMAN. I will so mark it. The next item is $100 to J. L. Sturtevandt. That is said to be for "advertising." What advertising was that?

Mr. EDMONDS. He is running a daily and weekly newspaper, I believe, at Wausau.

The CHAIRMAN. Who made that contract?

Mr. EDMONDS. I believe I sent him the money.

The CHAIRMAN. Have you a bill and receipt for it?

Mr. EDMONDS. No, sir.

The CHAIRMAN. Any acknowledgment of it?

Mr. EDMONDS. No, sir.

The CHAIRMAN. What advertising was that for?

Mr. EDMONDS. I do not know why the word "advertising" is in there except that that is Mr. Sacket's method of designating certain of these matters to keep them in a certain account.

The CHAIRMAN. But you know about the payment of the money?

Mr. EDMONDS. Yes; I paid the money.

The CHAIRMAN. You inquired what it was for when you authorized it, did you not?

Mr. EDMONDS. No. I had known Mr. Sturtevandt for some little time, and, believing that he could be of assistance to us in Wausau—I knew that he was a friend of Senator Stephenson—I sent him a hundred dollars to use as he saw fit in promoting the interests of the Senator.

The CHAIRMAN. That was what might be termed a general contribution to the newspaper, was it; for its friendship?

Mr. EDMONDS. Perhaps it might be called that.

The CHAIRMAN. There was no specific advertisement—no space charged for—was there?

Mr. EDMONDS. In this particular instance, I do not know.

The CHAIRMAN. No bill was rendered for specific services as "advertising"?

Mr. EDMONDS. I do not recall, in this instance. I sent him the money, asking him to use it in the interest of Senator Stephenson.

The CHAIRMAN. You sent him the money for the purpose of retaining a friendly attitude toward Senator Stephenson, did you not?

Mr. EDMONDS. I did not need to do that, because he was very friendly; his paper was for him and had been all the time.

The CHAIRMAN. Then it was a gratuity. You already had the services, and in acknowledgment of friendship you sent him a hundred dollars; does that express it?

Mr. EDMONDS. No; I hardly think that expresses it.

The CHAIRMAN. Then what was the hundred dollars for?

Mr. EDMONDS. I thought that with the hundred dollars he would be more active in his support of Senator Stephenson.

The CHAIRMAN. Then it was for additional friendship to that already existing, was it?

Mr. EDMONDS. Perhaps that statement would be true.

The CHAIRMAN. It was to cement the existing friendship?

Mr. EDMONDS. Most assuredly; it was to help Senator Stephenson.

The CHAIRMAN. Was it in order that he might not probably be influenced to change his attitude of friendship?

Mr. EDMONDS. No; that was not at all necessary with him.

The CHAIRMAN. Very well. You sent just that class of contributions to a number of papers, I suppose, did you not?

Mr. EDMONDS. I think there were a number of instances; yes, sir.

Wise managers did not know, and did not attempt to find out, whether this money was spent honestly or not.

The CHAIRMAN. And that you have made no effort to ascertain whether or not the expenditures of this money were wrongful?

Mr. EDMONDS. No, sir.

The CHAIRMAN. In any case?

Mr. EDMONDS. I have not.

The extent and manner of distribution.

The CHAIRMAN. You had 70 men, I understand, in your organization industriously engaged in distributing money among the common people throughout the campaign?

Mr. EDMONDS. I should say there were probably that many.

Manager Sackett's description of "organization methods" (p. 175).

The CHAIRMAN. I notice that all of these items for organizing—and the greater part of them are for organizing—are after the time when you had filed the petitions with the signatures on them.

Mr. SACKET. My idea of organizing, as I used it in this statement, might include circulating of petitions, or any other work to perfect that organization which we hoped to use for the election of Senator Stephenson.

The CHAIRMAN. Would it include the distribution and payment of money to men who were to work at the polls?

Mr. SACKET. Yes, sir.

The CHAIRMAN. Would it include the payment of money to men who were to induce other men to vote for Senator Stephenson, without any limitation being placed upon the manner of inducement?

Mr. SACKET. It would include money expended that way; yes, sir.

The CHAIRMAN. It might include money expended in purchasing votes, might it?

Mr. SACKET. It might.

The CHAIRMAN. Did it?

Mr. SACKET. Not to my knowledge.

The CHAIRMAN. Can you say it did not?

Mr. SACKET. No, sir; not to my knowledge.

Method by which Sacket spent money.

(167) Mr. SACKET. I do not know.
The CHAIRMAN. What services did he perform?
Mr. SACKET. I do not know.
Mr. LITTLEFIELD. Was he one of the men you made an arrangement with?
Mr. SACKET. He was not.
The CHAIRMAN. Did you pay that on the order of Mr. Edmonds?
Mr. SACKET. I did.
The CHAIRMAN. Did you pay money on the order of any person other than Mr. Edmonds?
Mr. SACKET. Not to my recollection.
The CHAIRMAN. When Mr. Edmonds gave you an order, such as is indicated by that payment, did he give it to you in writing?
Mr. SACKET. Not necessarily.
The CHAIRMAN. How did he give it to you?
Mr. SACKET. He told me that he wanted a check for $300 for Mr. R. E. Orton.
The CHAIRMAN. Was it a verbal communication?
Mr. SACKET. Yes, sir.
The CHAIRMAN. Then you would get the check?
Mr. SACKET. Yes, sir.
The CHAIRMAN. And would you make a memorandum?
Mr. SACKET. I would.
The CHAIRMAN. Did you inquire of Edmonds what the money was to be used for?
Mr. SACKET. Not in all cases.
The CHAIRMAN. Did you in this case?
Mr. SACKET. I do not remember.
The CHAIRMAN. You have no recollection about it?
Mr. SACKET. No, sir.
The CHAIRMAN. You do not know whether it was to be used for purchasing votes or for what purposes?
Mr. SACKET. I had no knowledge of my own whatever.
The CHAIRMAN. Did you not feel it incumbent upon you to know for what the money that you paid out was to be used?
Mr. SACKET. The money that I paid out on Mr. Edmonds's order; no.
The CHAIRMAN. You think you would be relieved of responsibility if the money was to be paid out for an unlawful purpose merely because Mr. Edmonds told you to pay it?
Mr. SACKET. Yes, sir.
The CHAIRMAN. You think you would be relieved?
Mr. SACKET. Yes, sir.
The CHAIRMAN. You would not undertake to assert that if an associate were to ask you to violate the law you would be justified in doing it?
Mr. SACKET. No, sir.
The CHAIRMAN. Then how do you account for your answer that if you believed if Mr. Edmonds told you to pay this money out for an unlawful purpose that Mr. Edmonds and not you would be responsible?
Mr. SACKET. I felt that when Mr. Edmonds asked for money I was under obligations to give it to him. I was Mr. Stephenson's manager.

Destruction of memoranda.

Manager Sacket, in testifying as to the payment of an item of $400, stated that he was unable to remember anything about it. He then testified as follows (p. 164):
The CHAIRMAN. That emphasizes the misfortune of the destruction of your memoranda, does it not? Now, you say, in the absence of that memorandum, you can not remember anything about the $400. It may have been used to purchase votes in violation of law, may it not?
Mr. SACKET. I have no knowledge one way or the other.
The CHAIRMAN. So that a payment of this money passing through your hands as the representative of the candidate may have been used, so far as you can state, for an illegal purpose?
Mr. SACKET. I do not know.

Perrin's expenditures.

The CHAIRMAN. Who is C. R. Fridley?
Mr. PERRIN. He is an attorney at Superior.
The CHAIRMAN. Is he an old resident?
Mr. PERRIN. Yes.

The CHAIRMAN. Is he an old man or a young man?
Mr. PERRIN. He is a man of 42 or 43 years of age.
The CHAIRMAN. Did he support Senator Stephenson for nomination at the primaries and before the primaries?
Mr. PERRIN. Yes.
The CHAIRMAN. Was he in public life in any capacity?
Mr. PERRIN. No.
The CHAIRMAN. He was what you call a political worker, was he?
Mr. PERRIN. No. He was a practicing lawyer.
The CHAIRMAN. He was actively engaged in the practice of law?
Mr. PERRIN. Yes, sir.
The CHAIRMAN. You never asked him for any accounting as to the expense he had incurred?
Mr. PERRIN. I did not.
The CHAIRMAN. What is Mr. Fridley's business, you say?
Mr. PERRIN. He is an attorney.
The CHAIRMAN. The next item is $10 to H. L. Dresser. Who is H. L. Dresser?
Mr. PERRIN. Mr Dresser had nothing to do with the campaign, and does not live in the State. I was in Duluth and somebody made application to me for money, and had to go to him and borrow it, and gave him my check to reimburse him. It was money expended in the campaign.
The CHAIRMAN. He lived in Duluth?
Mr. PERRIN. He lived in Duluth when this application was made to me.
The CHAIRMAN. You drew this money for your own expenditure, or to be paid out by you?
Mr. PERRIN. I drew that money to be paid to some one in the Stephenson campaign.
The CHAIRMAN. Can you say to whom you paid it?
Mr. PERRIN. I can not.
The CHAIRMAN. We go to the next item of $50 cash. Can you account for any part of it?
Mr. PERRIN. I have no recollection of it.
The CHAIRMAN. The last item I inquired about, of $10 to Dresser, was on the 18th of August.
Mr. PERRIN. Yes, sir.
The CHAIRMAN. And another item the same day, the 18th, is $50 cash. You say you can not account for that?
Mr. PERRIN. No.
The CHAIRMAN. At that time you had received the $3,000. You received it on the 15th. So you had all of this $5,000 then available?
Mr. PERRIN. Yes, sir.
The CHAIRMAN. And on the 19th you drew a check to W. W. Savage for $25, and he indorsed it. What was that for?
Mr. PERRIN. I am not sure about that. I sent him out two or three times, I do not remember when, to get information to enable us to carry on this work.
The CHAIRMAN. He was your clerk?
Mr. PERRIN. Yes.
The CHAIRMAN. On the 21st you paid out $200 cash. Can you account for any part of that?
Mr. PERRIN. I have no recollection of it.
The CHAIRMAN. On the same day you paid out $100 cash. Can you account for any part of that?
Mr. PERRIN. I have no distinct recollection.
The CHAIRMAN. Again on the same day, $40 cash. Can you account for that or any part of it?
Mr. PERRIN. I do not recollect that.
The CHAIRMAN. Was it money expended in the city of Superior?
Mr. PERRIN. This money was expended in four counties—Douglas, Bayfield, Sawyer, and Washburn.
The CHAIRMAN. Are they the northern counties in the State?
Mr. PERRIN. Yes.
The CHAIRMAN. The most northern?
Mr. PERRIN. Yes.
The CHAIRMAN. Tell us the conversation—what he said to you and what you said to him that resulted in the handing over of that check.
Mr. PERRIN. I can not remember the details.
The CHAIRMAN. Give us the substance.
Mr. PERRIN. The substance of it was that I went to him and asked him if he would put in some time in the Stephenson campaign. He said he would do what he could.

I asked him how much money he thought he would need at that time, and he said that he ought to have $250.

The CHAIRMAN. Did you tell him that you were disbursing Stephenson money at that time? You told him you had received this thousand dollars, did you?

Mr. PERRIN. Yes.

The CHAIRMAN. And he told you he could be of some use to Senator Stephenson, did he?

Mr. PERRIN. Yes.

The CHAIRMAN. How did he tell you he could be of use to Senator Stephenson?

Mr. PERRIN. I guess I knew as much about that as he did. I do not know that he expressed himself in specific terms as to what he could do or would do.

The CHAIRMAN. What did he do for Senator Stephenson's campaign?

Mr. PERRIN. I do not know.

The CHAIRMAN. You say you knew what he could do?

Mr. PERRIN. I knew what he could do; certainly.

The CHAIRMAN. Was that to be taken as a criterion of what he did do?

Mr. PERRIN. It was by me.

The CHAIRMAN. What did he do?

Mr. PERRIN. Taking that as a criterion, he could, and I believe he did, get men interested for Senator Stephenson that neither Senator Stephenson, Mr. Edmonds, nor I could otherwise get.

The CHAIRMAN. Get men that you could not get?

Mr. PERRIN. Yes.

The CHAIRMAN. How would he get them interested? What would he do?

Mr. PERRIN. I think he would mostly talk.

The CHAIRMAN. What would he say to them?

Mr. PERRIN. I am sure I do not know.

The CHAIRMAN. What would be the nature of the conversation?

Mr. PERRIN. I would not undertake to say.

The CHAIRMAN. How do you know it is not just exactly the conversation you or Mr. Edmonds would have had with these people?

Mr. PERRIN. Because I know that I could not talk to some of those people the way Mr. Shields could.

The CHAIRMAN. If you do not know what he said to them, how do you know that?

Mr. PERRIN. There are things, you know, that we know without being able to explain or express after long years of acquaintance with a man that no man living can sit on the witness stand and detail.

The CHAIRMAN. Do you think you are worth the $3,000 that Mr. Stephenson gave you?

Mr. PERRIN. Oh, I know I am worth that.

The CHAIRMAN. It takes a pretty good political talker to get that amount of money.

Mr. PERRIN. I did not have to talk any to get it.

The CHAIRMAN. How much of this money indicated by the cash items or the checks remained in your hands?

Mr. PERRIN. Not a cent.

The CHAIRMAN. And yet you can not account for a cent of it that you paid out?

Mr. PERRIN. I can not in detail; no, sir.

The CHAIRMAN. Not a single item?

Mr. PERRIN. Not one.

The CHAIRMAN. That was rather a spectacular campaign in some respects, was it not, with money flowing out freely in those amounts?

Mr. PERRIN. To speak in the vernacular, I guess we got them "going some."

Senator SUTHERLAND. In handing over sums of money to people that you employed in Senator Stephenson's interest, did you give any of them any instruction whatever as to what they should do?

Mr. PERRIN. If I thought it was necessary when I gave the man money to tell him what to do, I have no doubt I did.

Senator SUTHERLAND. Did you?

Mr. PERRIN. I do not remember.

Senator SUTHERLAND. You do not recall having given anybody any instructions?

Mr. PERRIN. No; I do not recall it. I know there were some instances where I said to some man, or some men, that we would look to him or them to provide workers at the polls, for instance, or teams to get voters out. But that was all in the most general way.

Senator SUTHERLAND. You gave them no specific instructions that you recall as to what they should do?

Mr. PERRIN. I do not recall now; no. I do not recall now that I did.

The CHAIRMAN. On August 5, $200 cash. For what was that cash expended, and by whom?

Mr. PERRIN. I have no recollection.

The CHAIRMAN. August 6, $25 cash. What do you say as to that?

Mr. PERRIN. I have no recollection.

The CHAIRMAN. August 6, $200. What have you to say as to that item?

Mr. PERRIN. I do not remember it.

The CHAIRMAN. When you say you do not remember, you mean——

Mr. PERRIN. I have no recollection.

The CHAIRMAN. That you have no information to give in regard to it, based upon your recollection?

Mr. PERRIN. None whatever.

The CHAIRMAN. On August 7, $100 cash. Have you any recollection as to the purpose for which that was expended?

Mr. PERRIN. No, sir.

The CHAIRMAN. And on August 7, again, $75; and on August 7, again, $50; that is $225 on August 7. Have you any knowledge as to what that was used for?

Mr. PERRIN. Those items are all "cash"?

The CHAIRMAN. Yes; they are all cash.

Mr. PERRIN. No; I have no recollection.

The CHAIRMAN. On the 8th we have cash items of $50, $50, $50, $50, and $50—$250; do you know the purpose for which that money, or any part of it, was expended?

Mr. PERRIN. Those are cash?

The CHAIRMAN. Yes; cash items.

Mr. PERRIN. No; I have no recollection.

Senator POMERENE. You have said in answer to Senator Sutherland—I want to quote you correctly, and if I do not you will correct me—that you probably paid money to 100 different persons, though you were not definite as to your statement.

Mr. PERRIN. No; I can not be.

Senator POMERENE. I understand that. You also said to him again in your examination that you knew personally very many of the men that you employed.

Mr. PERRIN. Yes.

Senator POMERENE. Do you mean to tell the committee that you do not now remember any of the men to whom you paid this money, outside of the few names that you gave to Senator Heyburn?

Mr. PERRIN. That is just exactly what I mean to say.

Senator POMERENE. Not one of them?

Mr. PERRIN. Not one of them.

Mr. Perrin's methods of distributing $5,000.

(689) Mr. PERRIN. I planned that we would take the first $1,000 and get hold of as many of the men who were accustomed to doing political work in that territory as we could get hold of with that money, laying the foundation for further and more extensive electioneering if the money was forthcoming. * * * At that time, I think, I knew I would get another $1,000.

"The CHAIRMAN. With this class of expenditure the motive does cut some figure. You were representing a candidate for office, under the laws of a State, and you were not spending your money, but his. Did it not occur to you that he would be responsible for the manner of your expenditure, and that incidentally to that you would have some responsibility?"

Mr. PERRIN. No.

The CHAIRMAN. It did not?

Mr. PERRIN. No.

The CHAIRMAN. You did not feel that you were under any responsibility to any person or any law for the manner of the expenditure of this money?

Mr. PERRIN. I do not think I said that.

The CHAIRMAN. I asked you. It is a question I am asking you.

Mr. PERRIN. Just read the question, please.

The reporter read as follows:

"The CHAIRMAN. You did not feel that you were under any responsibility to any person or any law for the manner of the expenditure of this money?"

Mr. PERRIN. I felt that I was responsible to Senator Stephenson for the expenditure of the money that he put in my hands.

The CHAIRMAN. Do you mean the manner of the expenditure?

Mr. PERRIN. No; I do not think so, entirely. I think I was selected to exercise an independent judgment upon the manner in which his candidacy should be furthered in that particular.

The CHAIRMAN. And leave the responsibility upon Senator Stephenson?

Mr. PERRIN. May I inquire—responsibility for what?

The CHAIRMAN. The manner in which you expended it; were you going to let him take chances on that?

Mr. PERRIN. I do not think the Senator was taking any chances on that.

The CHAIRMAN. To return to Mr. Shields: You have not been able to account for any item of expenditure by Mr. Shields; so that we shall have to rely upon Mr. Shields, shall we, for that information?

Mr. PERRIN. I presume he can give you some idea as to what he did with that money. I should like to say, if I may, that of these cash items I think Mr. Fridley had more than appears to have been given him upon checks drawn to his order.

This statute has never received in practical operation, by anybody that I know of in the State of Wisconsin, the construction which has been suggested here. It is the common, ordinary thing throughout northern Wisconsin to take a man to the theater or take him to lunch, not necessarily to corrupt his mind, but to enlighten him. You do these things to get a man's mind in a receptive mood. You can not go after him, Senator, you know, with an ax and beat an idea into him. It has got to be worked out along practical lines. It seems foolish for me to sit here and talk to you gentlemen about this thing, because you know so much more about it than I do.

The CHAIRMAN. Our examination here is not so much for our entertainment as to make a record.

Mr. PERRIN. I beg your pardon. I apologize.

The CHAIRMAN. You need make no apology. This is to be taken as a test of your meaning of "electioneering" then, is it?

Mr. PERRIN. I think that is a fair test of the meaning of ninety-nine men out of a hundred who conduct politics.

The CHAIRMAN. Of "electioneering"?

Mr. PERRIN. "Electioneering."

The CHAIRMAN. You think that comes within the definition of "electioneering"?

Mr. PERRIN. I certainly do.

The CHAIRMAN. And when you speak of having expended money in electioneering, either by you or by those whom you employed, you include that kind of proceeding under the head "electioneering"?

Mr. PERRIN. It may be included.

Senator SUTHERLAND. You think it is as legitimate to reach a man through his appetite as it is through his intellect?

Knowingly paid money to Shauers.

The CHAIRMAN. You said, or I understood you to say, that there was only one case in which you knowingly paid money to a man who was a candidate for the legislature; what case was that?

Mr. EDMONDS. Mr. Shauers, of Oconto County.

Mr. LITTLEFIELD. Was he elected?

Mr. EDMONDS. No, sir.

Mr. LITTLEFIELD. What was his name?

Mr. EDMONDS. Mr. Shauers.

The CHAIRMAN. For what purpose did you pay him money?

Mr. EDMONDS. He was a railroad man, and for the purpose of organizing he went in different parts of the State to see railroad men.

The CHAIRMAN. Was he in employment then or out of employment?

Mr. EDMONDS. Out of employment.

The CHAIRMAN. Then he went from his home to different parts of the State, outside of the legislative district where he was a candidate?

Mr. EDMONDS. Yes. It was distinctly understood that he was to spend no time, no money, in that district.

The CHAIRMAN. Well, but did he?

Mr. EDMONDS. He did not, to my knowledge.

Mr. LITTLEFIELD. That is, in his own district?

Mr. EDMONDS. In his own district.

Mr. LITTLEFIELD. So that nothing that was expended by him had any relation to the campaign pending in his district?

Mr. EDMONDS. Absolutely not.

Mr. LITTLEFIELD. Either directly or indirectly?

The CHAIRMAN. How much did you pay Shauers?

Mr. EDMONDS. I don't recall. I should think it might range from $50 to $100 or $125. I don't think more than that. I paid him, I think, two or three different times $25.

Thomas Reynolds.

The CHAIRMAN. Did you receive any more than $180 from Senator Stephenson, or from anyone in his behalf?

Mr. REYNOLDS. I received $100 from Senator Stephenson's manager.

The CHAIRMAN. Is that the $100 that you have referred to? Did you receive $280 altogether from Senator Stephenson or his manager?

Mr. REYNOLDS. I did not consider it from Senator Stephenson, although Senator Stephenson told me afterwards that he told them to send it to me—I supposed for my services; I do not know for what.

The CHAIRMAN. Did you receive $280 altogether from Senator Stephenson?

Mr. REYNOLDS. Yes, sir.

The CHAIRMAN. You received $80 from Senator Stephenson personally, did you not?

Mr. REYNOLDS. Yes.

The CHAIRMAN. Then you received $100 from Senator Stephenson personally?

Mr. REYNOLDS. No, sir; not personally.

The CHAIRMAN. From whom did you receive it?

Mr. REYNOLDS. I received it through the mail.

The CHAIRMAN. Did you receive the second $100 through the mail?

Mr. REYNOLDS. The second $100; yes, sir; that is the only $100 I received through the mail, the second $100—no; the first $100. The first $100.

The CHAIRMAN. Did you receive another $100 after that?

Mr. REYNOLDS. I received $100 by check from his manager.

The CHAIRMAN. Did you receive $100 by check from Senator Stephenson?

Mr. REYNOLDS. No, sir.

The CHAIRMAN. Did you receive more than one sum of $100 from the manager?

Mr. REYNOLDS. That is all I received from the manager—$100; a $100 check.

The CHAIRMAN. Tell us how you received the $280.

Mr. REYNOLDS. I received $80 from Senator Stephenson and $100 afterwards from him.

The CHAIRMAN. From Senator Stephenson?

Mr. REYNOLDS. Yes.

The CHAIRMAN. Personally?

Mr. REYNOLDS. Not personally; no.

The CHAIRMAN. How did you receive it?

Mr. REYNOLDS. Through the mail.

* * * * * * *

The CHAIRMAN. To whom did you pay the largest sum of money?

Mr. RIORDAN. In all?

The CHAIRMAN. Yes.

Mr. RIORDAN. During the campaign?

The CHAIRMAN. Yes; out of this fund.

Mr. RIORDAN. For any purpose?

The Chairman. Yes.

Mr. RIORDAN. $250 to E. A. Everett, of Eagle River.

The CHAIRMAN. For what did you pay him that sum?

Mr. RIORDAN. For traveling through the counties of Vilas, Iron, and Oneida and ascertaining, as far as he was able, the sentiment of the people as he went along; that is, those who were for and against each of the several candidates.

The CHAIRMAN. Did he report to you a memorandum of people, showing the result of that work?

Mr. RIORDAN. He made two such trips through the county. After the first one he came back and made a report to me, and the second time he came back and made a similar report.

The CHAIRMAN. Tell us who he was.

Mr. RIORDAN. E. A. Everett is the proprietor of the Everett resort.

The CHAIRMAN. What is that?

Mr. RIORDAN. That consists of a large hotel dining room and about 40 cottages on the Eagle chain of lakes, at Eagle River.

The CHAIRMAN. It is a summer resort?

Mr. RIORDAN. It is a summer resort. Prior to that time he was a member of the Wisconsin Assembly.

The CHAIRMAN. But at the time you made this arrangement with him he was not a public officer?

Mr. RIORDAN. He was a candidate for public office.

The CHAIRMAN. What office?

Mr. RIORDAN. The office of member of the assembly.

The CHAIRMAN. At the time you paid him this money?
Mr. RIORDAN. I did not pay him the money, I see by my testimony, until the 31st of August.
Senator POMERENE. Is that George E. Everett?
Mr. RIORDAN. E. A. Everett.
The CHAIRMAN. The testimony would indicate that you paid it to him before the primary election.
Mr. RIORDAN. I think a day or two before the primary election.
Mr. LITTLEFIELD. He was a candidate for the assembly?
Mr. RIORDAN. Yes.
The CHAIRMAN. Was he elected?
Mr. RIORDAN. No, sir.
The CHAIRMAN. When you paid it to him, did you know that he was a candidate for the assembly?
Mr. RIORDAN. I think I did, certainly. I surely talked with him about it.
The CHAIRMAN. Was he announcing for whom he would vote in the legislature if he were elected?
Mr. RIORDAN. Yes; he was to vote for the candidate who received the primary nomination.
The CHAIRMAN. Without regard to who it was?
Mr. RIORDAN. Yes; and I would like to add there that the man who was running against him made the same promise.
Mr. LITTLEFIELD. What was his name?
Mr. RIORDAN. D. B. Stevens.
The CHAIRMAN. They promised to abide the result of the primary?
Mr. RIORDAN. Yes. The campaign was made with that understanding.
The CHAIRMAN. For whom did they assert their influence during the primary, the time preceding the election?
Mr. RIORDAN. I think for themselves, individually.
The CHAIRMAN. Were they announcing their support of any particular candidate, or doing anything in the interest of any particular candidate?
Mr. RIORDAN. No; I do not think they were.

Bancroft's methods.

The CHAIRMAN (reading):
"The result of our conference was that I, being pretty well acquainted with the county, and knowing who the political workers were in the county, consented to disburse this amount of money for Mr. Stephenson."
Is that correct?
Mr. BANCROFT. That is correct.
The CHAIRMAN. Give us the names of the people and the amounts you gave them.
Mr. BANCROFT. George Mehaffy I paid $100.
The CHAIRMAN. What was he to do for that $100?
Mr. BANCROFT. I gave him no instructions whatever.
Senator POMERENE. What is his address?
Mr. BANCROFT. Richland Center.
The CHAIRMAN. What did he do with the money?
Mr. BANCROFT. I could not tell you.
The CHAIRMAN. Did you ask him to render you an account of the manner of its expenditure?
Mr. BANCROFT. I did not.
The CHAIRMAN. Did he ever tell you how he expended the money?
Mr. BANCROFT. He did not.
The CHAIRMAN. Then you never knew?
Mr. BANCROFT. I do not know.
The CHAIRMAN. Did you ever know?
Mr. BANCROFT. I never knew.

Money paid to Mulder, candidate for the legislature.

Mr. LITTLEFIELD. Then you said, "and he got some of this money"; so I got the impression that you referred to McConnell.
Senator POMERENE. You understood that I was referring to Mulder?
Mr. GORDON. Yes.
Mr. LITTLEFIELD. That is all right, then.
Senator POMERENE. Yes; that is all right, so there will be no misunderstanding. Was it as much as $50?
Mr. GORDON. I can not tell you how much it was.

Senator POMERENE. You can certainly give us some idea as to whether it was a matter of $5 or $10 or $50 or $100.

Mr. GORDON. I can not tell you definitely how much it was.

Senator POMERENE. I know; but I am not asking you for that. I am asking you for your best judgment about it.

Mr. GORDON. It was probably, I should guess, from $25 to $50.

Senator POMERENE. What did you say to him with reference to his campaign and what use was to be made of this money?

Mr. GORDON. He was one of the original Stephenson men in the county, and I asked him to do what he could in the interest of Mr. Stephenson.

Senator POMERENE. What else was said?

Mr. GORDON. That is all I can recollect. I do not recollect all that was said. That is what I naturally would say.

Senator POMERENE. Since your attention has been directed to this matter, do you not recall that Mulder was a candidate for the general assembly?

Mr. GORDON. I say he was a candidate, but I can not recollect whether he was when I gave him the money or whether he subsequently became a candidate.

Senator POMERENE. I misunderstood you, then.

Mr. GORDON. He was a candidate; yes.

Senator POMERENE. We understand each other now—that he was in fact a candidate?

Mr. GORDON. He was a candidate; yes, sir.

Senator POMERENE. But you meant to say that you do not remember whether at the time you gave him the money he was then an announced candidate or not?

Mr. GORDON. That is the idea.

Wheeler's methods of distribution.

William G. Wheeler distributed $600 and aided in the "organization." Mr. C. B. Salmons was one of his lieutenants. Mr. Salmons reported the success of his operations in the following letter to his chief (p. 897):

BELOIT, WIS., *September 1.*

MY DEAR WHEELER: I inclose bills in blank which are correct. *All the men and rigs were in the exclusive use of Stephenson.* We did not mix any other candidates. We also had about as many more that were Stephenson and one or two other candidates. At this writing, 4 p. m., I predict 1,700 to 1,800 votes, and that Stephenson will get 65 per cent.

Very truly,

C. B. SALMON.

We should pay these men in the morning.

(Our italics.)

Mr. Dart's methods in distributing money.

Dart was one of the deputy game wardens, and received $400 for "organization purposes."

The chairman read to the witness an extract from his testimony given before the legislative committee as follows:

"Q. What did you do with it?—A. Spent it.

"Q. How?—A. Every old way.

"Q. What is that?—A. Every way.

"Q. Tell us some way that you spent it.—A. Oh, I spent quite a lot of it in saloons.

"The CHAIRMAN. Is that true?

"Mr. DART. Well, I should not go past any of them if there was anybody there I wanted to see.

* * * * * * *

"The CHAIRMAN (reading from previous testimony):

"'Q. Did you make any payments to individuals?—A. Oh, yes; I gave them quite a little bunch of money.

"'Q. Who were the persons to whom you gave "quite a little bunch of money"?—A. Oh, I don't know; I could not mention half or a quarter of them.'"

He, however, on pages 977 to 982, gives an interesting account of the expenditures that he remembers.

The testimony of Mr. Wellensgard, on pages 852, 855, and 856; that of Mr. French, at page 876; and that of George Beyer, at page 881, furnish fair illustrations of the methods employed by local workers.

Liquor expenditures.

Senator POMERENE. Or, if he got a drink of whisky at the bar and drank it there, that would not be prohibited; but if he got a half a pint and put it in his pocket and took it away for a swig after a while, that would be illegal?

Mr. SACKET. I think I should have to revert to the custom again and say that the half pint was lawful.

Senator SUTHERLAND. Is it the custom in Wisconsin to buy the voters bottles of whisky and give to them?

Mr. SACKET. And kegs of beer; yes, sir.

Senator SUTHERLAND. And kegs of beer?

Mr. SACKET. Yes, sir.

Mr. LITTLEFIELD. Let me get that question.

Senator POMERENE. Being from Maine, you do not know anything about that.

Mr. LITTLEFIELD. That is why I was quite anxious to get the actual practical situation. I trust we are adding to the sum of human knowledge and at the same time increasing my own information. Of course, I fully realize my infirmity.

Senator SUTHERLAND. Now, Mr. Sacket, do you seriously mean that that is the custom in Wisconsin——

Mr. SACKET. The custom, as I understand it; yes, sir.

Senator SUTHERLAND. To purchase bottles of whisky and kegs of beer for voters?

Mr. SACKET. Yes, sir.

* * * * * * *

The CHAIRMAN (reading):

"'Q. You kept no track of it. How could you present a bill to Mr. Wayland? Was that just an estimate of what you spent?—A. No. I think there was $135 cash I had in my pocket, without the automobile, which was $15. I think it was $150 I had that day when I left the office."

Is that correct?

Mr. O'CONNOR. Yes, sir.

The CHAIRMAN (reading):

"'Q. And you spent all that in one day?—A. Yes, sir."

* * * * * * *

(827) Mr. O'CONNOR. No, sir; it was a supper, I guess, that cost about $1.60 for the two of us.

Senator SUTHERLAND. You spent $1.60 for food, as I understand you?

Mr. O'CONNOR. Yes, sir.

Senator SUTHERLAND. That would leave $305.40 for whisky and cigars and automobiles?

Mr. O'CONNOR. Yes, sir.

Senator SUTHERLAND. Do you think you spent a little too much for food?

Mr. O'CONNOR. No; I did not think anything about it.

Senator SUTHERLAND. You do not recall spending any of the money for anything else?

Mr. O'CONNOR. That is all it was spent for.

Senator SUTHERLAND. That is, you spent $305 40 for an automobile and for whisky and cigars?

Mr. O'CONNOR. Yes, sir.

Senator SUTHERLAND. And that was your notion of furthering the interests of Senator Stephenson in this campaign, was it?

Mr. O'CONNOR. That is the way they make a campaign up in that territory.

Senator SUTHERLAND. That is the way you made it, at all events?

Mr. O'CONNOR. That is customary up there.

Money paid to "enthuse" voters.

The CHAIRMAN. Mr. Edmonds, did you pay the $50 to Mr. Dettmam on August 8?

Mr. EDMONDS. My recollection is not clear on that, but I think I sent it to him.

The CHAIRMAN. You think you sent it to him; for what purpose?

Mr. EDMONDS. For assistance among the German Lutherans in his locality.

The CHAIRMAN. What kind of assistance?

Mr. EDMONDS. So that he would get out and help to get out the vote—interest his friends—for Senator Stephenson.

The CHAIRMAN. There was no vote to be gotten out on August 8 for any purpose—nearly a month before the election.

Mr. EDMONDS. When I say getting out the vote, I do not refer to the actual carrying or taking of the persons to the polls, but to interest them so that they would get out.

The CHAIRMAN. Enthuse them?
Mr. EDMONDS. That is the idea—enthuse them. Thank you for the suggestion.
The CHAIRMAN. "O. L. Gust, $300, August 8." Did you pay that money?
Mr. EDMONDS. I can not recall that payment at all.
* * * * * * *
The CHAIRMAN. What do you mean by lining them up for Senator Stephenson?
Mr. EDMONDS. Getting them interested in his election.
The CHAIRMAN. Discussing his election with them?
Mr. EDMONDS. Yes, sir.
The CHAIRMAN. Paying any money to them for any purpose?
Mr. EDMONDS. That was up to the man's judgment as to whether that was necessary or advisable in the conduct of the campaign for Senator Stephenson's election.
The CHAIRMAN. Was that money given to him to expend among the railroad men or cigars or treats of any kind if he saw fit to so expend it?
Mr. EDMONDS. So far as I know he might have expended it in that way.
The CHAIRMAN. There was no restriction placed upon it?
Mr. EDMONDS. I think not; not in that manner.

We regret that we can not feel warranted in finding for the sitting Member, but we believe the methods employed at the primary were corrupt; that they were against public policy; that they were demoralizing in character; that they directly contributed to destroy the purity and freedom of the election; that they violated the fundamental principles at the basis of our system of Government; and that they are not to be tolerated by the Senate of the United States as a means of procuring a seat in that body.

We desire to submit the following resolution:

"*Resolved*, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin."

W. L. JONES.
MOSES E. CLAPP.
WM. S. KENYON.
JNO. W. KERN.
LUKE LEA.

(Cong. Rec., vol. 48, pp. 2182–2187.)

FRIDAY, MARCH 22, 1912.

Mr. Jones offered an amendment in the nature of a substitute for the motion of the Senator from Idaho [Mr. Heyburn], that the Senate agree to the report of the Committee on Privileges and Elections in reference to the charges preferred by the Legislature of the State of Wisconsin against Isaac Stephenson, a Senator from that State, and expressed the desire to have pending the resolution.

The resolution is as follows:

"*Resolved*, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin." (Cong. Rec., vol. 48, p. 3777.)

The motion of Mr. Heyburn that the report of the committee declaring that the election of Isaac Stephenson was not procured by corrupt methods or practices was debated in the Senate: February 19, 1912 (Cong. Rec., vol. 48, pp. 2189–2195); February 20, 1912 (ibid., pp. 2233–2239); February 21, 1912 (ibid., pp. 2281–2283, 2284–2292); February 29, 1912 (ibid., pp. 2608–2609); March 1, 1912 (ibid., pp. 2656–2669); March 2, 1912 (ibid., pp. 2703–2718); March 4, 1912 (ibid., 2762–2774); March 25, 1912 (ibid., pp. 3803–3811); March 26, 1912 (ibid., pp. 3817–3827, 3829, 3830, 3831); March 27, 1912 (ibid., pp. 3865–3895).

Speeches and statements favoring adoption of committee report that Isaac Stephenson was entitled to his seat: Mr. Heyburn (Cong. Rec., vol. 43, pp. 2189–2195, 2233–2239, 2281–2283); Mr. Root (ibid., pp. 3817–3820); Mr. Pomerene (ibid., 3865–3873); Mr. Sutherland (ibid., pp. 3880–3888); Mr. Newlands (ibid., p. 3895).

Speeches and statements favoring resolution that Isaac Stephenson was not entitled to his seat: Mr. Bristow (ibid., pp. 2556–2669, 2703–2718); Mr. Kenyon (ibid., pp. 2762–2774); Mr. Reed (ibid., pp. 3803–3811); Mr. Borah (ibid., 3820–3827); Mr. Cummins (ibid., 3874–3877); Mr. Lea (ibid., pp. 3878–3880); Mr. O'Gorman (ibid., pp. 3888–3889); Mr. Poindexter (ibid., pp. 3889–3895).

MARCH 26, 1912.

On the question of agreeing to the amendment of Mr. Jones to the motion of Mr. Heyburn, viz, strike out the same and insert in lieu thereof the following words:

"*Resolved*, That Isaac Stephenson was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Wisconsin."

It was determined in the negative by the following vote:

Yeas.—Messrs. Borah, Bourne, Bristow, Brown, Bryan, Chamberlain, Clapp, Crawford, Cummins, Gardner, Gore, Gronna, Hitchcock, Johnson, Kenyon, Kern, Lea, Martine, Myers, O'Gorman, Poindexter, Reed, Simmons, Smith of Georgia, Smith of South Carolina, Townsend, and Works—27.

Nays.—Messrs. Bradley, Brandegee, Briggs, Burnham, Burton, Chilton, Crane, Cullom, Curtis, Fletcher, Foster, Gamble, Heyburn, Johnston, Lippitt, Lodge, Lorimer, McLean, Newlands, Nixon, Pomerene, Rayner, Richardson, Root, Smoot, Sutherland, Warren, Watson, and Wetmore—29.

So the amendment of Mr. Jones to the motion of Mr. Heyburn was not agreed to.

On motion by Mr. Heyburn, at 5 o'clock and 23 minutes p. m.,

The Senate took a recess until 11 o'clock a. m. to-morrow. (Cong. Rec., vol. 48, p. 3831.)

WEDNESDAY, MARCH 27, 1912.

Mr. Heyburn's motion that the report of the committee be adopted and that Isaac Stephenson be declared entitled to a seat as Senator from the State of Wisconsin in the United States Senate was read.

The question of agreeing to the motion being submitted to the Senate, the same was agreed to by the following vote:

Yeas.—Messrs. Bankhead, Bradley, Brandegee, Briggs, Burnham, Burton, Chilton, Clarke of Wyoming, Crane, Curtis, Dillingham, du Pont, Fletcher, Foster, Gamble, Heyburn, Johnston, Lippitt, Lodge, Lorimer, McCumber, McLean, Newlands, Nixon, Oliver, Overman, Page, Penrose, Perkins, Pomerene, Rayner, Richardson, Root, Smith of Maryland, Smoot, Sutherland, Thornton, Warren, Watson, and Wetmore—40.

Nays.—Messrs. Borah, Bourne, Bristow, Brown, Bryan, Chamberlain, Clapp, Crawford, Culberson, Cummins, Dixon, Garnder, Gronna, Hitchcock, Johnson, Jones, Kenyon, Kern, La Follette, Lea, Martine, Myers, O'Gorman, Owen, Percy, Poindexter, Shively, Smith of Georgia, Smith of Michigan, Smith of South Carolina, Stone, Townsend, Williams, and Works—34.

So it was

Resolved, that the Senate agree to the said report. (Cong. Rec., vol. 48, p. 3896.)

[Sixty-second Congress, second session.]

HENRY A. DU PONT,

Of Delaware.

The credentials of Henry A. du Pont, certifying to his election as a Senator from the State of Delaware for the term commencing March 4, 1911, were submitted to the Senate on January 26, 1911, and on April 4 1911, the said Henry A. du Pont was sworn in.

On February 26, 1912, Mr. Reed submitted a resolution authorizing the Committee on Privileges and Elections to investigate and report whether corrupt methods and practices were employed by the said Henry A. du Pont in connection with certain elections in that State in 1904 and 1910. This resolution was based upon testimony taken by the Committee on the Judiciary in connection with the question of the confirmation of a person appointed to a Federal office in that State. On the following day Mr. du Pont made denial of the truth of the charges made and invited any action which the Senate deemed proper to take in the premises. On Wednesday, following a speech by Mr. Reed, the resolution was referred to the Committee on Privileges and Elections. No report was ever made by the committee up to the close of the Sixty-second Congress.

The case here given consists of a statement of the proceedings as found in the Congressiona Record.

[Sixty-first Congress, third session.]

THURSDAY, JANUARY 26, 1911.

Mr. Richardson presented the credentials of Henry A. du Pont, elected a Senator by the Legislature of the State of Delaware for the term commencing March 4, 1911, which were read and placed on file. (Cong. Rec., vol. 46, p. 1463.)

[Sixty-second Congress, first session.]

TUESDAY, APRIL 4, 1911.

Swearing in of Senators—

In list: Mr. Henry A. du Pont. (Cong. Rec., vol. 47, p. 2.)

[Sixty-second Congress, second session.]

MONDAY, FEBRUARY 26, 1912.

Mr. Reed submitted the following resolution for consideration:

Whereas the President of the United States, on the 22d day of January, 1912, appointed Cornelius P. Swain United States marshal for the State of Delaware, and sent said appointment to the Senate of the United States for confirmation, and said appointment was in due course referred to the Committee on the Judiciary of the Senate for proper action in the premises; and

Whereas certain prominent citizens of the State of Delaware caused it to be made known to said committee that they desired to protest against the confirmation of the appointment of the said Swain, upon the ground that he was an unfit person to hold the office of United States marshal for the said State of Delaware; and

Whereas the Committee on the Judiciary of the Senate of the United States designated two of its members, viz, Senators Sutherland and Overman, to act as a subcommittee, authorized to investigate the grounds and reasons for said protest; and

Whereas on the 2d and 9th days of February, 1912, there appeared before said subcommittee Hon. Willard Saulsbury, of Wilmington, Del., representing certain objectors to the confirmation of the appointment of the said Cornelius P. Swain, and there also appeared the said Cornelius P. Swain in person and by his counsel, Daniel O. Hastings, Esq.; and

Whereas said objectors, before said subcommittee, in substance and effect charged:

1. That the said Cornelius P. Swain was unfit to occupy any place connected with or near the courts of the United States for the district of Delaware, because the said Cornelius P. Swain bore the common and general reputation of a persistent violator of the criminal provisions of the constitution of the State of Delaware intended to secure purity of elections.

2. That the said Cornelius P. Swain had notoriously been a vote buyer in the second representative district of Sussex County (New Fork Hundred) for many years;
3. That the said Cornelius P. Swain had procured and carried large sums of money into said precinct for the purpose of corrupting the voters of said district, and in the year 1908 was the assistant cashier of the corruption fund, and in substance charged that all of the above facts were notorious; and

Whereas the testimony of certain witnesses produced before said subcommittee and certain affidavits there read in evidence tended to prove:

(*a*) That at the election held in the State of Delaware in the year 1904 members of the legislature were being selected who would thereafter have the right to elect a United States Senator, and who did, in fact, elect the said Henry Algernon du Pont Senator from the State of Delaware;

(*b*) That shortly prior to said election a large sum of money, to wit, a sum in excess of $25,000, and claimed to be in excess of $58,000, was contributed by the said Henry Algernon du Pont;

(*c*) That said sum of money was distributed among various corrupt agents working in the interest of the said Henry Algernon du Pont;

(*d*) That said distribution took place in the office of the said Henry Algernon du Pont, and with his knowledge;

(*e*) That $3,000 of the money so contributed was in the office of the said Henry Algernon du Pont delivered to be used for the purpose of corrupting the voters of the second representative district of Sussex County, Del., and was in fact so used under the direction of the said Cornelius P. Swain, and it was admitted by the attorney representing said Swain that said $3,000 was so received by him; and

Whereas the evidence tended further to show that not only at the election held in the year 1904, but in the elections held in the years 1906, 1908, and 1910 similar corrupt practices were employed, and said evidence tended further to show that said corrupt practices did affect the election of the members of the legislature who in the year 1911 reelected the said Henry Algernon du Pont to a seat in this body; and

Whereas said subcommittee construed its duties to be confined to an investigation of the corrupt practices with which the said Cornelius P. Swain could be shown to be directly connected, and did not therefore investigate generally into the conditions surrounding said election, so that there has, in fact, been no investigation of the connection of the said Henry Algernon du Pont with said alleged corrupt practices, except in so far as the same was made to appear as an incident of the investigation of the said Swain; and

Whereas the said Cornelius P. Swain was appointed to said office at the request of the said Henry Algernon du Pont, notwithstanding the evidence tends to show his corrupt practices and general reputation as an election corruptionist: Now, therefore, be it

Resolved, That the Committee on Privileges and Elections, or any subcommittee thereof, be authorized and directed to investigate and to report to the Senate, whether, in fact, corrupt methods and practices were employed by the said Henry Algernon du Pont to secure the election of members of the legislature who thereafter elected him to a seat in this body; whether said corrupt practices related to the general election of 1904, or the general election of 1910, or to his election by the members of the legislature selected at said elections; and whether the said Henry Algernon du Pont is a proper person to retain his seat, or ought to retain his seat, in this body as a Senator from the State of Delaware.

Said Committee on Privileges and Elections, or any subcommittee thereof, is hereby authorized to sit during the sessions or the recess of the Senate; to hold its sessions at such place or places as it shall deem most convenient for the purposes of the investigation aforesaid; to employ stenographers; to send for persons and papers; and to administer oaths. The expenses of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee or chairman of the subcommittee.

Said committee is requested to proceed with said investigation with all reasonable speed and to report its findings, together with the evidence, at the earliest possible date. (Cong. Rec., vol. 48, p. 2443.)

TUESDAY, FEBRUARY 12, 1912.

Mr. DU PONT. Mr. President, I rise to a question of personal privilege.

Certain resolutions were offered yesterday in the Senate by the junior Senator from Missouri [Mr. Reed] formulating charges against me. I will at this time confine myself to making the most emphatic denial of the truth of the charges made and invite any action which the Senate may deem proper to take in the premises. (Cong. Rec., vol. 48, p. 2492.)

The Presiding Officer (Mr. Brandegee in the chair) laid before the Senate the resolution yesterday submitted by Mr. Reed, directing the Committee on Privileges and Elections to investigate the election of Senator du Pont, etc.

On motion by Mr. Reed,

Ordered, That the resolution lie on the table. (Cong. Rec., vol. 48, p. 2497.)

WEDNESDAY, FEBRUARY 28, 1912.

On motion by Mr. Reed,

The Senate resumed the consideration of the resolution submitted by him on the 26th instant, directing the Committee on Privileges and Elections to investigate the election of Senator du Pont, etc.;

Mr. Reed addressed the Senate and, after debate,

The resolution was referred to the Committee on Privileges and Elections. (Cong. Rec., vol. 48, pp. 2550–2555.)

[Sixty-second Congress, third session.]

CLARENCE W. WATSON AND WILLIAM E. CHILTON,

Of West Virginia.

On February 2, 1911, Clarence W. Watson took his seat in the Senate following the submission of his credentials certifying to his election by the Legislature of West Virginia, as a Senator from that State, for the term ending March 3, 1913. On February 6, 1911, the credentials of William E. Chilton, certifying to his election by the same legislature, as a Senator from the State of West Virginia for the term beginning March 4, 1911, were presented. On the first day of the first session of the Sixty-second Congress, April 4, 1911, he took his seat in the Senate.

On the last day of the second session of the Sixty-second Congress, August 26, 1912, a petition, signed by five citizens of West Virginia, was presented to the Senate alleging that bribery and corruption were practiced in the election of said Messrs. Watson and Chilton as Senators of the United States, and praying for an investigation of such charges by the Senate. This petition was referred to the Committee on Privileges and Elections. On February 5, 1913, Senator Chilton made a statement in behalf of Senator Watson and himself in the Senate and submitted a communication in the nature of a reply to the petition above mentioned. This was also referred to the committee.

At the third session of the Sixty-second Congress, on the 11th day of February, 1913, the committee reported that no charge of bribery, or attempted bribery, on the part of any member of the legislature, to vote for the said Messrs. Watson and Chilton, appeared in the papers with the committee, and that the only charge of money being used appeared in a purported statement of one of the delegates, who said he received $1,000, prior to a Democratic caucus for the nomination of Senators, to vote for Messrs. Watson and Chilton, and that the statement was without foundation and had been fully retracted by a subsequent statement by the said delegate himself. The committee was unanimously of the opinion that the prayer of the petition should not be granted, and accompanied their report with a resolution that the Committee on Privileges and Elections be discharged from further consideration of the case. The committe report was adopted by the Senate.

The history of the case here presented consists of a statement of the proceedings in the Senate as published in the Congressional Record and the report of the committee.

[Sixty-first Congress, third session.]

THURSDAY, FEBRUARY 2, 1911.

Mr. Scott presented the credentials of Clarence Wayland Watson, chosen by the legislature of the State of West Virginia a Senator from that State to fill the vacancy caused by the death of Hon. Stephen Benton Elkins in the term ending March 3, 1913, which were read and ordered to be filed.

The oath prescribed by law having been administered, he took his seat in the Senate. (Cong. Rec., vol. 46, p. 1797.)

MONDAY, FEBRUARY 6, 1911.

Mr. Scott presented the credentials of William Edwin Chilton, chosen by the Legislature of the State of West Virginia a Senator from that State for the term beginning March 4, 1911, which were read and ordered to be filed. (Cong. Rec., vol. 46, p. 1969.)

[Sixty-second Congress, first session.]

TUESDAY, APRIL 4, 1911.

The oath of office having been administered to Mr. Chilton, he took his seat. (Cong. Rec., vol. 47, p. 2.)

[Sixty-second Congress, second session.]

MONDAY, AUGUST 26, 1912.

The President pro tempore laid before the Senate a petition of the governor of West Virginia and others, alleging that bribery and corruption were practiced in the election of Senators Watson and Chilton as Senators of the United States from the State of West Virginia, and praying for an investigation of such charges by the Senate.

Ordered, That the petition be referred to the Committee on Privileges and Elections.

The reading of the petition was commenced and, after debate, was expunged from the Record. (Cong. Rec., vol. 48, pp. 11862–11865.)

[Sixty-second Congress, third session.]

WEDNESDAY, FEBRUARY 5, 1913.

Mr. Chilton made a statement in the Senate, followed by a communication, which was referred to the Committee on Privileges and Elections, as follows:

To the Senate of the United States:

For the information of your honorable body we desire to reply to a certain memorial now before your committee, signed by William E. Glasscock, William Seymour Edwards, H. C. Ogden, David B. Smith, and Frederick A. MacDonald, and in order to be as brief and as clear as possible we will answer according to the order in which the said memorial sets out the several matters.

The first allegation is the statement made by the Hon. Nelson C. Hubbard, a member of the West Virginia House of Delegates, to the joint session of the legislature before a ballot for United States Senator was taken, in which he gave his reason for refusing to vote for the nominees of the Democratic caucus.

An attentive reading of what Mr. Hubbard said, as stated in the memorial, will show that he does not predicate his charge of corruption upon any fact or upon the testimony of any witness, but made it purely upon his belief, for which he offers no sufficient reason. The memorial, however, deliberately suppresses that part of Mr. Hubbard's statement in which he admitted that he had no evidence of bribery, and for the information of your committee we call attention to that part of Mr. Hubbard's statement, the omission of which the memorial indicates by stars. The omitted part is as follows:

"I do not pretend to say that I have any more information which would justify anyone at the present time as a juror under the evidence to convict any man of bribery and I do not say that I know any court that would."

When read in connection with what the memorial quotes from Mr. Hubbard's speech, it is thus made plain that he was simply willing to declare his belief in corrupt practices, though compelled in the same connection to admit that he had no evidence.

The second allegation of the memorial is the statement of Senator George W. Bland, which, outside of some vague and general insinuations that charges of bribery had been made throughout the State, was based upon a statement made by Mr. L. J. Shock, a member of the house of delegates. That statement was that one Hamrick had given Shock $1,000 and promised him an additional $1,500 to vote for Mr. Watson and Mr. Chilton, and two reputable citizens of West Virginia were called in to see Shock count down the $1,000. We do not question that Shock exhibited the $1,000 to Hon. John J. Davis and Hon. W. G. Bennett, but that he had been furnished with that money for the very purpose of exhibiting it to these honorable gentlemen we think the committee will not doubt when they have read this statement. It will be noted first that the so-called statement of Shock read by Senator Bland was not signed, and it is a further fact that though he was present at the joint session, as shown by its records, when Senator Bland read his statement, he did not utter a word on that subject.

Subsequently and within a few days after Bland had read Shock's statement Shock was asked to produce the $1,000 which it was charged he had received, and he explained his inability to do so by saying that two men had taken the money away from him. He further stated that he had never seen either of these two men before they took the money from him and had never seen them since.

It is not pretended that Shock raised any outcry against the men who took the money from him or even related the circumstance to anyone until he was asked to produce the money.

Shock's explanation of why he was unable to produce the money which he was asked to do as a basis of an investigation which we had requested at the hands of the legislature was so ridiculously absurd that every sensible man in the legislature at once understood that Shock had been supplied with the $1,000 for the very purpose of creating a scandal, and that those who supplied him with it were not willing to trust him with the custody of it long enough to carry out the scheme.

It is not necessary for us, however, to argue that question or to ask the committee to accept our view of the episode, because Shock himself has admitted that his story of the attempt to bribe him was a pure invention in the following letter which he voluntarily sent to Senator Watson, the original of which we file herewith.

BURNSVILLE, W. VA., *January 8, 1913.*

Hon. C. W. WATSON, *Washington, D. C.*

DEAR SIR: The time has come when you should know the truth about the so-called Shock statement. I never have signed any statement that was read before the legis-

lature, and I never have been under oath. I have let the talking go on because I hated to be put in a wrong light. The truth is that I set up the whole business; nobody tried to buy my vote and would not swear that they did. I wanted to nominate McGraw and I thought if I got this thousand dollars and made this play it would hurt you and Chilton. The trick failed to work and now you have the truth. I do not know you and am sending this to you because I want justice to be done. So far as I know your election and Chilton's was honest and fair, and it is wrong to have this report going around.

Very truly, yours,

L. J. SHOCK.

The third allegation is that a resolution to investigate the vague and indefinite charges of bribery was proposed in the Legislature of West Virginia and defeated.

While it is true that the joint session of the West Virginia Legislature refused, on a point of order, as under the Federal Statutes it was compelled to do, to postpone the election of a Senator, it is further true that the house of delegates, which was controlled by a Democratic majority of exactly 40, promptly and by a unanimous vote passed a resolution, offered by Hon. C. M. Seibert, who supported both of us in the Democratic caucus, ordering an investigation and sent it to the senate, which finally disposed of that resolution by tabling it, because in the meantime the absurd story of Mr. Shock about the money having been taken away from him by two unknown men had been made so public that it was known to all senators and representatives, and the charges of corruption which had been mainly based on it were then treated as an absurdity. This explanation which we make to the Senate is the same as was made to Senator Chilton by Hon. D. E. French, a copy of which is attached and original of which we file. Mr. French was then a leading member of the State senate, and was unanimously nominated by the Democrats at the present session of the senate as their candidate for president of the senate. The allegation that we prevented the adoption of that resolution by the senate will be completely negatived when your committee reflects that the State senate was composed of 15 Democrats and 15 Republicans, which made it an easy matter for the investigation to have been ordered by a vote of the Republican senators, with the vote of even Senator Bland, and as there were several other Democratic senators active, aggressive, and even bitter opponents of the two nominees the investigation would have been ordered, except that every reasonable man in the senate was then thoroughly convinced that the charges were unfounded.

The committee will, of course, remember that the Legislature of West Virginia not only completed the regular session at which we were elected, but that it was subsequently convened in extraordinary session, which lasted 45 days; and during all that time, though we were in our seats at Washington, not even a suggestion that we were not entitled to our seats was made.

The fourth and last allegation in the memorial is that our election was brought about by a combination of the railroads and the Standard Oil Co. The committee will, of course, perceive by glancing at the memorial that this charge has no other or better foundation than the irresponsible comments of some newspapers, and we could well dismiss them as entitled only to the consideration which every Senator's experience warrants him in giving to them. The charge, however, is so contrary to the facts that we crave the indulgence of the committee while we show how thoroughly it is the reverse of true. In the first place the opponent of Senator Watson was then and is now the general counsel in West Virginia of the Norfolk & Western Railroad, which was then and is now owned and controlled by the Pennsylvania Railroad, while Mr. McGraw, the opponent of Senator Chilton, is the owner of the West Virginia Midland Railroad, which connects with the Baltimore & Ohio Railroad, and the attorney of Mr. McGraw's railroad, a member of the State senate at that time, is the same gentleman who prepared the statement of one L. J. Shock.

More than this, Mr. Hubbard, from whose speech the memorial makes a garbled quotation, was then and is now an attorney for one of the Pennsylvania Railroad lines in West Virginia.

The falsity of the charge that we were supported and elected by the Standard Oil Co. will appear to the Senate when they are told that this same Senator Bland, from whose statement at the joint session the memorial quotes so elaborately, was then and is now the attorney of the Hope Natural Gas Co., a subsidiary of the Standard Oil Co.

This statement makes it plain that we were opposed rather than supported by those special interests.

There is one statement made in these newspaper clippings to which we feel called upon to reply particularly. The memorial recites an editorial from the Monroe County Watchman, in which the editor of that paper quotes a letter from one of his

correspondents, who is represented as saying, "We have positive information that $150,000 was expressed here last week for the purpose of corrupting the delegates. This information comes from such sources as render it absolutely reliable and proof is obtainable to a moral and legal certainty."

In reply to this assertion we state upon our honor as men and as Senators that neither $150,000 nor any other sum was expressed to us or to any of our friends for the purpose of corrupting the delegates or for any other purpose.

It can not be deemed inappropriate for us to say that the sinister purpose of this memorial is apparent from the fact that it was presented to the Senate on the last day of its last session when there could be no possible expectation of any action on it before the general election in November. Neither will it be out of place for us to say that after these charges, vague and indefinite as they are, have been circulated industriously throughout West Virginia for two years, Senator Watson has been renominated by the unanimous vote of the Democratic caucus to succeed himself, thus expressing to the Senate and to the world the judgment of the people who have the best opportunity and are in the best position to know the truth or falsity of them.

Reading this memorial in connection with our answer, we feel confident that your committee will promptly report to the Senate that no ground for an investigation has been shown. If any reasonable cause to challenge our election were before you, we would immediately demand an investigation as a matter of justice to the Senate, to the State of West Virginia, and to ourselves, but we do not believe that the time of the Senate ought to be wasted, the name of our State brought into question, and our attention diverted from our duties by a proceeding instigated by political revenge and supported by accusations which we have shown to be utterly unfounded.

C. W. WATSON.
W. E. CHILTON.

BLUEFIELD, W. VA., *June 17, 1911.*

Hon. WM. E. CHILTON,
Washington, D. C.

MY DEAR SENATOR: Yours of the 15th instant in regard to the statements made by Delegate Shock, of Braxton County, last winter, at Charleston, in regard to the election of United States Senators, received.

The facts in regard to this matter, as I now recollect them, are as follows:

Shock, in his statement, which was read at the joint session of the legislature in which yourself and Senator Watson were elected, said that just prior to the Democratic caucus at which you and Senator Watson were nominated as the Democratic candidates for United States Senators he had been paid $1,000 by a man—my recollection is Hambrick, from Clay—as a part consideration, that he, Shock, would vote in the Democratic caucus for yourself and Watson, and that Shock took the money to Judge Bennett, who counted it. Afterwards Shock went into the said caucus, and without saying anything in the said caucus about the payment of the money to him, voted on every ballot against yourself and Senator Watson, and did not make any public statement concerning said matter until the joint session of the legislature was held, at which United States Senators were elected, at which time the statement above referred to, which purported to have been made by Shock, was read. It was also publicly stated and generally discussed among the members of the legislature and others that after the said caucus Shock stated to various members of the legislature and other persons that two men whom he did not know, neither of them being the man who gave him the money, came to him and demanded the said $1,000, and that thereupon he, Shock, delivered the money to the said strangers, neither of whom he has ever seen since; that he did not know either of the said men and that he did not take their names. That Mr. Hambrick, the person whom Shock claims gave him the money, upon hearing of Shock's statement, came to Charleston and confronted Shock, and that Shock then stated that Hambrick was not the man who gave him the money and that he did not know who the man was. That he had understood that it was Hambrick, and for that reason had named him as the man who had given him the money. It was also commonly reported that Shock had stated that he proposed to trap and expose any efforts at corruption in the selection of United States Senators.

In view of this state of affairs, I felt at the time, and still feel, and think most of the other senators thought likewise, that an investigation was unnecessary and uncalled for, and that for the Senate to undertake to investigate such flimsy charges would not have reflected credit upon the Senate and would only have lent color to charges which in themselves contained nothing substantial or tangible upon which an investigation could properly be based. In fact, this entire matter, to my mind, bore the earmarks of a fabricated scheme in which Shock was simply made a tool of, perhaps

innocently, by others, who in this way sought to raise a cry of corruption in the Democratic Party and thus to reflect discredit upon the party and the United States Senators which it elected.

I recollect distinctly the statement made by Senator Watson before the joint session of the legislature which elected him to the United States Senate, that if anyone could produce reasonable proof of corruption on his part in connection with his election to the United States Senate he would resign the office, and that you on the same occasion publicly stated that you courted the fullest investigation that any person or body of men could make of these charges. So far as I know, neither yourself nor Senator Watson ever expressed a wish or said anything to prevent or hinder an investigation of these matters.

It is my recollection that you went into the Democratic caucus with some thirty-odd votes affirmatively for you, and I know there were others who held you as their second choice. The fact that Col. McGraw, who was your opponent in the Democratic caucus, came from an adjoining county to Senator Watson, and that he was not a candidate against Watson for the short term, and the further fact that it was not probable that both United States Senators would be selected from the same section of the State is certainly a sufficient explanation of the fact that many of your friends voted for Watson and his friends voted for you.

With best wishes, I beg to remain,

Yours, very sincerely,

D. E. FRENCH.

The PRESIDENT PRO TEMPORE. The statement will be referred to the Committee on Privileges and Elections. (Cong. Rec., vol. 49, pp. 2635–2637.)

REPORT OF THE COMMITTEE.

[The committee consisted of Messrs. Dillingham (chairman), Gamble, Clapp, Sutherland, Bradley, Jones, Oliver, Kenyon, Paynter, Johnston of Alabama, Fletcher, Kern, Lea, and Pomerene.]

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 11, 1913.—Ordered to be printed.

Mr. Dillingham, from the Committee on Privileges and Elections, submitted the following report (No. 1206):

The Committee on Privileges and Elections, to whom was referred the petition of William E. Glasscock, William Seymour Edwards, Herschel C. Ogden, David B. Smith, and F. A. MacDonald, citizens of West Virginia, making certain charges and allegations of fraud and corruption connected with the nomination and election of Clarence W. Watson and William E. Chilton as Senators of the United States from the State of West Virginia, report—

That a careful examination of the said petition and of all the papers submitted by the Senate to the committee discloses—

First. That the Legislature of West Virginia, which convened on the 11th day of January, A. D. 1911, chose Messrs. Clarence W. Watson and William E. Chilton as Senators of the United States from the State of West Virginia, and that they appeared, took their oath of office, and are now sitting as Senators in this body. The petitioners do not state or allege that in such election any individual member of the legislature was bribed to vote for either of the persons named, or that, in voting for them, or either of them, any member thereof was actuated by any corrupt or improper motive.

Second. It does not appear upon any of the papers before this committee that in such election any member of the Legislature of West Virginia was improperly approached by any person interested in the election of either of the said Senators, or that any improper offer or inducement of any kind or nature was made to any such member to cast his vote for said Senators, or either of them.

Third. The only direct charge that money was improperly used, or attempted to be used, by anyone is contained in a purported statement of L. J. Shock, a member of the West Virginia Legislature that, on the 18th day of January, 1911, prior to the caucus of the Democratic members of the legislature which was held to nominate party candidates for United States Senators, he was paid $1,000, and promised a further sum, to vote for Messrs. Watson and Chilton for United States Senators. This statement was read by Hon. George W. Bland, a State senator, before the Joint Assembly of the Legislature of West Virginia on the 25th day of January, 1911. But it affirmatively appears, from the papers submitted to this committee, that the charge made by Mr. Shock was without foundation, and has been fully retracted in a statement made by him to Senator Watson, of which the following is a copy:

BURNSVILLE, W. VA., *January 8, 1913.*

Hon. C. W. WATSON,
Washington, D. C.

DEAR SIR: The time has come when you should know the truth about the so-called Shock statement. I never have signed any statement that was read before the legislature and I never have been under oath. I have let the talking go on because I hated to be put in a wrong light. The truth is that I set up the whole business. Nobody tried to buy my vote, and would not swear that they did. I wanted to nominate McGraw, and I thought if I got this thousand dollars and made this play, it would hurt you and Chilton. The trick failed to work, and now you have the truth. I do not know you, and am sending this to you because I want justice to be done. So far as I know, your election and Chilton's was honest and fair, and it is wrong to have this report going around.

Very truly, yours,

L. J. SHOCK.

Fourth. All other matters contained in the petition aforesaid are rumors without apparent foundation—statements of individual opinion, newspaper stories, and speculations as to general conditions existing in and about the legislature and throughout the State of West Virginia just previous to and at the time of such election. These do not in any instance refer to the action of any particular member of the Legislature of West Virginia. They do not charge any act of bribery or attempted bribery. They neither name any member of that body as having received, nor as having been asked to receive, money for his vote, nor do they indicate any person who made any attempt to bribe or improperly influence any member of the legislature. They are of that general character too frequently indulged in both by individuals and by the public press on the occasion of elections in connection with which great public interest is aroused, and, while calculated to arouse suspicion and create prejudice, they do not, in the opinion of the committee, present a proper basis for action on the part of the Senate.

The committee are unanimously of the opinion that the prayer of the petition should not be granted, and submit the following resolution:

"*Resolved*, That the Committee on Privileges and Elections be discharged from further consideration of the subject."

Mr. DILLINGHAM. I ask for the present consideration of the resolution.

The PRESIDENT PRO TEMPORE. The Senator from Vermont asks for the present consideration of the resolution which has just been read. Is there objection? The Chair hears none.

Mr. STONE. Mr. President, my attention was diverted. I wish to be certain what this is.

The PRESIDENT PRO TEMPORE. The Secretary will again read the resolution.

Mr. STONE. No; I desire to be certain just what it relates to.

The PRESIDENT PRO TEMPORE. It relates to the question of the validity of the election of the Senators from West Virginia, Senator Watson and Senator Chilton. The resolution has been read to the Senate. It is now before the Senate for action. [Putting the question.] The resolution is unanimously agreed to. The report, the Chair understands, is a part of the action of the Senate. The report is adopted and the resolution is agreed to. (Cong. Rec., vol. 49, p. 3001.)

SENATE ELECTION CASES.

III.

EXPULSION OF SENATORS.

[Fifth Congress—First session.]

WILLIAM BLOUNT,

Senator from Tennessee from December 6, 1796, to July 8, 1799.

Mr. Blount was expelled from the Senate on July 8, 1797, as "having been guilty of a high misdemeanor." An account of his impeachment, which was a proceeding distinct from the expulsion case here given, is found in the Annals of Congress, 5th Cong., 1st and 2d sess., vol. 1, 1797–'98, within pages 39 to 45, and Annals of Congress, 2d and 3d sess., vol. 2, 1798–'99, pages 2245 to 2416. The decision in the impeachment trial was that "the court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed," the grounds on which the decision rested not being given.

The account of the expulsion case here given consists of a transcript of the proceedings of the Senate relating to it from the Annals of Congress, 5th Cong., 1st and 2d sess., vol. 1, 1797–'98, within pages 33 to 45.

MONDAY, *July* 3, 1797.

The following message was received from the President of the United States:

Gentlemen of the Senate and House of Representatives:

The whole of the intelligence which has for some time past been received from abroad, the correspondence between this Government and the ministers of the belligerent powers residing here, and the advices from the officers of the United States, civil and military, upon the frontiers, all conspire to show, in a very strong light, the critical situation of our country. That Congress might be enabled to form a more perfect judgment of it, and of the measures necessary to be taken, I have directed the proper officers to prepare such collections of extracts from the public correspondence as might afford the clearest information. The reports made to me, from the Secretary of State and the Secretary of War, with a collection of documents from each of them, are now communicated to both Houses of Congress. I have desired that the message, reports, and documents may be considered as confidential, merely that the members of both Houses of Congress may be apprised of their contents before they should be made public. As soon as the two Houses shall have heard them, I shall submit to their discretion the publication of the whole or any such parts of them as they shall judge necessary or expedient for the public good.

JOHN ADAMS.

UNITED STATES, *July* 3, 1797.

The message and papers were read.

On motion, the copy of a letter communicated with the message was again read, in the hearing of Mr. Blount, who was absent when it was read the first time; and who, on being requested to declare whether he was the author of this letter or not, observed that he wrote a letter to Cary, but was unable to say whether the copy was a correct one or not without recurrence to his papers; and desired that he might have until to-morrow to reply.

TUESDAY, *July* 4, 1797.

Mr. Cocke laid before the Senate a letter addressed to him, signed William Blount, purporting that it was necessary for him, the said William Blount, to have further time for recurrence to his papers and other evidence to remove suspicion.

Resolved, That so much of the message from the President of the United States, of the 3d instant, and the papers accompanying the same, as relates to a letter purport-

ing to have been written by William Blount, a Senator from the State of Tennessee, be referred to a select committee, to consider and report what, in their opinion, it is proper for the Senate to do thereon; and that the said committee have power to send for persons, papers, and records relating to the subject committed to them, and that Messrs. Ross, Stockton, Henry, Sedgwick, and Read be the committee.

Ordered, That the Senate be, for the present, under an injunction of secrecy on the papers referred to in the above-mentioned message.

WEDNESDAY, *July* 5, 1797.

Mr. Ross, from the committee on part of the message of the President of the United States, of the 3d instant, made report; and the report was read.

Ordered, That the Vice-President notify William Blount, Senator from the State of Tennessee, by letter, to attend the Senate.

The Vice-President accordingly addressed to him the following letter, by the Doorkeeper:

SENATE CHAMBER, *July* 5, 1797.

SIR: You are hereby required to attend the Senate, in your place, without delay. By order of the Senate.

TH. JEFFERSON,
President of the Senate.

WILLIAM BLOUNT, Esq.,
Senator from the State of Tennessee.

On motion that it be

Resolved, That the letter said to have been written by William Blount, together with the several notes that passed between the Secretary of State and the British minister relative to the said letter, be printed for the use of the members—

It was agreed that the consideration of this motion be postponed until to-morrowf

Ordered, That the injunction of secrecy respecting the message of the President o. the United States of the 3d instant, and the papers accompanying the same, be taken off.

The Vice-President acquainted the Senate that the Doorkeeper had returned his letter addressed agreeably to their order to William Blount, as on inquiry he could not be found.

THURSDAY, *July* 6, 1797.

Mr. Ross, from the committee to whom was referred that part of the President's message of the 3d instant which relates to a letter purporting to have been written by William Blount, esq., together with the papers accompanying the same, made a further report; which was read. Upon which,

Mr. Blount read in his place a declaration, purporting that he should attend in his seat, from time to time, to answer to any allegations that might be brought against him.

Ordered, That the consideration of the report of the committee be postponed until 11 o'clock to-morrow morning.

On motion by Mr. Blount that he be heard by counsel on the subject-matter of this report,

A motion was made to postpone the consideration of this motion until to morrow, and it passed in the negative.

Resolved, That Mr. Blount be heard by counsel, not exceeding two, to-morrow morning at 11 o'clock.

Ordered, That the Secretary furnish Mr. Blount with attested copies of such papers as he may point out, respecting the subject this day reported on by the committee.

FRIDAY, *July* 7, 1797.

Resolved, That the instructions to the committee to whom was referred that part of the President's message of the 3d instant which relates to a letter purporting to have been written by William Blount, esq., together with the papers accompanying the same, be amended by adding, after the word "records," the following words: "and particularly the papers of William Blount, esq."

Agreeably to the order of the day, the Senate proceeded to the consideration of the report of the above-mentioned committee, made yesterday.

On motion that such printers as may request it be accommodated with stands on the floor of the Senate, to enable them to take notes of their proceedings on the present occasion, it passed in the negative.

Mr. Blount notified the Senate that Jared Ingersoll and Alexander J. Dallas are the counsel he has employed, agreeably to the vote of the Senate passed yesterday.

The President requested Mr. Blount to declare whether or not he was the author

of a letter a copy of which was communicated with the message of the President of the United States of the 3d instant.

Mr. Blount declined to answer.

On motion, in consequence of the request of the counsel above mentioned that they have until Monday next to prepare themselves to show cause why the report of the committee should not be adopted, after debate it was agreed that the question before the Senate be postponed for the purpose of receiving a special message from the House of Representatives.

SATURDAY, *July* 8, 1797.

The Senate resumed the consideration of the report of the committee to whom was referred that part of the President's message which relates to a letter purporting to have been written by William Blount, esq., together with the papers accompanying the same.

On motion, Mr Justice Smith was desired to attend and administer the oath to such witnesses as might be adduced.

On motion, Mr. Martin and Mr. Cocke, of the Senate, being sworn, severally testified on inspection of the letter said to be written by Mr. Blount, that it was his handwriting, they being acquainted therewith, and having seen him write.

The President then said:

"William Blount, esq., you have now an opportunity, agreeably to the vote of Senate, in pursuance of your own request, by your counsel, to show cause why the report of the committee should not be adopted."

Mr. Blount was heard by his counsel, Mr. Ingersoll and Mr. Dallas; and,

After debate,

A motion was made to postpone the consideration of the report of the committee to the next session of Congress; and it was decided in the negative—yeas 7, nays 19; as follows:

YEAS—Messrs. Bloodworth, Brown, Cocke, Gunn, Martin, Tazewell, and Tatnall.

NAYS—Messrs. Bingham, Bradford, Foster, Goodhue, Henry, Hillhouse, Howard, Hunter, Latimer, Laurance, Livermore, Marshall, Read, Ross, Rutherfurd, Sedgwick, Tichenor, Tracy, and Vining.

On the question to agree to the report of the committee, as follows:

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Ross, Stockton, Henry, Sedgwick, and Read.]

The committee to whom was referred that part of the President's message which relates to a letter purporting to have been written by William Blount, esq., one of the Senators from the State of Tennessee, together with the papers accompanying the same, having had the same under their consideration, beg leave to make a further report:

That Mr. Blount, having declined an acknowledgment or denial of the letter imputed to him, and having failed to appear to give any satisfactory explanation respecting it, your committee sent for the original letter, which accompanies this report, and it is in the following words:

COLONEL KING'S IRON WORKS,
April 21, 1797.

DEAR CAREY: I wished to have seen you before I returned to Philadelphia, but I am obliged to return to the session of Congress, which commences on the 15th of May.

Among other things that I wished to have seen you about was the business Capt. Chesholm mentioned to the British minister last winter at Philadelphia.

I believe, but am not quite sure, that the plan then talked of will be attempted this fall; and if it is attempted it will be in a much larger way than then talked of, and if the Indians act their part I have no doubt but it will succeed. A man of consequence has gone to England about the business, and if he makes arrangements as he expects I shall myself have a hand in the business, and probably shall be at the head of the business on the part of the British. You are, however, to understand that it is not yet quite certain that the plan will be attempted, yet you will do well to keep things in a proper train of action in case it should be attempted, and to do so will require all your management—I say require all your management, because you must take care in whatever you say to Rogers or anybody else not to let the plan be discovered by Hawkins, Dinsmore, Byers, or any other person in the interest of the United States or Spain.

If I attempt this plan I shall expect to have you and all my Indian country and Indian friends with me; but you are now in good business, I hope, and you are not to risk the loss of it by saying anything that will hurt you until you again hear from me. Where Capt. Chesholm is I do not know; I left him in Philadelphia in

March, and he frequently visited the minister and spoke upon the subject; but I believe he will go into the Creek Nation by way of South Carolina or Georgia. He gave out he was going to England, but I did not believe him. Among other things that you may safely do will be to keep up my consequence with Watts and the Creeks and Cherokees generally, and you must by no means say anything in favor of Hawkins, but, as often as you can with safety to yourself, you may teach the Creeks to believe he is no better than he should be. Any power or consequence he gets will be against our plan. Perhaps Rogers, who has no office to lose, is the best man to give out talks against Hawkins. Read the letter to Rogers, and if you think it best to send it to him put a wafer in it and forward it to him by a safe hand, or perhaps you had best send for him to come to you, and speak to him yourself respecting the state and prospect of things.

I have advised you in whatever you do to take care of yourself. I have now to tell you to take care of me, too, for a discovery of the plan would prevent the success and much injure all the parties concerned.

It may be that the commissioners may not run the line as the Indians expect or wish, and in that case it is probable the Indians may be taught to blame me for making the treaty. To such complaints against me, if such there are, it may be said by my friends, at proper times and places, that Doublehead confirmed the treaty with the President at Philadelphia, and receives as much as $5,000 a year, to be paid to the nation, over and above the first price; indeed, it may with truth be said that, though I made the treaty, that I made it by the instructions of the President, and, in fact, it may with truth be said that I was by the President instructed to purchase much more land than the Indians would agree to sell. This sort of talk will be throwing all the blame off me upon the late President, and as he is now out of office it will be of no consequence how much the Indians blame him. Among other things that may be said for me is that I was not at the running of the line, and that if I had been it would have been run more to their satisfaction. In short, you understand the subject, and must take care to give out the proper talks, to keep up my consequence with the Creeks and Cherokees. Can't Rogers contrive to get the Creeks to desire the President to take Hawkins out of the nation? For if he stays in the Creek Nation and gets the good will of the nation he can and will do great injury to our plan. When you have read this letter over three times, then burn it. I shall be at Knoxville in July or August, when I will send for Watts and give him the whisky I promised him.

I am, etc.,

WILLIAM BLOUNT.

Two Senators, now present in the Senate, have declared to the committee that they are well acquainted with the handwriting of Mr. Blount, and have no doubt that this letter was written by him. Your committee have examined many letters from Mr. Blount to the Secretary of War, a number of which are herewith submitted, as well as the letter addressed by Mr. Blount to Mr. Cook, his colleague in the Senate, and to this committee, respecting the business now under consideration, and find them all to be of the same handwriting with the letter in question. Mr. Blount has never denied this letter, but, on the other hand, when the copy transmitted to the Senate was read in his presence, on the 3d instant, he acknowledged in his place that he had written a letter to Carey, of which he had preserved a copy, but could not then decide whether the copy read was a true one. Your committee are therefore fully persuaded that the original letter now produced was written and sent to Carey by Mr. Blount. They also find that this man Carey, to whom it was addressed, is, to the knowledge of Mr. Blount, in the pay and employment of the United States as their interpreter to the Cherokee Nation of Indians, and an assistant in the public factory at Tellico Blockhouse. That Hawkins, who is so often mentioned in this letter as a person who must be brought into suspicion among the Creeks, and if possible driven from his station, is the superintendent of Indian affairs for the United States among the Southern Indians; Dinsmore is agent for the United States in the Cherokee Nation; and Byers one of the agents in the public factory at Tellico Blockhouse.

The plan hinted at in this extraordinary letter to be executed under the auspices of the British is so capable of different constructions and conjectures that your committee at present forbear giving any decided opinion respecting it, except that to Mr. Blount's own mind it appeared to be inconsistent with the interests of the United States and of Spain, and he was therefore anxious to conceal it from both. But when they consider his attempts to seduce Carey from his duty as a faithful interpreter, and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers of the United States residing among them; the measures he has proposed to excite a temper which must produce the recall or expulsion of our superintendent from the Creek Nation; his insidious advice tending to the advancement of his own popularity and consequence, at the expense and

hazard of the good opinion which the Indians entertain of this Government and of the treaties subsisting between us and them, your committee have no doubt that Mr. Blount's conduct has been inconsistent with his public duty, renders him unworthy of a further continuance of his present public trust in this body, and amounts to a high misdemeanor. They therefore unanimously recommend to the Senate an adoption of the following resolution:

Resolved, That William Blount, esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.

The report was adopted—yeas 25, nay 1; as follows:

YEAS—Messrs. Bingham, Bloodworth, Bradford, Brown, Cocke, Foster, Goodhue, Gunn, Henry, Hillhouse, Howard, Hunter, Latimer, Laurance, Livermore, Martin, Marshall, Read, Ross, Rutherfurd, Sedgwick, Tatnall, Tichenor, Tracy, and Vining.

Mr. Tazewell voted in the negative.

So it was

Resolved, That William Blount, esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.

Ordered, That the Secretary transmit to the executive of the State of Tennessee an attested copy of the proceedings of the Senate on the report of the committee, of the 6th instant, for the expulsion of William Blount.

Ordered, That the Secretary lay before the President of the United States an attested copy of the proceedings of the Senate on his message of the 3d instant, transmitting a letter signed William Blount, directed to Mr. Cary.

[Tenth Congress—First session.]

JOHN SMITH,

Senator from Ohio from October 25, 1803, till he resigned, April 25, 1808.

November 27, 1807, the Senate resolved that a committee be appointed to inquire whether it was compatible with the privileges of the Senate that Mr. Smith, against whom bills of indictment were found at the United States circuit court of Virginia for treason and misdemeanor, should be permitted longer to have a seat therein; and that the committee inquire into all the facts regarding the conduct of Mr. Smith as an alleged associate of Aaron Burr, and report to the Senate. December 31, the committee reported that the conspiracy of Aaron Burr and his associates was of such a character, and that its existence was so established by evidence, that it was incompatible with the privileges of the Senate that any person engaged in it should be permitted to hold a seat in the Senate. The committee submit to the Senate the evidence collected, and leave it to the Senate to determine whether the facts are sufficient to substantiate the participation of Mr. Smith in the conspiracy. The committee reported that the bills of indictment found against Mr. Smith in the United States circuit court at Richmond were precisely similar to those found against Aaron Burr; that owing to the fact that certain evidence was not admitted in the trial of Mr. Burr, the jury had found that he was "not proved to be guilty, under that indictment, by any evidence submitted to them"; that on account of this decision the counsel for the United States abandoned the prosecution against Mr. Smith; that the committee was not disposed to question the correctness of this decision on a case of treason before a court of criminal jurisdiction, but that whether the transactions proved against Aaron Burr did or did not amount, in technical language, to an overt act of levying war, there was no doubt in the minds of the committee that but for the vigilance and energy of the Government in crushing his designs they would have resulted in war; that a grand jury had charged Mr. Smith with being an accomplice in these designs, and that the fact that under the circumstances the prosecution against Mr. Smith had been abandoned did not, in the opinion of the committee, remove the imputation which the accusations of the grand jury had brought upon him; that the committee would not permit themselves to comment upon the evidence submitted or the answers which Mr. Smith had given as sufficient for his justification, but that they felt compelled to submit for the consideration of the Senate a resolution that by his participation in the conspiracy of Aaron Burr he had been guilty of conduct incompatible with his station as a Senator, and that he be expelled therefor. April 9, 1808, after long debate on the question to agree to the resolution, 19 voted yea and 10 nay; so that, two-thirds of the Senators not concurring therein, he was not expelled.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 10th Cong., 1st sess., with the report of the committee from Annals of Congress, 10th Cong., 1st sess., vol. I, pages 56–62.

Special references to the debates of each day are inserted below.

FRIDAY, *November* 27, 1807.

The Hon. John Smith, from the State of Ohio, attended.

On motion, the following resolution, having been amended, was agreed to:

"*Resolved*, That a committee be appointed to inquire whether it be compatible with the honor and privileges of this House that John Smith, a Senator from the State of Ohio, against whom bills of indictment were found at the circuit court of Virginia, held at Richmond in August last, for treason and misdemeanor, should be permitted any longer to have a seat therein; and that the committee do inquire into all the facts regarding the conduct of Mr. Smith as an alleged associate of Aaron Burr, and report the same to the Senate."

Ordered, That Messrs. Adams, Maclay, Franklin, Smith of Maryland, Pope, Thruston, and Anderson be the committee.

During the discussion of the preceding resolution,

Mr. Tiffin, by permission, read in his place a letter from Mr. Smith, as follows:

WASHINGTON, *November* 27, 1807.

DEAR SIR: Just having heard that a motion is pending in the Senate to appoint a committee to inquire into certain charges exhibited against me at Richmond by the late grand jury, I beg you, sir, to assure the Senate, in my name, that nothing will afford me more pleasure than to have a public investigation of the said charges, and an opportunity to vindicate my innocence, and I beg you, from your seat, to make this statement.

I am, dear sir, respectfully, yours, &c.,

JOHN SMITH.

Hon. Mr. TIFFIN.

[An account of the debate is found on pages 39–42 of Annals of Congress referred to in the head-note.]

MONDAY, *November* 30, 1807.

Mr. Adams stated that he was instructed by the committee appointed on the 27th instant to inquire into the conduct of John Smith, a Senator from the State of Ohio, to submit to the Senate the following resolution; which was read and agreed to:

"*Resolved*, That the President of the United States be requested to cause to be laid before the Senate such information as may be in his possession in relation to the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr."

Ordered, That the Secretary lay this resolution before the President of the United States.

Mr. Adams, from the same committee, also stated that he was instructed to submit to the Senate the following resolution; which was read and agreed to:

"*Resolved*, That the committee appointed on the 27th instant to inquire and report the facts respecting the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr, be authorized to extend their inquiries to any other facts which, in their opinion, would be incompatible with his duty as a Senator of the United States, and that they be authorized to send for persons, papers, and records."

WEDNESDAY, *December* 2, 1807.

The following written message was received from the President of the United States, by Mr. Coles, his secretary:

To the Senate of the United States:

In compliance with the request made in the resolution of the Senate of November 30 I must inform them that when the prosecutions against Aaron Burr and his associates were instituted I delivered to the Attorney-General all the evidence on the subject, formal and informal, which I had received, to be used by those employed in the prosecutions. On the receipt of the resolution of the Senate, I referred it to the Attorney-General, with a request that he would enable me to comply with it by putting into my hands such of the papers as might give information relative to the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr, and having this moment received from him the affidavit of Elias Glover, with an assurance that it is the only paper in his possession which is within the term of the request of the Senate, I now transmit it for their use.

TH. JEFFERSON.

DECEMBER 2, 1807.

The message was read.

Ordered, That the message and paper therein mentioned be referred to the committee appointed on the 27th of November last to inquire into the conduct of Mr. Smith as an alleged associate of Aaron Burr.

FRIDAY, *December* 4, 1807.

Mr. Adams stated that he was instructed by the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, to submit the following resolution; which was read and agreed to:

"*Resolved*, That the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, be authorized to admit the attendance of Mr. Smith."

MONDAY, *December* 7, 1807.

Mr. Adams stated that he was instructed by the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, to submit the following resolution; which was read and agreed to:

"*Resolved*, That the committee appointed to inquire and report the facts relating to the conduct of John Smith, a Senator from the State of Ohio, be authorized to cause to be printed, under their inspection, all such documents and papers touching the subject-matter of the inquiries on which they have been appointed as may appear necessary to the committee, previous to the presentation of the same to the Senate."

THURSDAY, *December* 31, 1807.

Mr. Adams stated that the committee appointed on the 27th of November last "to inquire whether it be compatible with the honor and privileges of this House that John Smith, a Senator from the State of Ohio, against whom bills of indictment were found at the circuit court of Virginia, held at Richmond in August last, for treason and mis-

demeanor, should be permitted any longer to have a seat therein," were ready to report, and he made the following motion; which was read and agreed to:

Ordered, That John Smith, a Senator from the State of Ohio, be notified by the Vice-President to attend in his place.

The Vice-President accordingly notified Mr. Smith in the words following:

"SIR: You are hereby required to attend the Senate in your place without delay.

"By order of the Senate.

"GEO. CLINTON,
"*President of the Senate.*

"JOHN SMITH, Esq.,
"*Senator from the State of Ohio.*"

And Mr. Smith attended.

Whereupon,

Mr. Adams made report from the committee last mentioned; and the report was read.

On motion,

Ordered, That three hundred copies thereof be printed for the use of the Senate.

Mr. Adams also, from the same committee, made a further report, which was read.

Ordered, That it lie for consideration.

The queries addressed by the committee to Mr. Smith, and his answers to the same, were read; also the testimony of James Taylor, esq., and Mr. Smith's letter to the committee relating thereto.

A motion was made by Mr. Hillhouse that Mr. Smith's answers be printed for the use of the Senate; and objections arising thereon that the said answer contained exceptionable matter which ought not to be printed,

It was agreed, by consent of Mr. Smith, that he should take back his answers, and expunge such exceptionable matters, and that the answers should then be printed, under the inspection of the chairman of the committee.

[An account of the debate is found on pages 62, 63 of the Annals of Congress referred to in the head-note.]

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Adams, Maclay, Franklin, Smith of Maryland Pope, Thruston, and Anderson.]

Your committee are of opinion that the conspiracy of Aaron Burr and his associates against the peace, union, and liberties of these States is of such a character, and that its existence is established by such a mass of concurring and mutually corroborative testimony, that it is incompatible, not only with the honor and privileges of this House, but with the deepest interests of this nation, that any person engaged in it should be permitted to hold a seat in the Senate of the United States.

Whether the facts, of which the committee submit herewith such evidence as, under the order of the Senate, they have been able to collect, are sufficient to substantiate the participation of Mr. Smith in that conspiracy or not will remain for the Senate to decide.

The committee submit also to the consideration of the Senate the correspondence between Mr. Smith and them, through their chairman, in the course of their meetings. The committee have never conceived themselves invested with authority to try Mr. Smith. Their charge was to report an opinion relating to the honor and privileges of the Senate and the facts relating to the conduct of Mr. Smith. Their opinion, indeed, cannot be expressed in relation to the privilege of the Senate without relating, at the same time, to Mr. Smith's right of holding a seat in this body; but in that respect the authority of the committee extends only to proposal, and not to decision. But as he manifested a great solicitude to be heard before them, they obtained permission from the Senate to admit his attendance, communicated to him the evidence in their possession by which he was inculpated, furnished him in writing with the questions arising from it which appeared to them material, and received from him the information and explanations herewith submitted as part of the facts reported. But Mr. Smith has claimed as a right to be heard in his defense by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the committee had been a circuit court of the United States. But it is before the Senate itself that your committee conceived it just and proper that Mr. Smith's defense of himself should be heard. Nor have they conceived themselves bound in this inquiry by any other rules than those of natural justice and equity due to a brother Senator on the one part, and to their country on the other.

Mr. Smith represents himself on this inquiry as solitary, friendless, and unskilled, contending for rights which he intimates are denied him; and the defender of Senatorial

privileges which he seems apprehensive will be refused him by Senators, liable, so long as they hold their offices, to have his case made their own. The committee are not unaware that in the vicissitudes of human events no member of this body can be sure that his conduct will never be made a subject of inquiry and decision before the assembly to which he belongs. They are aware that, in the course of proceeding which the Senate may now sanction, its members are marking out a precedent which may hereafter apply to themselves. They are sensible that the principles upon which they have acted ought to have the same operation upon their own claims to privilege as upon those of Mr. Smith; the same relation to the rights of their constituents which they have to those of the legislature which he represents. They have deemed it their duty to advance in the progress of their inquiry with peculiar care and deliberation. They have dealt out to Mr. Smith that measure which, under the supposition of similar circumstances, they would be content to find imparted to themselves; and they have no hesitation in declaring that under such imputations, colored by such evidence, they should hold it a sacred obligation to themselves, to their fellow-Senators, and to their country to meet them by direct, unconditional acknowledgment or denial, without seeking a refuge from the broad face of day in the labyrinth of technical forms.

In examining the question whether these forms of judicial proceedings or the rules of judicial evidence ought to be applied to the exercise of that censorial authority which the Senate of the United States possesses over the conduct of its members, let us assume as the test of their application either the dictates of unfettered reason, the letter and spirit of the Constitution, or precedents domestic or foreign, and your committee believe that the result will be the same; that the power of expelling a member must, in its nature, be discretionary, and in its exercise always more summary than the tardy process of judicial tribunals.

The power of expelling a member for misconduct results on the principles of common sense from the interest of the nation that the high trust of legislation should be invested in pure hands. When the trust is elective it is not to be presumed that the constituent body will commit the deposit to the keeping of worthless characters. But when a man whom his fellow-citizens have honored with their confidence on the pledge of his spotless reputation has degraded himself by the commission of infamous crimes which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member, which should have no remedy of amputation to apply until the poison had reached the heart.

The question upon the trial of a criminal cause before the courts of common law is not between guilt and innocence, but between guilt and the possibility of innocence. If a doubt can possibly be raised, either by the ingenuity of the party or of his counsel, or by the operation of general rules in their unforeseen application to particular cases, that doubt must be decisive for acquittal, and the verdict of not guilty perhaps in nine cases out of ten means no more than that the guilt of the party has not been demonstrated in the precise, specific, and narrow forms prescribed by law. The humane spirit of these laws multiplies the barriers for the protection of innocence and freely admits that these barriers may be abused for the shelter of guilt. It avows a strong partiality favorable to the person upon trial, and acknowledges the preference that ten guilty should escape rather than that one innocent should suffer. The interest of the public that a particular crime should be punished is but as one to ten, compared with the interest of the party, that innocence should be spared. Acquittal only restores the party to the common rights of every other citizen; it restores him to no public trust; it invests him with no public confidence; it substitutes the sentence of mercy for the doom of justice, and to the eyes of impartial reason in the great majority of cases must be considered rather as a pardon than a justification.

But when a member of a legislative body lies under the imputation of aggravated offenses and the determination upon his cause can operate only to remove him from a station of extensive powers and important trust, this disproportion between the interest of the public and the interest of the individual disappears; if any disproportion exists it is of an opposite kind. It is not better that ten traitors should be members of this Senate than that one innocent man should suffer expulsion. In either case, no doubt, the evil would be great. But in the former it would strike at the vitals of the nation; in the latter it might, though deeply to be lamented. only be the calamity of an individual.

By the letter of the Constitution the power of expelling a member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two-thirds of the votes to give it effect.

The spirit of the Constitution is perhaps in no respect more remarkable than in the solicitude which it has manifested to secure the purity of the Legislature by that of the elements of its composition. A qualification of age is made necessary for the members

to insure the maturity of their judgment; a qualification of long citizenship to insure a community of interests and affections between them and their country; a qualification of residence to provide a sympathy between every member and the portion of the Union from which he is delegated; and to guard, as far as regulation can guard, against every bias of personal interest and every hazard of interfering duties, it has made every member of Congress ineligible to office which he contributed to create, and every officer of the Union incapable of holding a seat in Congress. Yet, in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment; and when the darling of the people's choice has become their deadliest foe can it enter the imagination of a reasonable man that the sanctuary of their legislation must remain polluted with his presence until a court of common law with its pace of snail can ascertain whether his crime was committed on the right or on the left bank of a river; whether a puncture of difference can be found between the words of the charge and the words of the proof; whether the witnesses of his guilt should or should not be heard by his jury; and whether he was punishable because present at an overt act or intangible to public justice because he only contrived and prepared? Is it conceivable that a traitor to that country which has loaded him with favors, guilty to the common understanding of all mankind, should be suffered to return unquestioned to that post of honor and confidence where, in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calmness and indifference session after session to the voice of notorious infamy until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life?

Such, in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals as an apology for crippling the Congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our Constitution. They believe that the very purpose for which this power was given was to preserve the Legislature from the first approaches of infection; that it was made discretionary because it could not exist under the procrastination of general rules; that its process must be summary, because it would be rendered nugatory by delay.

Passing from the constitutional view of the subject to that which is afforded by the authority of precedent, your committee find that since the establishment of our present National Legislature there has been but one example of expulsion from the Senate. In that case the member implicated was called upon in the first instance to answer whether he was the author of a letter the copy of which only was produced, and the writing of which was the cause of his expulsion. He was afterwards requested to declare whether he was the author of the letter itself, and declining in both cases to answer, the fact of his having written it was established by a comparison of his handwriting and by the belief of persons who had seen him write, upon inspection of the letter. In all these points the committee perceive the admission of a species of evidence which in courts of criminal jurisdiction would be excluded, and in the resolution of expulsion the Senate declared the person inculpated guilty of a high misdemeanor, although no presentment or indictment had been found against him and no prosecution of law was ever commenced upon the case.

This event occurred in July, 1797. About fifteen months before that time, upon an application from the legislature of Kentucky requesting an investigation by the Senate of a charge against one of the members from that State of perjury, which had been made in certain newspaper publications, but for which no prosecution had been commenced, the Senate did adopt by a majority of 16 votes to 8 the report of a committee purporting that the Senate had no jurisdiction to try the charge, and that the memorial of the Kentucky legislature should be dismissed. There were, indeed, very sufficient reasons of a different kind assigned in the same report for not pursuing the investigation in that particular case any further; and your committee believe that in the reasoning of that report some principles were assumed and some inferences drawn which were altogether unnecessary for the determination of that case which were adopted without a full consideration of all their consequences, and the inaccuracy of which was clearly proved by the departure from them in the instance which was so soon afterwards to take place. It was the first time that a question of expulsion had ever been agitated in Congress since the adoption of the Constitution, and the subject being thus entirely new, was considered perhaps too much with reference to the particular circumstances of the moment, and not enough upon the numerous contingencies to which the general question

might apply. Your committee state this opinion with some confidence, because of the sixteen Senators who in March 1796, voted for the report dismissing the memorial of the Kentucky legislature eleven, on the subsequent occasion in July, 1797, voted also for that report which concluded with a resolution for the expulsion of Mr. Blount. The other five were no longer present in the Senate. Yet, if the principles advanced in the first report had been assumed as the ground of proceeding at the latter period the Senate would have been as impotent of jurisdiction upon the offense of Mr. Blount as they had supposed themselves upon the allegation against Mr. Marshall.

Those parts of the fifth and sixth articles amendatory to the Constitution upon which the report in the case of Mr. Marshall appears to rely for taking away the jurisdiction of the Senate your committee suppose can only be understood as referring to prosecutions at law; to suppose that they were intended as restrictions upon powers expressly granted by the Constitution to the Legislature or either of its branches would in a manner annihilate the power of impeachment as well as that of expulsion. It would lead to the absurd conclusion that the authority given for the purpose of removing iniquity from the seats of power should be denied its exercise in precisely those cases which most loudly call for its energies. It would present the singular spectacle of a legislature vested with powers of expelling its members, of impeaching, removing, and disqualifying public officers for trivial transgressions beneath the cognizance of the law, yet forbidden to exert them against capital or infamous crimes.

These two articles were in substance borrowed from similar regulations contained in that justly celebrated statute which for so many ages has been distinguished by the name of the Great Charter of England. Yet in that country, where they are recognized as the most solid foundations of the liberties of the nation, they have never been considered as interfering with the power of expelling a member, exercised at all times by the House of Commons; a power which there, however, rests only upon parliamentary usage, and has never been bestowed, as in the Constitution of the United States, by any act of supreme legislation. From a number of precedents which have been consulted it is found that the exercise of this authority there has always been discretionary and its process always far otherwise than compendious in the prosecutions before the judicial courts. So far, indeed, have they been from supposing a conviction at law necessary to precede a vote of expulsion that in one instance a resolution to demand a prosecution appears immediately after the adoption of the resolution to expel. In numerous cases the member submits to examination, adduces evidence in his favor, and has evidence produced against him, with or without formal authentication, and the discretion of the house is not even restricted by the necessary concurrence of more than a bare majority of the votes.

The provision in our Constitution which forbids the expulsion of a member by an ordinary majority and requires for this act of rigorous and painful duty the assent of two-thirds your committee consider as a wise and sufficient guard against the possible abuse of this legislative discretion. In times of heat and violent party spirit the rights of the minority might not always be duly respected if a majority could expel their members under no other control than that of their own discretion. The operation of this rule is of great efficacy, both over the proceedings of the whole body and over the conduct of every individual member. The times when the most violent struggles of contending parties occur—when the conflict of opposite passions is most prone to excess—are precisely the times when the numbers are most equally divided; when the majority amounts to the proportion of two-thirds the security in its own strength is of itself a guard against extraordinary stretches of power; when the minority dwindles to the proportion of one-third its consciousness of weakness dissuades from any attempts to encroach upon the rights of the majority, which might provoke retaliation. But if expulsion were admissible only as a sequel to the issue of a legal prosecution or upon the same principles and forms of testimony which are established in the criminal courts, your committee can see no possible reason why it should be rendered still more imbecile by the requisition of two-thirds to give it effect.

It is now the duty of your committee to apply the principles which they have here endeavored to settle and elucidate to the particular case upon which the Senate have directed them to report. The bills of indictment found against Mr. Smith at the late session of the circuit court of the United States at Richmond (copies of which are herewith submitted) are precisely similar to those found against Aaron Burr. From the volume of printed evidence communicated by the President of the United States to Congress, relating to the trial of Aaron Burr, it appears that a great part of the testimony which was essential to his conviction upon the indictment for treason was withheld from the jury upon an opinion of the court that Aaron Burr, not having been present at the overt act of treason alleged in the indictment, no testimony relative to his conduct or declarations elsewhere, and subsequent to the transactions on Blannerhasset's Island, could be admitted. And in consequence of this suppression of evidence the traverse jury found a verdict "that Aaron Burr was not proved to be guilty, under that indictment, by any evidence

submitted to them." It was also an opinion of the court that none of the transactions of which evidence was given on the trial of Aaron Burr did amount to an overt act of levying war, and, of course, that they did not amount to treason. These decisions, forming the basis of the issue upon the trials of Burr, anticipated the event which must have awaited the trials of the bills against Mr. Smith, who, from the circumstances of his case, must have been entitled to the benefit of their application; they were the sole inducements upon which the counsel for the United States abandoned the prosecution against him.

Your committee are not disposed now to question the correctness of these decisions on a case of treason before a court of criminal jurisdiction. But whether the transactions proved against Aaron Burr did or did not amount, in technical language, to an overt act of levying war, your committee have not a scruple of doubt on their minds that but for the vigilance and energy of the Government and of faithful citizens under its directions in arresting their progress and in crushing his designs, they would, in a very short lapse of time, have terminated not only in a war, but in a war of the most horrible description, in a war at once foreign and domestic. As little hesitation have your committee in saying that if the daylight of evidence, combining one vast complicated intention with overt acts innumerable, be not excluded from the mind by the curtain of artificial rules the simplest understanding cannot but see what the subtlest understanding cannot disguise, crimes before which ordinary treason whitens into virtue; crimes of which war is the mildest feature. The debauchment of our Army, the plunder and devastation of our own and foreign territories, the dissolution of our national Union, and the root of interminable civil war were but the means of individual aggrandizement, the steps to projected usurpation. If the ingenuity of a demon were tasked to weave into one composition all the great moral and political evils which could be inflicted upon the people of these States it could produce nothing more than a texture of war, dismemberment, and despotism.

Of these designs a grand jury composed of characters as respectable as this nation can boast have upon the solemnity of their oaths charged John Smith with being an accomplice. The reasons upon which the trial of this charge has not been submitted to the verdict of a jury have been shown by your committee and are proved by the letter from the attorney of the United States for the district of Virginia, herewith reported. And your committee are of opinion that the dereliction of the prosecution on these grounds cannot in the slightest degree remove the imputation which the accusations of the grand jury have brought to the door of Mr. Smith.

Your committee will not permit themselves to comment upon the testimony which they submit herewith to the Senate; nor upon the answers which Mr. Smith has given as sufficient for his justification. Desirous as the committee have been that this justification might be complete, anxiously as they wished for an opportunity declaring their belief of his innocence, they can neither control nor dissemble the operation of the evidence upon their minds; and, however painful to their feelings, they find themselves compelled by a sense of duty paramount to every other consideration to submit to the Senate for their consideration the following resolution:

Resolved, That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States, has been guilty of conduct incompatible with his duty and station as a Senator of the United States, and that he be therefore, and hereby is, expelled from the Senate of the United States.

MONDAY, *January* 4, 1808.

Mr. Adams laid before the Senate a letter from Mr. Smith, directed to the chairman of the committee of inquiry appointed 27th November, which letter Mr. Smith requested might be considered as a part of his answer; and the letter was read.

TUESDAY, *January* 5, 1808.

On motion by Mr. Adams, the minutes of the committee of inquiry appointed the 27th of November last, on the conduct of John Smith, a Senator from the State of Ohio, also sundry papers relative to the inquiry, were read, and

On motion by Mr. Bradley, it was agreed that the report of the committee be the order of the day for Thursday next.

THURSDAY, *January* 7, 1808.

Agreeably to the order of the day, the Senate resumed the consideration of the report of the committee of inquiry appointed on the 27th of November last, on the conduct of John Smith, a Senator from the State of Ohio; and the report was read.

Mr. Smith's letter to the President, of the 4th instant, was also read.

On request of Mr. Smith, that he be informed specifically of the charges against him;

that he be allowed to make defense against such charges, and process to compel the attendance of witnesses necessary in his defense, and the privilege of being heard by counsel;

After debate,

A motion was made by Mr. Hillhouse that it be

Resolved, That Mr. Smith be heard by counsel, not exceeding two, to show cause why the report of the committee should not be adopted;

And, on the question to agree to this resolution, it passed unanimously in the affirmative—yeas 32.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted are Messrs. Adams, Anderson, Bayard, Bradley, Condit, Crawford, Gaillard, Giles, Gilman, Goodrich, Gregg, Hillhouse, Howland, Kitchel, Maclay, Mathewson, Milledge, Mitchill, Moore, Parker, Pickering, Pope, Reed, Robinson, Smith of Maryland, Smith of New York, Smith of Tennessee, Sumter, Thruston, Tiffin, Turner, and White.

On motion,

Ordered, That Wednesday next be assigned for the hearing.

[An account of the debate is found on pages 66–78 of the Annals of Congress referred to in the head-note.]

TUESDAY, *January* 12, 1808.

On request of Mr. Smith, of Ohio, for a copy of the minutes of the committee appointed on the 27th of November last, to inquire into his conduct, and also a copy of all the correspondence between them and himself,

The following motion was made by Mr. Crawford:

Ordered, That a copy of the minutes of the committee appointed on the 27th of November last, to inquire into the conduct of John Smith, of Ohio, and also a copy of the correspondence between the committee and said Smith, be furnished to the said John Smith.

And on the question to agree to this motion, it was determined in the affirmative—yeas 17, nays 9.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Crawford, Goodrich, Gregg, Hillhouse, Howland, Mathewson, Milledge, Mitchill, Pickering, Pope, Reed, Smith of New York, Sumter, Thruston, Turner, and White.

Those who voted in the negative are Messrs. Anderson, Bradley, Condit, Giles, Gilman, Kitchel, Moore, Parker, and Smith of Tennessee.

WEDNESDAY, *January* 13, 1808.

Agreeably to the order of the day, the Senate resumed the consideration of the report of the committee appointed the 27th of November last, to inquire into the conduct of John Smith, a Senator from the State of Ohio.

The President stated to Mr. Smith that he had now an opportunity to show cause why the report of the committee should not be adopted, and he was desired to name his counsel.

He accordingly informed the Senate that he had engaged Luther Martin and Francis S. Key, esquires, as counsel; and

On motion of Mr. Bradley, Shall Mr. Key be admitted as counsel for Mr. Smith? it was determined in the affirmative; and

On motion, Shall Mr. Martin be admitted as counsel for Mr. Smith? it was determined in the negative.

On request by Mr. Bayard that Mr. Smith inform the Senate whether, under present circumstances, he is ready to proceed,

Mr. Smith, by his counsel, offered his affidavit, together with the following application:

"John Smith, of Ohio, offers his affidavit to the honorable Senate, and requests a reasonable time to procure the testimony therein stated, and the proper means to enable him to produce it."

The affidavit was read.

The letter of the 4th of January to the President from Mr. Smith, requesting to be heard by counsel, was again read.

On motion by Mr. Giles,

Ordered, That the affidavit and application, together with the subsequent report of the committee appointed 27th of November last to inquire into the conduct of John Smith, a Senator from the State of Ohio, be printed for the use of the Senate.

On motion by Mr. Gilman, it was agreed that the further consideration of the application of Mr. Smith, made this day by his counsel, be postponed until to-morrow.

THURSDAY, *January* 14, 1808.

Mr. Adams moved that sundry amendments and notes of reference be entered upon the minutes of the proceedings of the committee appointed on the 27th of November last to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged accomplice of Aaron Burr; which were read and ordered to be entered accordingly.

* * * * * * *

Agreeably to the order of the day, the Senate resumed the consideration of the application of John Smith, a Senator from the State of Ohio, filed yesterday, as follows:

"John Smith, of Ohio, offers his affidavit to the honorable Senate, and requests a reasonable time to procure the testimony therein stated, and the proper means to enable him to produce it."

Whereupon,

A motion was made by Mr. Giles that the further consideration of the resolution reported by the committee for the expulsion of John Smith from this House be postponed until the — day of ——— next, on which day the Senate will proceed to the final hearing of the said John Smith, with such testimony as he shall then offer to them, to show cause why the said resolution should not be adopted by the Senate.

Ordered, That this motion be referred to Messrs. Anderson, Giles, Adams, Crawford, and Bayard, to consider and report thereon.

The following motion, made by Mr. Bayard, was referred to the above-mentioned committee:

"*Resolved*, That John Smith, of Ohio, having made affidavit of the materiality of witnesses now absent, by whom, he states, he will be able to disprove the charges made against him, that he be allowed time till the — day of ——— to obtain the testimony of any witnesses, and to procure any evidence which he may deem material in his defense."

The following motion, made by Mr. Crawford, was referred to the same committee:

"*Resolved*, That the consideration of the resolution for the expulsion of John Smith be postponed until the — day of ——— next, on which day the Senate will proceed to hear the testimony of such witnesses as may then attend on the part of Mr. Smith, or against him, which will have a tendency to destroy or support the testimony of Elias Glover, Peter Taylor, and Col. James Taylor."

The following motion, made by Mr. Bayard, was also referred to the same committee:

"*Resolved*, That the Senate will allow John Smith, of Ohio, to adduce, in his defense against the charges made against him, the depositions of any witnesses he may deem material in his defense, and also the testimony of witnesses whom he may bring to the bar of the Senate, and all other evidence which he may deem material."

On motion,

Ordered, That the affidavit of John Smith, filed on the 13th instant, be referred to the same committee, to consider and report thereon.

[An account of the debate is found on pages 84, 85 of the Annals of Congress referred to in the head-note.]

SATURDAY, *January* 16, 1808.

Mr. Anderson, from the committee to whom was referred several resolutions which were offered to the consideration of the Senate, in the case of John Smith, Senator from the State of Ohio, made report; which was read for consideration.

[For report, see proceedings Wednesday, January 20, 1808.]

MONDAY, *January* 18, 1808.

On motion by Mr. Anderson to proceed to the examination of James Taylor, in the case of John Smith, a Senator from the State of Ohio,

A motion was made by Mr. Maclay to postpone this motion, and to go into the consideration of the report of the committee appointed 27th November to inquire into the conduct of John Smith, a Senator from the State of Ohio; and it was determined in the negative.

On motion by Mr. Anderson,

"*Resolved*, That Col. James Taylor be examined at the bar of the Senate in the case of John Smith, a Senator from the State of Ohio; that the questions put to Mr. Taylor be reduced to writing and put to him by the President, who shall decide upon the propriety of each question proposed."

James Taylor was called accordingly, and the oath was administered to him by the President in the form following:

"You solemnly swear that you will make true answers to such questions as shall be put to you touching the case of John Smith, a Senator from the State of Ohio, now in hearing."

On motion by Mr. Anderson,

Ordered, That the Secretary of the Senate notify John Graham that he is requested to

attend the Senate to give evidence in the case of John Smith, a Senator from the State of Ohio;

And Mr. Graham attended.

Mr. Smith attended with his counsel, and, after the examination and cross-examination of Mr. Taylor,

On motion, the Senate adjourned to 11 o'clock to-morrow morning.

[An account of the debate is found on pages 87–89 of the Annals of Congress referred to in the head-note.]

TUESDAY, *January* 19, 1808.

The Senate resumed the examination of the witnesses in the case of John Smith, a Senator from the State of Ohio.

Mr. Smith attended with his counsel.

James Taylor was again called, examined, and cross-examined.

On motion by Mr. Adams, Mr. Taylor was requested to file attested copies of extracts of certain letters written by him to the Secretary of State, and read this morning as part of his testimony.

John Graham was called, sworn, and examined.

James Taylor was again called and cross-examined.

Mr. Pope submitted the following motion for consideration:

"*Resolved*, That the Secretary of the Senate do issue a subpœna, in the usual form, to cause to be summoned to appear before the Senate, on the first Monday in March next, Elias Glover, then and there to give testimony in the case of John Smith, a Senator from the State of Ohio, regarding his alleged participation in the conspiracy of Aaron Burr."

WEDNESDAY, *January* 20, 1808.

On motion by Mr. Adams, Mr. Tiffin, a Senator from the State of Ohio, was sworn as a witness in the case of John Smith, Senator from that State, examined and cross-examined.

Mr. Smith attended with his counsel.

The Senate proceeded to consider the report of the committee to whom was referred several resolutions submitted to the Senate in the case of John Smith, a Senator from the State of Ohio, made on the 16th instant.

On motion to amend the report and strike out the words "first day of March next," it was determined in the negative—yeas 10, nays 21.

The yeas and nays being required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anderson, Condit, Gilman, Kitchel, Maclay, Mathewson, Moore, Parker, Robinson, and Smith of Tennessee.

Those who voted in the negative are Messrs. Adams, Bayard, Crawford, Franklin, Gaillard, Giles, Goodrich, Gregg, Hillhouse, Howland, Milledge, Mitchill, Pickering, Pope, Reed, Smith of Maryland, Smith of New York, Sumter, Thruston, Turner, and White.

On motion to adopt the report of the committee, which is as follows:

"*Resolved*, That on the 1st day of March next the Senate will receive such testimony as John Smith, Senator from the State of Ohio, may then adduce in his defense, and that the Senate will then proceed to the final consideration of the report of the committee appointed on the 27th of November last, to inquire into his conduct as an alleged associate of Aaron Burr; provided, in case Mr. Smith shall adduce evidence to discredit any witness whose testimony has been made use of against him, that he shall make it appear to the Senate that reasonable notice had been given to the witness so intended to be discredited of the time and place appointed for the taking of such evidence, that he was served with a copy of this resolution,"

It was determined in the affirmative—yeas 25, nays 6.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Anderson, Bayard, Condit, Crawford, Franklin, Gaillard, Giles, Goodrich, Gregg, Hillhouse, Howland, Kitchel, Milledge, Mitchill, Pickering, Pope, Reed, Smith of Maryland, Smith of New York, Smith of Tennessee, Sumter, Thruston, Turner, and White.

Those who voted in the negative are Messrs. Gilman, Maclay, Mathewson, Moore, Parker, and Robinson.

On motion by Mr. Adams,

"*Resolved*, That the Secretary of the Senate do procure, from the clerk of the circuit court of the United States for the district of Virginia, certified copies of the papers read in that court on the trial of Aaron Burr, and originally published in the Ohio Gazette, under the signature of Querist."

On motion by Mr. Adams,

"*Resolved*, That the Secretary of the Senate do procure a file of the newspaper called the Enquirer, edited at Richmond by Thomas Ritchie, for the year 1807."

The motion by Mr. Pope, that the Secretary of the Senate issue a subpœna, was amended as follows:

"*Resolved*, That the Secretary of the Senate do issue a summons, in the usual form, to cause to be summoned to appear before the Senate, on the first day in March next, Elias Glover and William McFarland, then and there to give testimony in the case of John Smith, a Senator from the State of Ohio, regarding his alleged participation in the conspiracy of Aaron Burr."

And on the question to agree to this motion as amended, it was determined in the negative—yeas 7, nays 23.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Goodrich, Hillhouse, Pickering, Pope, Smith of Maryland, and White.

Those who voted in the negative are Messrs. Adams, Anderson, Bradley, Condit, Crawford, Franklin, Gaillard, Giles, Gilman, Gregg, Howland, Kitchel, Maclay, Mathewson, Milledge, Mitchill, Parker, Reed, Robinson, Smith of New York, Smith of Tennessee, Sumter, and Turner.

[An account of the debate is found on pages 90–98 of the Annals of Congress referred to in the head-note.]

MONDAY, *January* 25, 1808.

The President communicated a letter from James Taylor, requesting compensation as a witness in the case of John Smith, of Ohio; which was read.

Ordered, That it be referred to Messrs. Adams, Anderson, and Tiffin to report thereon.

(The bill passed the Senate the following day.)

TUESDAY, *March* 1, 1808.

Agreeably to the order of the day, the Senate resumed the consideration of the resolution reported by the select committee for the expulsion of John Smith, a Senator from the State of Ohio.

Mr. Smith being absent, Mr. Key attended as his counsel.

On request by Mr. Key that Mr. Harper be permitted to attend also as counsel on behalf of Mr. Smith,

A motion was made by Mr. Bradley that Mr. Harper be admitted as one of the counsel of Mr. Smith; and it passed in the affirmative.

Whereupon,

Mr. Harper attended.

The following request was submitted by Mr. Key:

"John Smith, of Ohio, by his counsel, prays the honorable Senate to grant him further time to produce his testimony and prepare for his defense."

On motion by Mr. Tiffin,

Ordered, That the papers directed to the Secretary of the Senate, and which were taken as testimony in the case of John Smith, of Ohio, be referred to a select committee, to examine and report thereon, and that Messrs. Anderson, Adams, and Tiffin be the committee.

WEDNESDAY, *March* 2, 1808.

Mr. Anderson, from the committee appointed to examine and separate the depositions transmitted in the case of John Smith, a Senator from the State of Ohio, reported that they had performed that service.

THURSDAY, *March* 3, 1808.

On motion by Mr. Adams,

Ordered, That the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr, be postponed to Tuesday, the 15th instant.

On motion by Mr. Adams,

Ordered, That the papers received by the Secretary of the Senate relating to the case of John Smith, a Senator from the State of Ohio, be subject to the inspection of his counsel.

FRIDAY, *March* 4, 1808.

The President communicated sundry letters from Elias Glover, referring to depositions inclosed, in the case of John Smith, a Senator from the State of Ohio, and the letters were read.

On motion by Mr. Gregg,

Ordered, That the counsel on behalf of John Smith, a Senator from the State of Ohio, be authorized to take copies of the depositions in the case, under the direction of the Secretary of the Senate.

TUESDAY, *March* 15, 1808.

Agreeably to the order of the day, the Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Messrs. Harper and Key, counsel for Mr. Smith, attended.

Mr. Harper read a letter from Mr. Smith, requesting further time to enable him to prepare for his defense, and requested, in Mr. Smith's behalf, an extension of the time accordingly.

Whereupon,

On motion by Mr. Hillhouse that the further consideration of the report of the committee be postponed to Monday, the 28th of March, it was determined in the negative—yeas 15, nays 17.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Bayard, Gaillard, Giles, Goodrich, Hillhouse, Howland, Mathewson, Pickering, Pope, Reed, Smith of New York, Sumter, Thruston, and White.

Those who voted in the negative are Messrs. Anderson, Bradley, Condit, Crawford, Franklin, Gilman, Gregg, Kitchel, Maclay, Milledge, Mitchill, Moore, Parker, Robinson, Smith of Maryland, Smith of Tennessee, and Turner.

On request by Mr. Key, one of the counsel in behalf of Mr. Smith, of Ohio, and on motion by Mr. Smith, of Maryland, it was agreed that the further consideration of the report of the committee be postponed until to-morrow.

[An account of the debate is found on pages 164–167 of the Annals of Congress referred to in the head-note.]

WEDNESDAY, *March* 16, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Messrs. Harper and Key, counsel on behalf of Mr. Smith, attended.

The memorial of the counsel on behalf of Mr. Smith was presented and read, praying the further hearing of this case may be postponed until the first Monday in April next, for reasons stated in the memorial; and

On motion by Mr. Bradley that the consideration of the report of the committee be postponed to the first Monday in April next, the votes of the Senate were equally divided—16 in the affirmative and 16 in the negative, and the President determined the question in the negative.

On motion by Mr. Bayard that the further consideration of the report of the committee be postponed to the 1st day of April next, it was determined in the affirmative—yeas 17, nays 15.

The yeas and nays having been required by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Adams, Bayard, Bradley, Gaillard, Giles, Goodrich, Hillhouse, Howland, Mathewson, Milledge, Pickering, Pope, Reed, Smith of New York, Sumter, Thruston, and White.

Those who voted in the negative are Messrs. Anderson, Condit, Crawford, Franklin, Gilman, Gregg, Kitchel, Maclay, Mitchill, Moore, Parker, Robinson, Smith of Maryland, Smith of Tennessee, and Turner.

[An account of the debate is found on pages 167–170 of the Annals of Congress referred to in the head-note.]

FRIDAY, *April* 1, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

On motion by Mr. Anderson,

Ordered, That Mr. Smith's counsel have seats assigned them at the bar of this House.

Mr. Harper and Mr. Key, his counsel, attended accordingly.

Mr. Key requested the attendance of Messrs. Davenport, Morrow, and Sturgis, members of the House of Representatives of the United States, to give evidence in the case; also, that a subpœna issue to General Wilkinson to attend for that purpose.

Mr. Key proceeded to read certain depositions, taken on behalf of Mr. Smith, and which were objected to as not within the rule; and,

On motion, it was agreed that the counsel on behalf of Mr. Smith should proceed in reading the depositions, the informality notwithstanding; and,

After progress,

On motion, the Senate adjourned to 10 o'clock to-morrow morning.

[An account of the debate is found on pages 178–180 of the Annals of Congress referred to in the head-note.]

SATURDAY *April* 2, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Mr. Harper and Mr. Key, his counsel, attended.

The following motion was submitted by Mr. Milledge for consideration:

"*Resolved*, That a message be sent to the House of Representatives requesting that Messrs. Sturgis, Davenport, and Jeremiah Morrow, members of that House, be permitted to attend the Senate to give evidence as to the characters of sundry witnesses in the case of John Smith, a Senator from the State of Ohio."

The counsel for Mr. Smith proceeded in reading the depositions taken on his behalf.

After which,

On motion, it was agreed that the consideration of the report be further postponed.

[An account of the debate is found on pages 184, 185 of the Annals of Congress referred to in the head-note.]

MONDAY, *April* 4, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Mr. Smith attended, together with Messrs. Harper and Key, counsel on his behalf, who proceeded in reading their depositions.

The depositions transmitted to the Senate on behalf of Elias Glover were also read; after which it was agreed that the further consideration of the report be postponed until to-morrow.

TUESDAY, *April* 5, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Mr. Smith attended, together with Messrs. Harper and Key, counsel on his behalf, and the counsel proceeded in the further reading of their depositions.

On request of Mr. Smith, Mr. Tiffin, of the Senate, Messrs. Van Rensselaer, Jeremiah Morrow, Talmadge, Bacon, and Davenport, of the House of Representatives, were severally sworn, and gave testimony as to the credibility of sundry witnesses whose depositions were read yesterday.

Mr. Key proceeded to show cause why the report of the committee should not be adopted, after which it was agreed that the further consideration thereof be postponed until to-morrow.

[An account of the debate, with the argument of Mr. Key, is found on pages 186–207 of the Annals of Congress referred to in the head-note.]

WEDNESDAY, *April* 6, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

Mr. Smith attended, together with Messrs. Harper and Key, counsel in his behalf.

On request of Mr. Smith, Messrs. Gardenier and Russell, of the House of Representatives, were severally sworn, and gave testimony as to the credibility of certain witnesses whose depositions were read on the 4th instant; and

Mr. Harper proceeded to show cause why the report of the committee should not be adopted.

After which,

On motion by Mr. Anderson, it was agreed that the consideration thereof be further postponed.

[An account of the debate, with the argument of Mr. Harper, is found on pages 208–234 of the Annals of Congress referred to in the head-note.]

THURSDAY, *April* 7, 1808.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr; and Mr. Smith attended.

On motion by Mr. Smith, of Maryland,

"*Resolved*, That the President of the United States be requested to lay before this House Matthew Nimmo's letter to him of the 28th November, 1806, and any other letter or letters of the said Nimmo relative to any supposed connection of John Smith, of Ohio,

with the conspiracy of Aaron Burr, and also the letter of the said John Smith of January, 1807, inclosing the deposition of himself and his son."

Ordered, That the Secretary lay this resolution before the President of the United States.

On motion by Mr. White, it was agreed that the further consideration of the report be postponed until to-morrow.

FRIDAY, *April* 8, 1808.

The following written message was received from the President of the United States by Mr. Coles, his secretary:

To the Senate of the United States:

Agreeably to the request of the Senate in their resolution of yesterday I have examined my papers and find no letter from Matthew Nimmo of the date of November 28, 1806, nor any other from him of any date but that of January 23, 1807, now transmitted with all the papers in my possession which accompanied it. Nor do I find any letter from John Smith, of Ohio, bearing date at any time in the month of January, 1807.

Having delivered to the Attorney-General all the papers respecting the conspiracy of Aaron Burr which came to my hands during or before his prosecution, I might suppose the letters above requested had been delivered to him. But I must add my belief that I never received such letters and the ground of it. I am in the habit of noting daily in the list kept for that purpose the letters I receive daily by the names of the writers and dates of time and place, and this has been done with such exactness that I do not recollect ever to have detected a single omission. I have carefully examined that list from the 1st of November, 1806, to the last of June, 1807, and I find no note within that period of the receipt of any letter from Matthew Nimmo but that now transmitted, nor of any one of the date of January, 1807, from John Smith, of Ohio. The letters noted as received from him within that period are dated at Washington, February 2, 2, 7, and 21, which I have examined, and find relating to subjects entirely foreign to the objects of the resolution of the 7th instant; and others dated at Cincinnati, March 27, April 6, 13, and 17, which not being now in my possession, I presume have related to Burr's conspiracy, and have been delivered to the Attorney-General. I recollect nothing of their particular contents. I must repeat, therefore, my firm belief that the letters of Nimmo of November 28, 1806, and of John Smith of January, 1807, never came to my hands, and that if such were written (and Nimmo's letter expressly mentions his of November 28) they have been intercepted, or otherwise miscarried.

TH. JEFFERSON.

APRIL 8, 1808.

The message and papers referred to were read, and

Ordered, To lie for consideration.

The Senate resumed the consideration of the first report of the committee appointed to inquire into the conduct of John Smith, a Senator from the State of Ohio, as an alleged associate of Aaron Burr.

On motion by Mr. Franklin, it was agreed to take up the resolution reported by the committee, as follows:

"*Resolved*, That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States has been guilty of conduct incompatible with his duty and station as a Senator of the United States, and that he be therefor, and hereby is, expelled from the Senate of the United States."

And, after debate,

On motion by Mr. Giles, it was agreed that the further consideration thereof be postponed until to-morrow.

[An account of the debate, with the speech of Mr. Adams, is found on pages 236–265 of the Annals of Congress referred to in the head-note.]

SATURDAY, *April* 9, 1808.

Agreeably to the order of the day the Senate resumed the consideration of the resolution reported by the committee appointed on the 7th of November last to consider the subject, to wit:

"*Resolved*, That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union, and liberties of the people of the United States has been guilty of conduct incompatible with his duty and station as a Senator of the United States, and that he be therefore, and hereby is, expelled from the Senate of the United States."

And on the question to agree to the resolution, it was determined in the negative, two-thirds of the Senators present not concurring therein—yeas 19, nays 10.

Those who voted in the affirmative are Messrs. Adams, Anderson, Condit, Crawford, Franklin, Gaillard, Gilman, Gregg, Kitchel, Maclay, Mathewson, Milledge, Moore, Robinson, Smith of Maryland, Smith of Tennessee, Sumter, Tiffin, and Turner.

Those who voted in the negative are Messrs. Giles, Goodrich, Hillhouse, Howland, Pickering, Pope, Reed, Smith of New York, Thurston, and White.

[An account of the debate, with the speech of Mr. Hillhouse, is found on pages 265–324 of the Annals of Congress referred to in the head-note.]

[Thirty-fifth Congress—First session.]

HENRY M. RICE,

Senator from Minnesota from May 12, 1858, *till March* 3, 1863.

May 12, 1858, the credentials of Mr. Rice were presented, and he took his seat in the Senate. On the same day the following resolution was submitted by Mr. Harlan, of Iowa, for consideration: "*Resolved*, That a committee be appointed to investigate the allegation of fraud and extortion made against Henry M. Rice as agent of the Secretary of War in the sale of the Fort Crawford reservation, by settlers on said reservation, and that said committee have power to send for persons and papers." This resolution was amended so that the Committee on Military Affairs were instructed to make the investigation. That committee reported June 9, 1858, that "after an examination of all the testimony adduced, they do not find that it sustains any allegation which imputes criminality to, or arraigns the integrity of Mr. Rice, and finding nothing in the developments of the investigation which, in the opinion of the committee, tend to disqualify him for a seat in the Senate, they herewith submit the record in the case as a part of this report, and ask to be discharged from the further consideration of the subject." The report was unanimously agreed to.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 1st sess. 35th Cong., which includes the report of the committee.

The debates on the case, which are very brief, are found on pages 2075–2079, 2123, 2163 of the Congressional Globe, part 3, 1st sess. 35th Cong. The record accompanying the report of the committee is found in Senate Reports, 1st sess. 35th Cong., vol. 2, No. 314.

WEDNESDAY, *May* 12, 1858.

Mr. Toombs presented the credentials of the Hon. Henry M. Rice, elected a Senator by the legislature of the State of Minnesota; which were read.

The oath prescribed by law was administered to the Hon. Henry M. Rice, and he took his seat in the Senate.

* * * * * * *

Mr. Harlan submitted the following resolution for consideration:

"Whereas the settlers on Fort Crawford reservation, in the State of Iowa, allege that they have been defrauded by Mr. Henry M. Rice, as agent of Hon. John B. Floyd, Secretary of War, in the sale of their claims as settlers on said reservation, viz:

"1. That said Secretary of War instructed said Henry M. Rice to sell to the settlers on said reservations their claims at one dollar and twenty-five cents per acre; that said Rice required said settlers to pay for their claims at the rate of one dollar and fifty cents per acre, and receipted to them, on the payment of said one dollar and fifty cents per acre, for but one dollar and twenty-five cents per acre, and refused to receipt to them for the remaining twenty-five cents per acre received of them by him, as aforesaid.

"2. That sundry cases in which settlers applied to said Rice for leave to enter their said claims, he referred them to his clerk, who charged them fees, varying from ten to eighty dollars each, in addition to the said one dollar and fifty cents per acre, for leave to purchase their said claims; that these fees were charged and received by said Rice corruptly, and, said settlers believe, through the interposition of his clerk.

"3. That said Rice negligently failed to give said settlers reasonable notice of the time of said sale, and thereby subjected them to the necessity of borrowing money at enormous rates of interest with which to purchase their said claims.

"4. That said Rice defrauded one of said settlers of his rights to purchase his claim under the instruction of the Secretary of War, by surreptitiously securing from him a quit-claim to a part of the land embraced in said claim: Therefore,

"*Resolved*, That a committee be appointed to investigate the allegation of fraud and extortion made against Henry M. Rice, as agent of the Secretary of War, in the sale of the Fort Crawford reservation, by settlers on said reservation, and that said committee have power to send for persons and papers."

FRIDAY, *May* 14, 1858.

Mr. Rice submitted the following resolution for consideration:

"*Resolved*, That a select committee, to consist of five members, be appointed to investigate the charges preferred by certain citizens of Iowa, settlers upon the Fort Crawford reserve, as to the conduct of Henry M. Rice, special agent, appointed by the Secretary of War, to superintend the sale of that reserve; that said committee have power to send for persons and papers and to report by bill or otherwise."

SATURDAY, *May* 15, 1858.

The Senate proceeded to consider the resolution yesterday submitted by Mr. Rice; and having been amended, the resolution was agreed to, as follows:

"*Resolved*, That the Committee on Military Affairs and the Militia be instructed to investigate the charges preferred by certain citizens of Iowa, settlers upon the Fort Crawford reserve, as to the conduct of Henry M. Rice, special agent, appointed by the Secretary of War, to superintend the sale of that reserve; that said committee have power to send for persons and papers and to report by bill or otherwise."

WEDNESDAY, *June* 9, 1858.

[The committee consisted of Messrs. Davis (chairman), Fitzpatrick, Johnson of Arkansas, Iverson, Broderick, Wilson, and King.]

Mr. Davis, from the Committee on Military Affairs and the Militia, to whom was referred the resolution of the Senate of the 15th ultimo, to inquire into certain charges made by citizens of Iowa against the Hon. Henry M. Rice, a Senator from Minnesota, reported:

That, under the authority of the resolution, they procured from the War Department, and elsewhere, papers exhibiting the facts in the case, and had before them twenty-two witnesses, who testified under oath as to the allegations made against Mr. Rice; and, after an examination of all the testimony adduced, they do not find that it sustains any allegation which imputes criminality to, or arraigns the integrity of, Mr. Rice, and finding nothing in the developments of the investigation which, in the opinion of the committee, tend to disqualify him for a seat in the Senate, they herewith submit the record in the case as a part of this report and ask to be discharged from the further consideration of the subject.

The Senate proceeded, by unanimous consent, to consider the report; and the report was unanimously agreed to.

Ordered, That the report (No. 314) be printed.

JEFFERSON DAVIS AND ALBERT G. BROWN,

of Mississippi.

STEPHEN R. MALLORY AND DAVID L. YULEE,

of Florida.

C. C. CLAY AND BENJAMIN FITZPATRICK,

of Alabama.

ROBERT TOOMBS,

of Georgia.

JUDAH P. BENJAMIN,

of Louisiana.

January 22, 1861, a motion was submitted that the Journal be so corrected as to record the fact that Messrs. Davis, Mallory, Yulee, Clay, and Fitzpatrick had announced that the States from which they were Senators, respectively, had seceded, and that they thereupon withdrew from the Senate. A motion was offered as an amendment that these names "be stricken from the list of Senators." It was ordered that both motions lie on the table. March 13, 1861, a resolution was submitted that Messrs. Brown, Davis, Mallory, Clay, Toombs, and Benjamin having withdrawn from the Senate, "their seats in this body have thereby become vacant." (Certain other Senators had withdrawn during the previous session and their terms of office had expired March 3, 1861. See foot notes.) The following day the Senate resolved that the seats of these members having become vacant, "the Secretary be directed to omit their names, respectively, from the roll."

The history of the cases here given consists of a transcript of the proceedings of the Senate relating to them from Senate Journal, second sess. Thirty-sixth Cong.

Special references to the debates are inserted below.

[Second session of the Thirty-sixth Congress.]

TUESDAY, *January* 22, 1861.

The Vice-President stated that no notice had been taken in the Journal of the withdrawal* from the Chamber on yesterday, and that no paper had been filed with the presiding officer by those Senators notifying him that they had withdrawn from the Senate; and that he would like some instruction as to what vacancies exist in the committees, and whether the names of those Senators should continue to be called in taking the yeas and nays.

Mr. Benjamin submitted the following motion:

Ordered, That the Journal of the proceedings of the Senate be so corrected as to record the fact that the Senators from the States of Florida and Alabama, and the Hon. Jefferson Davis, Senator of the State of Mississippi, made announcement that the said States of Florida, Alabama, and Mississippi had seceded from the Union, had resumed the powers delegated by the said several States to the United States of America, and that they, the said Senators, considered themselves by reason of said action of said States as being no longer entitled to retain their seats as Senators, and accordingly thereupon withdrew from the Senate.

The Senate proceeded to consider the said motion; and

On motion by Mr. Douglas to amend the same by striking out all after the word "ordered," and in lieu thereof inserting:

"That Jefferson Davis of Mississippi, Stephen R. Mallory and David L. Yulee of Florida, C. C. Clay and Benjamin Fitzpatrick of Alabama, having announced to the Senate their withdrawal from the same,

* The remarks of the Senators on their withdrawal are found on pages 484-487 of the Congressional Globe, part 1, 2d sess. 36th Cong.

"*Ordered*, That their names be stricken from the list of Senators, and the Secretary directed no longer to call the same."

After debate,

On motion by Mr. Seward that the motion of Mr. Benjamin and the proposed amendment lie on the table,

Mr. Benjamin raised a question of order, to wit: Whether it was in order to move to lay upon the table a motion to correct the Journal of the Senate of the preceding day; and

The Vice-President decided that the motion was in order; and

On the question to agree to the motion of Mr. Seward, it was determined in the affirmative—yeas 32, nays 22.

On motion by Mr. Seward, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Baker, Bigler, Bingham, Chandler, Clark, Collamer, Crittenden, Dixon, Doolittle, Durkee, Fessenden, Fitch, Foot, Foster, Grimes, Gwin, Hale, Harlan, Johnson of Tennessee, King, Latham, Morrill, Saulsbury, Seward, Simmons, Sumner, Ten Eyck, Thomson, Wade, Wilkinson, and Wilson.

Those who voted in the negative are Messrs. Benjamin, Bragg, Bright, Clingman, Douglas, Green, Hemphill, Hunter, Iverson, Johnson of Arkansas, Kennedy, Lane, Mason, Nicholson, Pearce, Polk, Powell, Rice, Sebastian, Slidell, Trumbull, and Wigfall.

So it was

Ordered, That the motion of Mr. Benjamin, and the proposed amendment, lie on the table.

[The debate is found on pages 500–505 of the Congressional Globe, part 1, 2d sess. 36th Cong.]

[Special session of Senate, March, 1861.]

WEDNESDAY, *March* 13, 1861.

Mr. Fessenden submitted the following resolution for consideration:

"*Resolved*, That Albert G. Brown and Jefferson Davis of Mississippi, Stephen R. Mallory of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs of Georgia, and Judah P. Benjamin of Louisiana, having announced* that they are no longer members of the Senate, and having withdrawn therefrom, their seats in this body have thereby become vacant, and the Secretary is directed to strike their names from the roll of members."

THURSDAY, *March* 14, 1861.

On motion by Mr. Fessenden that the Senate proceed to the consideration of the resolution yesterday submitted by him, declaring the seats of certain Senators vacant, and directing the Secretary to strike their names from the roll of the Senate, it was determined in the affirmative—yeas 26, nays 13

On motion by Mr. Douglas, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bingham, Chandler, Clark, Collamer, Cowan, Doolittle, Fessenden, Foot, Foster, Grimes, Hale, Harlan, Harris, Howe, King, Lane, Morrill, Simmons, Sumner, Ten Eyck, Thomson, Trumbull, Wade, Wilkinson, and Wilson.

Those who voted in the negative are Messrs. Breckinridge, Bright, Clingman, Douglas, Hunter, Latham, Mason, Mitchel, Nesmith, Nicholson, Polk, Powell, and Rice.

So the motion was agreed to; and the Senate proceeded to consider the said resolution; and

The resolution having been modified, on the motion of Mr. Fessenden, to read as follows:

"*Resolved*, That Albert G. Brown and Jefferson Davis of Mississippi, Stephen R. Mallory of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs of Georgia, and Judah P. Benjamin of Louisiana, having announced that they are no longer members of the Senate, and having withdrawn therefrom, their seats in this body have thereby become vacant, and the Secretary is directed to omit their names from the roll of members;"

On motion by Mr. Bayard to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting:

"That Albert G. Brown and Jefferson Davis of Mississippi, Stephen R. Mallory of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs of Georgia, and Judah P.

* For announcement of Mr. Brown, see page 352 of the Congressional Globe, part 1, 2d sess. 36th Cong.; for that of Mr. Benjamin, see page 721, 722, *Ib.* The terms of Messrs. Yulee, Fitzpatrick, Iverson, and Slidell, who had withdrawn from the Senate during the past session, had expired March 3, 1861. For announcement of withdrawal by Mr. Iverson, see page 589 of the Congressional Globe, part 1, 2d sess. 36th Cong.; for that by Mr. Slidell, see pages 720, 721, *Ib.*

Benjamin of Louisiana, having announced that by the secession of their respective States they were no longer members of the Senate, and withdrawn therefrom, the Secretary is directed to omit their names in calling the roll of the Senate,"

It was determined in the negative—yeas 12, nays 26.

On motion by Mr. Bayard, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Breckinridge, Bright, Clingman, Hunter, Mason, Mitchel, Nicholson, Polk, Powell, Rice, and Thomson.

Those who voted in the negative are Messrs. Anthony, Baker, Bingham, Chandler, Clark, Collamer, Cowan, Doolittle, Douglas, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Howe, King, Lane, Morrill, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, and Wilson.

After debate,

On motion by Mr. Collamer that the Senate proceed to the consideration of executive business, it was determined in the affirmative; and after the consideration of executive business, the doors were opened.

The Senate resumed the consideration of the resolution of Mr. Fessenden; and

The resolution having been further modified, on the motion of Mr. Clark, to read as follows:

"Whereas the seats of Albert G. Brown and Jefferson Davis of Mississippi, Stephen R. Mallory of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs of Georgia, and Judah P. Benjamin of Louisiana, as members of the Senate, have become vacant: Therefore,

"*Resolved*, That the Secretary be directed to omit their names, respectively, from the roll,"

On motion by Mr. Mason to amend the resolution by striking out all after the word "resolved," and in lieu thereof inserting:

"That Albert G. Brown and Jefferson Davis of Mississippi, Stephen R. Mallory of Florida, Clement C. Clay, jr., of Alabama, Robert Toombs of Georgia, and Judah P. Benjamin of Louisiana, having ceased to be members of the Senate, the Secretary be directed to omit their names from the roll,"

It was determined in the negative—yeas 10, nays 24.

On motion by Mr Mason, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Breckinridge, Bright, Clingman, Hunter, Mason, Mitchel, Nicholson, Polk, Powell, and Rice.

Those who voted in the negative are Messrs. Anthony, Bingham, Chandler, Clark, Collamer, Cowan, Doolittle, Fessenden, Foot, Foster, Harris, Howe, Johnson, King, Lane, Morrill, Nesmith, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, and Wilson.

No further amendment being proposed,

On the question to agree to the resolution as modified on the motion of Mr. Clark, it was determined in the affirmative.

So the resolution was agreed to.

[The debate is found on pages 1454–1456 of the Congressional Globe, part 2, 2d sess. 36th Cong.]

79908°—S. Doc. 1036, 62–3——77

[Thirty-sixth Congress—Second session.]

LOUIS T. WIGFALL,

Senator from Texas from January 4, 1860, till July 11, 1861, when he was expelled.

March 8, 1861, a resolution was submitted that Mr. Wigfall be expelled from the Senate. The preamble stated that he had declared in debate that he was a foreigner; that he owed no allegiance to this Government; but that he belonged to and owed allegiance to another and foreign state and government. March 11, the following resolution was moved as an amendment: "Whereas it is understood that the State of Texas has seceded from the Union, and is no longer one of the United States: Therefore, *Resolved*, That she is not entitled to be represented in this body." After brief debate the resolution and amendment were referred, March 12, to the Committee on the Judiciary, by whom they were not reported. Extracts from remarks given below will show the facts and arguments presented in support of the two resolutions.

In the next session of Congress, Mr. Wigfall was expelled by resolution of July 11, 1861 (see page 741).

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 36th Cong.; with extracts from remarks of Messrs. Foster and Clingman.

The debate in the case is found on pages 1447–1451 of the Congressional Globe, part 2, 2d sess. 36th Cong.

FRIDAY, *March* 8, 1861.

Mr. Foster submitted the following resolution for consideration:

"Whereas L. T. Wigfall, now a Senator of the United States from the State of Texas, has declared in debate that he is a foreigner; that he owes no allegiance to this Government, but that he belongs to and owes allegiance to another and foreign state and government: Therefore,

"*Resolved*, That the said L. T. Wigfall be, and he hereby is, expelled from this body."

MONDAY, *March* 11, 1861.

On motion by Mr. Foster, the Senate proceeded to consider the resolution submitted by him, the 8th instant, to expel the Hon. L. T. Wigfall from the Senate; and,

On motion by Mr. Clingman, to amend the resolution by striking out all after the word "whereas," and in lieu thereof inserting:

"It is understood that the State of Texas has seceded from the Union, and is no longer one of the United States: Therefore

"*Resolved*, That she is not entitled to be represented in this body."

Pending debate,

On motion by Mr. Clark that the Senate proceed to the consideration of executive business, it was determined in the affirmative—yeas 28, nays 16.

TUESDAY, *March* 12, 1861.

The Senate resumed the consideration of the resolution submitted by Mr. Foster, the 8th instant, to expel the Hon. L. T. Wigfall from the Senate; and,

On motion by Mr. Simmons,

Ordered, That the resolution, with the amendment submitted by Mr. Clingman, be referred to the Committee on the Judiciary.

[Extract made from remarks made in the Senate, March 11, 1861, by Mr. Foster, of Connecticut, in support of the resolution submitted by him, taken from pages 1447, 1448 of the Congressional Globe referred to in the head-note.]

"I have but very few words to say, Mr. President, either in regard to the resolution or the substitute. I do not propose, at least at present, to enter into any lengthened discussion either of the one or the other; and it is proper, perhaps, that I should state that I have offered the resolution without consultation with my political friends. It is entirely on my own independent responsibility that it is proposed to the body. I have thus offered it without consultation with my political friends; not becauseI do not need, as much as any one, advice and aid from them, nor because I am not, on proper occasions, a party man, but because I was desirous of presenting this question to the Senate altogether unconnected with party interests, and stripped, so far as possible, of all party considerations. I shall not, therefore, call upon any member of the Senate, on one side of the Chamber or the other, to support it; and I ask no member for his support of it; but beg every one to pass upon its naked merits. If it has merits, Senators of course will

vote for it on their own view of those merits. If it has no merits, I trust I should be as far any member of the body from desiring to press it through on any party or political grounds. The privileges of a seat in this body are certainly of too high a character to be involved in any matter of party, and I should hope that in the consideration and in the decision of this question we shall rise above all such views, and discuss it and determine it upon far more elevated grounds.

"The Constitution provides for the qualification and the manner of the election of members of this body. It provides, in the third section of the first article, that each State shall be entitled to two Senators; and, in other parts of the instrument, provision is made in respect to the necessary age, to be not less than thirty years; that no person shall be eligible who has not been nine years a citizen of the United States; and, finally, it provides that Senators, like other officers, executive and judicial, of the United States, shall take an oath or affirmation to support the Constitution.

"These are substantially the requirements of the Constitution in regard to members of this body: and I take it it is implied that a Senator of the United States shall owe allegiance to the United States; that this shall be his country; that he shall either be a native-born or a naturalized citizen; and that, if not native-born, he shall have been at least nine years a citizen before he is eligible as a member; clearly manifesting the idea that a man shall become thoroughly American in thought and feeling before holding a seat in this body.

"It is not, however, on any technical grounds, as I suppose, as to citizenship, that the Senator from Texas is obnoxious to objection. I suppose he was a native-born citizen of the United States, and I suppose he was duly elected a member of this body; and I do not suppose that when he spoke of himself as a foreigner he meant that he was born out of the jurisdiction of the country, but that he had another meaning in his mind, which he probably would define more readily and perfectly than I could. Still, Mr. President, it seems to me that this body owes it to itself not to allow members to sit here who avow that they are foreigners, who avow that they owe no allegiance to this Government, who avow that they belong to a foreign government; and if that government happens to be in arms against this Government, attacking its troops, seizing its property, expelling from its territory officers and soldiers of the United States by force, tearing down and trampling in the dust the national flag, treating with scorn and contempt every emblem of our country's authority and power, there may be additional reasons why such avowals and declarations should not be passed idly by. What, beside entire contempt of the body, do such declarations indicate, uttered on the floor of the Senate?

"I felt it due to myself, as a member of this body, that we should inquire and decide whether it was consistent with our duty as members of the Senate of the United States to allow one so circumstanced, and avowing such feelings and opinions, longer to hold a seat here. I scarcely need say that I have no personal feeling on the subject. I can say with entire truth that so far as my personal relations with the Senator from Texas are concerned they have been entirely kind and friendly. I stated that this was not a party question, so it certainly is not a personal question, and I certainly shall endeavor to prevent its becoming one. If other members of the body think that it is right and proper for a man avowing these opinions to continue to sit here, I shall have done my duty, and shall feel relieved from a responsibility which I felt pressing upon me previously to offering the resolution. I could not, as it seemed to me, discharge my duty without offering it, and presenting the question distinctly to the decision of the Senate.

"The Senator from North Carolina has suggested a substitute for the resolution; and the question, I suppose, is first on the substitute. The substitute assumes the right of a State to secede from the Union, and it assumes that the State of Texas has seceded, and therefore, as a logical inference, that she is no longer entitled to representation in this body. I must be so unfortunate, if it be unfortunate, as to differ from the Senator from North Carolina in regard to the whole theory of our Constitution and Government. I do not believe that any State of this Union has any right, any power, under the Constitution, to secede, to take itself out of the Union of these States, which go to make up the United States of America. I differ widely and radically from all who entertain any such view of our Constitution and Government as that, and it appears to me to be a claim altogether monstrous. That this Government is one of power and authority; that no State in this Confederacy has any right, under the Constitution, to go out and cease to be a member of this Federal Union, is a proposition which is to me as clear as anything can be which is not absolutely self-evident. I am not, however, about to enter into an argument on the question. I am persuaded that if I were to endeavor to convince gentlemen who entertain the opposite view, and many do, whose opinions perhaps ought to be more weighty than mine, I should not be able to succeed in convincing them of their error. We entertain so precisely opposite and antagonistic views of law and Government and our Constitution, that any argument of mine or any reasoning of mine would be wholly lost upon them, as I am free to say theirs would be on me. We might just

as well reason with each other in a foreign language, which the one understood and the other did not, and we should succeed just as well in convincing each other of our error on the one side and of the correctness of the opposite opinion."

[Extract from remarks made in the Senate, March 11, 1861, by Mr. Clingman, of North Carolina, against the adoption of the resolution submitted by Mr. Foster, taken from pages 1448, 1449 of the Congressional Globe referred to in the head-note.]

"Mr. President, I think the Senator from Connecticut has made a very good argument against his own resolution. If his argument be true, I think it is concluoive that his resolution ought not to be adopted; but there is a misunderstanding, perhaps, between us in relation to the facts. If we are to credit the newspapers, the State of Texas has called a convention, and that convention has passed an ordinance of secession, and submitted it to the people, and it has been ratified, it is stated, by a very large vote. That is the opinion entertained by the Senator from Texas, and it is my opinion about the facts, and probably the opinion of most gentlemen here. If that be true, and that be a valid act, and the State of Texas be no longer one of the United States, clearly my resolution is proper enough, and not the resolution of the Senator. When we decide for any cause of law or fact that a person upon this floor, claiming to be a Senator, is not entitled to a seat here, he is never expelled. How was it when, a few years ago, the Senate decided that a Senator from Iowa, who claimed a seat, was not entitled? Did anybody propose to expel him? Repeatedly the Senate and House of Representatives have decided that those who came here and attempted to act as members of the body were not entitled to seats; but nobody ever thought of expelling them on that ground.

"I need not, I am sure, dilate on this point of view; for I take it for granted the Senator agrees with me that if the State of Texas has in fact ceased to be one of the United States we should simply say so, and declare that she is not longer entitled to be represented. But the Senator argues that this act is invalid. Take it to be true; suppose Texas has no right, no power, to secede, and in fact has not seceded: then the Senator before me [Mr. Wigfall] is entitled to be here as a member of the body, unless you argue that his erroneous opinion upon that fact disqualifies him. Now, let us look at it for a moment. The Senator from Texas thinks that his State has seceded, and that he is no longer a Senator. That is his opinion as a matter of constitutional law. The Senator from Connecticut, on the other side, says that he is mistaken in that point. Well, sir, was it ever pretended that you would expel a Senator for a mistake upon a legal question? I ask Senators all around, was it ever maintained, that because a Senator differed with a majority upon a constitutional question, however important, that was a reason for expelling him from the body? I do not think so. The Senate may overrule him; they may take such action as to show him that in their judgment he is mistaken, and then he may feel bound to conform to their action, and may do so.

"The Senator from Connecticut says that secession is a monstrous idea. I admit that you might expel a Senator, perhaps, for having some monstrous idea, which showed that he was not capable of acting as one of the body. If, for example, a Senator were to entertain the opinion that the moon was made of green cheese, or some other absurdity, we might come to the conclusion that he had not intellect enough to act upon this floor as a Senator, and that therefore he ought to be driven off it; but will anybody pretend that this opinion of my friend from Texas stands in that category? Have not twenty Senators, perhaps, during the past session, declared on this floor that they entertained that very idea? The whole State of Virginia, I believe, "the mother of States and of statesmen," as she is called, almost without division of opinion, has always maintained that position. Without knowing what either of the Senators from Virginia would say, I take it for granted they both agree with the Senator from Texas.

"If it is an error, therefore, on his part, to believe that a State has a right to secede, and you can expel him for that reason, why not expel the Virginia Senators; why not expel the others who have expressed that opinion; and especially, why not expel those gentlemen who have declared it and gone away? Why is it that their names are called from time to time as Senators in this body? They have avowed the same opinion in quite as strong language as my friend from Texas, and they have acted upon it and gone away, and left us sometimes without a quorum, shown an utter defiance and disregard of the opinions which the Senator from Connecticut avows. Why not extend it to them?

"But the Senator alludes to the fact that the State of Texas has taken possession of some of the public property, and perhaps expelled the armies of the United States. Is that a sufficient reason for expelling her representatives here? If that be a good reason, it applies with more force to the other States. I ask that Senator how it is that he allows the name of Jefferson Davis to be called here, and makes no motion to expel him? He claims to be the head of a foreign government. Not only has his State seceded; not only has he advised taking possession of the forts; but he is the commander-in-chief of the army and the president of another republic, and yet he is a "marvelously proper" Senator; there is no motion made to expel him. I should like to know upon what principle it is."

[Thirty-seventh Congress—First session.]

JAMES M. MASON AND ROBERT M. T. HUNTER,

of Virginia.

THOMAS L. CLINGMAN AND THOMAS BRAGG,

of North Carolina.

JAMES CHESTNUT, JR.,

of South Carolina.

A. O. P. NICHOLSON,

of Tennessee.

WILLIAM K. SEBASTIAN AND CHARLES B. MITCHEL,

of Arkansas.

JOHN HEMPHILL AND LOUIS T. WIGFALL,

of Texas.

July 10, 1861, a resolution was submitted that Messrs. Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian,* Mitchel, Hemphill, and Wigfall be "expelled from the Senate." The preamble stated that it was "apparent that these Senators were engaged in the conspiracy for the destruction of the Union, or, with full knowledge of the conspiracy, had failed to advise the Government of its progress, or aid in its suppression." The following day the resolution was agreed to.

WEDNESDAY, *July* 10, 1861.

Mr. Clark submitted the following resolution for consideration:

"Whereas a conspiracy has been formed against the peace, union, and liberties of the people and Government of the United States, and in furtherance of such conspiracy a portion of the people of the States of Virginia, North Carolina, South Carolina, Tennessee, Arkansas, and Texas have attempted to withdraw those States from the Union, and are now in arms against the Government; and

"Whereas James M. Mason and Robert M. T. Hunter, Senators from Virginia; Thomas L. Clingman and Thomas Bragg, Senators from North Carolina; James Chestnut, jr., a Senator from South Carolina; A. O. P. Nicholson, a Senator from Tennessee; William K. Sebastian* and Charles B. Mitchel, Senators from Arkansas; and John Hemphill and Louis T. Wigfall, Senators from Texas, have failed to appear in their seats in the Senate, and to aid the Government in this important crisis, and it is apparent to the Senate that said Senators are engaged in said conspiracy for the destruction of the Union and Government, or with full knowledge of such conspiracy have failed to advise the Government of its progress or aid in its suppression: Therefore,

"*Resolved*, That the said Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchel, Hemphill, and Wigfall be, and they hereby are, each and all of them, expelled from the Senate of the United States."

THURSDAY, *July* 11, 1861.

On motion by Mr. Clark, the Senate proceeded to consider the resolution yesterday submitted by him to expel certain Senators from the Senate of the United States.

On motion by Mr. Latham to amend the resolution by inserting before the word

*This preamble and resolution was revoked and annulled, so far as Mr. Sebastian was concerned, by resolution of the Senate, March 3, 1877. See report No. 513, 1st sess. 44th Cong. The same resolution provided for settling the unpaid accounts of Mr. Sebastian.

"said," in the second line, the words "names of," and by striking out the words "expelled from the Senate of the United States," and inserting "stricken from the roll, and their seats declared vacant," so that the resolution will read:

"*Therefore, resolved*, That the names of said Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchel, Hemphill, and Wigfall be, and they hereby are, each and all of them, stricken from the roll, and their seats declared vacant,"

It was determined in the negative—yeas 11, nays 32.

On motion by Mr. Latham, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Bayard, Breckinridge, Bright, Johnson of Tennessee, Johnson of Missouri, Latham, Nesmith, Polk, Powell, Rice, and Saulsbury.

Those who voted in the negative are Messrs. Anthony, Bingham, Browning, Chandler, Clark, Collamer, Cowan, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Hale, Harlan, Harris, Howe, King, Lane of Indiana, Lane of Kansas, McDougall, Morrill, Pomeroy, Sherman, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Wilmot, and Wilson.

So the amendment proposed by Mr. Latham was not agreed to.

On the question to agree to the resolution, it was determined in the affirmative—yeas 32, nays 10.

On motion by Mr. Clark, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Bingham, Browning, Chandler, Clark, Collamer, Cowan, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Hale, Harlan, Harris, Howe, King, Lane of Indiana, Lane of Kansas, McDougall, Morrill, Pomeroy, Sherman, Simmons, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Wilmot, and Wilson.

Those who voted in the negative are Messrs. Bayard, Breckinridge, Bright, Johnson of Tennessee, Johnson of Missouri, Latham, Nesmith, Polk, Powell, and Rice.

So the resolution was agreed to, two-thirds of the Senators present having voted in the affirmative; and it was

"*Therefore, resolved*, That the said Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchel, Hemphill, and Wigfall be, and they hereby are, each and all of them, expelled from the Senate of the United States."

[The debate is found on pages 62–64 of the Congressional Globe, 1st sess. 37th Cong.]

[Thirty-seventh Congress—Second session.]

JOHN C. BRECKINRIDGE,

Senator from Kentucky from March 4, 1861, *till December* 4, 1861, *when he was expelled.*

December 4, 1861, a resolution was submitted that John C. Breckinridge be expelled from the Senate. It was amended by a preamble stating that he "had joined the enemies of his country," and was agreed to.

The history of the case here given consists of a transcript of the proceedings of the Senate in relation thereto from the Journal of the Senate, 2d sess. 37th Cong.

WEDNESDAY, *December* 4, 1861.

Mr. Chandler submitted the following resolution for consideration:

"*Resolved*, That John C. Breckinridge be, and he hereby is, expelled from the Senate."

The Senate proceeded, by unanimous consent, to consider the resolution; and the same having been amended, on the motion of Mr. Trumbull, to read as follows:

"Whereas John C. Breckinridge, a member of this body from the State of Kentucky, has joined the enemies of his country, and is now in arms against the Government he had sworn to support: Therefore,

"*Resolved*, That said John C. Breckinridge, the traitor, be, and he hereby is, expelled from the Senate."

On the question to agree to the resolution as amended, it was determined in the affirmative—yeas 37, nays none.

On motion by Mr. Trumbull, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Browning, Carlile, Chandler, Clark, Collamer, Cowan, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Hale, Harlan, Harris, Howe, Kennedy, King, Lane of Indiana, Lane of Kansas, Latham, McDougall, Morrill, Nesmith, Pomeroy, Rice, Sherman, Simmons, Sumner, Ten Eyck, Thompson, Trumbull, Wade, Wilkinson, Wilmot, and Wilson.

So the resolution as amended was agreed to, two-thirds of the Senators present having voted in the affirmative.

THURSDAY, *December* 5, 1861.

Mr. Rice stated that he was not in the Chamber yesterday when the vote was taken upon the resolution expelling John C. Breckinridge from the Senate, and asked unanimous consent to be allowed to have his vote recorded in the affirmative upon that question.

Whereupon,

It was unanimously agreed that the name of Mr. Rice be entered upon the list of yeas and nays among those who voted in the affirmative upon the passage of the said resolution.

[Thirty-seventh Congress—Second session.]

TRUSTEN POLK,

Senator from Missouri from March 4, 1857, *till January* 10, 1862.

December 18, 1861, the following resolution was submitted, and referred to the Committee on the Judiciary: "*Resolved*, That Trusten Polk, of Missouri, now a traitor to the United States, be expelled and he hereby is expelled from the Senate." January 9, 1862, the committee reported that it appeared to their satisfaction that Trusten Polk had, in a letter transmitting pecuniary means to aid in the publication of a secession newspaper in Missouri, declared among other disloyal and treasonable expressions that "dissolution is now a fact," and that he hoped Missouri would not "hesitate a moment to go with her Southern sisters:" that this letter had been extensively published, and could hardly have failed to come to the notice of Senator Polk; yet that neither he nor any one in his behalf had appeared before the committee to deny the authenticity of the letter, or attempted in any way to explain it; that he had not only failed to appear in his seat during the session, but on the contrary, as the committee are fully satisfied, had left his home in Saint Louis, and had gone clandestinely within the lines of the enemy then in rebellion against the United States. They reported back the resolution with the unanimous recommendation that it pass. January 10 it passed by a vote of 36 yeas to no nays. A few remarks in regard to Mr. Polk's letter, and reference of the resolution, constitute the debate on the case.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to the case from Senate Journals, 2d sess. 37th Cong., with the report of the committee from Senate Reports, 2d sess., 37th Cong., No. 4.

The debate is found on page 126 of the Congressional Globe, part 1, 2d sess. 37th Cong.

WEDNESDAY, *December* 18, 1861.

Mr. Sumner submitted the following resolution; which was considered by unanimous consent, and referred to the Committee on the Judiciary:

"*Resolved*, That Trusten Polk, of Missouri, now a traitor to the United States, be expelled, and he hereby is expelled, from the Senate."

THURSSDAY, *January* 9, 1862.

Mr. Ten Eyck, from the Committee on the Jndiciary, to whom was referred a resolution for the expulsion of Trusten Polk, a Senator from the State of Missouri, reported the resolution without amendment, and with a recommendation that the resolution do pass.

Mr. Ten Eyck submitted a report (No. 4) on the subject; which was ordered to be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan, Harris, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 9, 1862.—Submitted, and ordered to be printed.

Mr. Ten Eyck made the following report:

The Committee on the Judiciary, to whom was referred the resolution of the Senate for the expulsion of Trusten Polk, a Senator from the State of Missouri, report:

That it appears to the satisfaction of the committee that Trusten Polk recently and since the commencement of the present rebellion, in a letter transmitting pecuniary means to aid in the publication of a secession newspaper in Southwestern Missouri, among other disloyal and treasonable expressions used the following: "Dissolution is now a fact; not only a fact accomplished, but thrice repeated. Everything here looks like inevitable and final dissolution. Will Missouri hesitate a moment to go with her Southern sisters? I hope not. Please let me hear from you. I would be glad to keep posted as to the condition of things in Southwest Missouri. I like Governor Jackson's position. It looks like adherence to the 'Jackson resolutions.'"

That a copy of this letter was published in full in the Congressional Globe of the 19th of December last, the day after the resolution of expulsion in this case was introduced in the Senate, and has also, both before and since that time, been published and referred to in several other newspapers in Missouri and elsewhere, and widely circulated throughout the country, which publication could hardly have failed to come to the notice of Senator Polk; and yet neither he nor any other person in his behalf has ap-

peared before the committee to deny the authenticity of the letter referred to, or attempted in any other way to deny or explain it so far as the committee are aware; a course of conduct deemed to be wholly incompatible with the idea of his innocence, since an innocent man in his position, according to the first impulses of a true and loyal heart, would not have suffered a moment to elapse without flying to his place to deny, if false, so grave and foul a charge.

That besides this he has not only failed to appear in his seat during the whole time of the continuance of the present session, now a period of six weeks, to perform his duty to his State and to the Union on an occasion of the greatest possible urgency, when the votes as well as counsel of every true and loyal Senator were eminently needed in providing for the public welfare and in putting down a fierce rebellion threatening the very existence of the Union, but, on the contrary, as the committee are fully satisfied on information derived from reliable official and other sources in Missouri, has left his home in Saint Louis and gone clandestinely within the lines of the enemy now in open, armed rebellion against the United States, whose Constitution he, as Senator, has solemnly sworn to support.

The committee, under this state of facts, are of opinion that justice to the Senate, to rid its roll of his name as well as the Chamber of his presence; justice to the State of Missouri, whose high commission he has dishonored, and justice to the Union which he has sought to betray, all require that he should no longer continue a member of this body.

They therefore respectfully report the resolution for the expulsion of Trusten Polk, a Senator from Missouri, back to the Senate, with the unanimous recommendation that the same do pass.

FRIDAY, *January* 10, 1862.

On motion by Mr. Ten Eyck, the Senate proceeded to consider the resolution submitted by Mr. Sumner the 18th of December, expelling from the Senate Trusten Polk, a Senator from the State of Missouri; and

On the question to agree to the resolution, as follows:

"*Resolved*, That Trusten Polk, of Missouri, now a traitor to the United States, be expelled, and he hereby is expelled, from the Senate,"

It was determined in the affirmative—yeas 36, nays none.

Those who voted in the affirmative are Messrs. Anthony, Bright, Browning, Carlile, Chandler, Collamer, Cowan, Davis, Dixon, Fessenden, Foster, Grimes, Hale, Harlan, Harris, Howe, Johnson, King, Lane of Indiana, Lane of Kansas, Latham, Morrill, Nesmith, Pomeroy, Powell, Rice, Saulsbury, Sherman, Simmons, Sumner, Ten Eyck, Thompson, Trumbull, Wade, Wilkinson, and Wilson.

So the resolution was agreed to, two-thirds of the Senators present having voted in the affirmative.

Mr. Trumbull submitted the following motion; which was considered by unanimous consent, and agreed to:

Ordered, That the Vice-President be requested to transmit to the governor of the State of Missouri copies of the resolutions expelling Waldo P. Johnson and Trusten Polk from the Senate, attested by the Secretary of the Senate.

[Thirty-seventh Congress—Second session.]

WALDO P. JOHNSON,

Senator from Missouri from March 4, 1861, *till January* 10, 1862.

December 10, 1861, a resolution was submitted that Mr. Johnson be expelled from the Senate for his sympathy with and participation in the rebellion, conduct incompatible with his duty and station as a Senator. December 12 the resolution was referred to the Committee on the Judiciary, with instructions to inquire into the facts. January 9, 1862, the committee reported that previous to his election Mr. Johnson was known, in Missouri, as entertaining secession proclivities; that since his election he was reported to have made a speech evincing a spirit hostile to the Government; that he had not appeared in his seat in the Senate since the session began; that this failure to appear in his place, and his silence under the imputations upon his loyalty, which, from their publicity, could not have escaped his notice if within a loyal portion of the Union, of themselves furnish strong presumptive grounds against his fidelity to the Government. They reported back the resolution with the recommendation that it pass. January 10 it passed by a vote of 35 yeas to no nays. A few remarks, mainly on the question of reference of the resolution, constitute the only debate on the case.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journal, 2d sess. 37th Cong., with the report of the committee from Senate Reports, 2d sess., 37th Cong. No. 5.

The debate is found on pages 70, 71 of the Congressional Globe, part 1, 2d sess. 37th Cong.

TUESDAY, *December* 10, 1861.

Mr. Foot submitted the following resolution for consideration:

"*Resolved*, That Waldo P. Johnson, a Senator from the State of Missouri, by his sympathy with and participation in the rebellion against the Government of the United States has been guilty of conduct incompatible with his duty and station as a Senator; and that he be therefor, and hereby is, expelled from the Senate of the United States."

THURSDAY, *December* 12, 1861.

The Senate proceeded to consider the resolution, submitted by Mr. Foot the 9th instant, to expel Waldo P. Johnson, a Senator from the State of Missouri, from the Senate; and

After debate,

On motion by Mr. Saulsbury that the resolution be referred to the Committee on the Judiciary, with instructions to inquire into the facts of the case, it was determined in the affirmative.

THURSDAY, *January* 9, 1862.

Mr. Trumbull, from the Committee on the Judiciary, to whom was referred a resolution to expel Waldo P. Johnson, a Senator from the State of Missouri, reported the resolution without amendment, and with a recommendation that the resolution do pass.

Mr. Trumbull submitted a report (No. 5) on the subject; which was ordered to be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan, Harris, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 9, 1862.—Submitted, and ordered to be printed.

Mr. Trumbull made the following report:

The Committee on the Judiciary, to whom was referred a resolution for the expulsion from the Senate of Waldo P. Johnson, a Senator from the State of Missouri, submit the following report:

Previous to his election to the Senate Mr. Johnson was known in Missouri as entertaining secession proclivities, and to sympathize and co-operate with the prominent citizens of that State who are now in open rebellion against the Government. He was elected to the Senate by a legislature which has since sought to array the State against the Union. Since his election he is reported to have made a speech evincing a spirit hostile to the Government, which speech was extensively published in the State of

Missouri without public contradiction from him. He has not appeared in his seat in the Senate since the session began; and though the resolution for his expulsion was proposed in the Senate on the 10th day of December, and referred to this committee on the 12th day of December, 1861, and has been extensively published in Missouri and other parts of the Union, the said Johnson has wholly failed to furnish any reason for his absence, or explanation of the charges of disloyalty urged against him.

The failure of said Johnson for so long a period to appear in his place to discharge the high duties incumbent upon him for the preservation of the Republic in this time of rebellion against its authority, and his silence under the imputations upon his loyalty, which, from their publicity, could not have escaped his notice if within a loyal portion of the Union, of themselves furnish strong presumptive grounds against his fidelity to the Government.

His whereabouts at this time the committee have been unable, with actual certainty, to ascertain. They are satisfied that, had he been so disposed, there was nothing to prevent his attendnnce on the Senate at its commencement; and when last heard from he was reported to have gone voluntarily within the lines of rebels in arms against the Government.

Under these circumstances, the committee are of the opinion that he ought to be expelled from the body, and they accordingly report the resolution back to the Senate with a recommendation that it do pass.

FRIDAY, *January* 10, 1862.

On motion by Mr. Trumbull, the Senate proceeded to consider the resolution submitted by Mr. Foot the 10th of December, expelling from the Senate Waldo P. Johnson, a Senator from the State of Missouri; and

On the question to agree to the resolution, as follows:

"*Resolved*, That Waldo P. Johnson, a Senator from the State of Missouri, by his sympathy with, and participation in, the rebellion against the Government of the United States, has been guilty of conduct incompatible with his duty and station as a Senator, and that he be therefor, and hereby is, expelled from the Senate of the United States,"

It was determined in the affirmative—yeas 35, nays none.

Those who voted in the affirmative are Messrs. Anthony, Bayard, Bright, Browning, Carlile, Chandler, Collamer, Cowan, Davis, Dixon, Fessenden, Foster, Grimes, Hale, Harlan, Harris, Howe, Johnson, King. Lane of Indiana, Lane of Kansas, Morrill, Nesmith, Pomeroy, Powell, Rice, Saulsbury, Sherman, Simmons, Sumner, Ten Eyck, Thomson, Trumbull, Wade, and Wilson.

So the resolution was agreed to, two-thirds of the Senators present having voted in the affirmative.

* * * * * * *

Mr. Trumbull submitted the following motion; which was considered by unanimous consent, and agreed to:

Ordered, That the Vice-President be requested to transmit to the governor of the State of Missouri copies of the resolution expelling Waldo P. Johnson and Trusten Polk from the Senate, attested by the Secretary of the Senate.

[Thirty-seventh Congress—Second session.]

JESSE D. BRIGHT,

Senator from Indiana from March 4, 1845, *to February* 5, 1862.

December 16, 1861, a resolution was submitted that Mr. Bright be expelled from the Senate. The preamble stated that Mr. Bright had written a certain letter (given below) which was believed to be evidence of disloyalty to the United States, and calculated to give aid and comfort to the public enemies. The resolution was referred to the Committee on the Judiciary. January 13, 1862, the committee reported that in their opinion the facts charged against Mr. Bright were not sufficient to warrant his expulsion and recommended that the resolution do not pass. February 5, 1862, after a long debate the Senate agreed to the resolution by a vote of 32 yeas to 14 nays, and, more than two-thirds of the Senators present voting in the affirmative, Mr. Bright was expelled.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 2d sess. 37th Cong., with the report of the committee taken from the Congressional Globe.

The debates in the case are found in the Congressional Globe, part 1, 2d sess. 37th Cong., and the Appendix contained in part 4 of the same.

Special references to the debates of each day are inserted below.

MONDAY, *December* 16, 1861.

Mr. Wilkinson submitted the following resolution; which was considered, by unanimous consent, and referred to the Committee on the Judiciary:

"Whereas the Hon. Jesse D. Bright heretofore, on the 1st day of March, 1861, wrote a letter, of which the following is a copy:

"'WASHINGTON, *March* 1, 1861.

"'MY DEAR SIR: Allow me to introduce to your acquaintance my friend, Thomas B. Lincoln, of Texas. He visits your capital mainly to dispose of what he regards a great improvement in fire-arms. I commend him to your favorable consideration as a gentleman of the first respectability, and reliable in every respect.

"'Very truly yours,

"'JESSE D. BRIGHT.

"'To his Excellency JEFFERSON DAVIS,

"'*President of the Confederation of States.*'

"And whereas we believe the said letter is evidence of disloyalty to the United States, and is calculated to give aid and comfort to the public enemies: Therefore,

"*Resolved*, That the said Jesse D. Bright be expelled from his seat in the Senate of the United States."

Mr. Wilkinson also submitted a paper in relation to the aforesaid resolution; which was referred to the Committee on the Judiciary.

[Remarks by Mr. Bright and another letter written by him are found on page 89 of the Congressional Globe referred to in the head-note.]

FRIDAY, *December* 20, 1861.

Mr. Trumbull presented a memorial of James M. Logan and others, loyal citizens of the State of Indiana, praying for the removal of the Hon. Jesse D. Bright from the United States Senate; which was referred to the Committee on the Judiciary.

MONDAY, *January* 13, 1862.

Mr. Cowan, from the Committee on the Judiciary, to whom was referred a resolution for the expulsion of Jesse D. Bright, a Senator from the State of Indiana, from the Senate, reported it without amendment, and with a recommendation that the resolution do not pass.

The Senate resumed the consideration of the said resolution; and

On motion by Mr. Wilkinson,

Ordered, That the further consideration thereof be postponed to, and made the special order of the day for, Thursday, the 16th instant, at 1 o'clock

REPORT OF COMMITTEE.*

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan Harris, Bayard, and Powell.]

The Committee on the Judiciary, to whom was referred a resolution to expel the Hon. Jesse D. Bright from his seat in the United States Senate, respectfully report:

That they are of opinion that the facts charged against Mr. Bright are not sufficient to warrant his expulsion from the Senate; and they therefore recommend that the resolution do not pass.

MONDAY, *January* 20, 1862.

The Vice-President called up the special order of the day, and the Senate resumed the consideration of the resolution submitted by Mr. Wilkinson on the 16th of December last, for the expulsion of the Hon. Jesse D. Bright from the Senate, reported upon adversely by the Committee on the Judiciary; and

After debate,

On motion by Mr. Hale, the Senate adjourned.

[The debate is found on pages 391–398 of the Congressional Globe referred to in the head-note.]

TUESDAY, *January* 21, 1862.

The Senate resumed, &c.

[The debate is found on pages 412–419 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *January* 22, 1862.

The Senate resumed, &c.

[The debate is found on pages 431–435 of the Congressional Globe referred to in the head-note.]

THURSDAY, *January* 23, 1862.

The Senate resumed, &c.

[The debate is found on pages 447–454 of the Congressional Globe referred to in the head-note.]

FRIDAY, *January* 24, 1862.

The Senate resumed, &c.

[The debate is found on pages 470, 471 of the Congressional Globe referred to in the head-note.]

MONDAY, *January* 27, 1862.

The Senate resumed, &c.

[The debate is found on pages 37–42 of the Appendix to the Congressional Globe referred to in the head-note.]

WEDNESDAY, *January* 29, 1862.

The Senate resumed, &c.

[The debate is found on pages 539–545 of the Congressional Globe referred to in the head-note.]

THURSDAY, *January* 30, 1862.

The Senate resumed, &c.

[The debate is found on pages 559–564 of the Congressional Globe referred to in the head-note.]

FRIDAY, *January* 31, 1862.

The Senate resumed, &c.

[The debate is found on pages 582–592 of the Congressional Globe referred to in the head-note.]

TUESDAY, *February* 4, 1862.

The Senate resumed, &c.

[The debate is found on pages 622–629 of the Congressional Globe referred to in the head-note.]

WEDNESDAY, *February* 5, 1862.

The Senate resumed the consideration of the resolution submitted by Mr. Wilkinson, the 16th of December, for the expulsion of the Hon. Jesse D. Bright from the Senate, and reported upon adversely by the Committee on the Judiciary; and

After debate,

On the question to agree to the resolution as follows:

"Whereas the Hon. Jesse D. Bright, heretofore, on the 1st day of March, 1861, wrote a letter of which the following is a copy:

*Found on page 287 of the Congressional Globe referred to in the head-note.

"'WASHINGTON, *March* 1, 1861.

"'MY DEAR SIR: Allow me to introduce to your acquaintance my friend, Thomas B. Lincoln, of Texas. He visits your capital mainly to dispose of what he regards a great improvement in fire-arms. I commend him to your favorable consideration as a gentleman of the first respectability, and reliable in every respect.

"'Very truly yours,

"'JESSE D. BRIGHT.

"'His Excellency JEFFERSON DAVIS,
"'*President of the Confederation of States.*'

"And whereas we believe the said letter is an evidence of disloyalty to the United States, and is calculated to give aid and comfort to the public enemies: Therefore,

"*Resolved*, That the said Jesse D. Bright be expelled from his seat in the Senate of the United States,"

It was determined in the affirmative—yeas 32, nays 14.

Those who voted in the affirmative are Messrs. Anthony, Browning, Chandler, Clark, Collamer, Davis, Dixon, Doolittle, Fessenden, Foot, Foster, Grimes, Hale, Harlan, Henderson, Howard, Howe, Johnson, King, Lane of Indiana, McDougall, Morrill, Pomeroy, Sherman, Simmons, Sumner, Trumbull, Wade, Wilkinson, Wilmot, Wilson of Massachusetts, and Wilson of Missouri.

Those who voted in the negative are Messrs. Bayard, Carlile, Cowan, Harris, Kennedy, Latham, Nesmith, Pearce, Powell, Rice, Saulsbury, Ten Eyck, Thomson, and Willey.

So the resolution was agreed to, two-thirds of the Senators present having voted in the affirmative; and it was

Resolved, That the said Jesse D. Bright be expelled from his seat in the Senate of the United States.

[The debate is found on pages 644–655 of the Congressional Globe referred to in the head-note.]

THURSDAY, *February* 6, 1862.

On motion by Mr. Wilkinson,

Ordered, That the Vice-President be requested to transmit to the executive of the State of Indiana a copy of the resolution expelling Jesse D. Bright from the Senate, attested by the Secretary of the Senate.

BENJAMIN STARK.

May 7, 1862, a resolution was submitted that Benjamin Stark, who had been found disloyal by a committee of the Senate, be expelled. A motion to consider the resolution was determined in the negative, June 6, by vote of 16 yeas to 21 nays. (J. of S., 2d sess. 37th Cong., p. 616.) As the case contains other points relating to the admission of Mr. Stark, it has been thought best to insert it in Part II. *Vide supra*, p. 188.

[Thirty-seventh Congress—Second session.]

LAZARUS W. POWELL,

Senator from Kentucky from March 4, 1859, *till March* 3, 1865.

February 20, 1862, a resolution was submitted that Mr. Powell be expelled from the Senate. It was accompanied by a preamble setting forth certain conduct of Mr. Powell, which, it stated, showed that "his purposes, if not his acts, were treasonable." The resolution was referred to the Committee on the Judiciary. March 12, 1862, the committee reported back the resolution with the recommendation that it do not pass. No report showing the grounds on which the committee proceeded was made. From remarks by the chairman of the committee, given below, it appears that nothing was shown to satisfy the committee that Mr. Powell had done anything to favor the cause of the rebellion; that his opinions differed from the opinions of the speaker, but that no man was to be expelled because he disagreed with others in opinion. March 14 the resolution was not agreed to by a vote of 28 nays to 11 yeas.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 2d sess. 37th Cong., and remarks by Mr. Trumbull from Congressional Globe, part 2, 2d sess. 37th Cong., page 1234.

Special references to the debates of each day are inserted below.

THURSDAY, *February* 20, 1862.

Mr. Wilkinson submitted the following resolution; which was considered by unanimous consent, referred to the Committee on the Judiciary, and ordered to be printed:

"Whereas Lazarus W. Powell, a Senator from the State of Kentucky, after eleven States had published their ordinances of secession by which to sever themselves from the Government of the United States, had formed a confederation and provisional government, and made war upon the United States, did, on the 20th day of June last, at the city of Henderson, in the State of Kentucky, attend a large Southern State's rights convention, over which he was called to and did preside; and, on taking his seat as president thereof, made a speech, in which he stated the object of said convention, and then appointed a committee, which reported to said convention a long series of resolutions that were unanimously adopted by it. Among those resolutions are the following:

"'2. That the war being now waged by the Federal Administration against the Southern States is in violation of the Constitution and laws, and has already been attended with such stupendous usurpations as to amaze the world and endanger every safeguard of constitutional liberty.

* * * * * * *

"'That the recall of the invading armies and the recognition of the separate independence of the Confederate States is the true policy to restore peace and preserve the relations of fraternal love and amity between the States.

* * * * * * *

"'6. That we heartily approve the refusal of Governor Magoffin to furnish Kentucky troops to subjugate the South; and we cordially indorse his recent proclamation defining the position of Kentucky, in accordance with the sentiment of her people, and *forbidding* the *invasion* of *Kentucky* by *Federal* or confederate troops.

"'7. That, although Kentucky has determined that her proper position *at present* is that of strict neutrality between the belligerent sections, yet, if either of them invade her soil against her will, she ought to *resent* and *repel* it by *necessary force.*'

"The pith of Governor Magoffin's proclamation, which that convention so cordially approved, is embodied in this paragraph: 'I hereby notify and warn all other States, separate or united, especially the United and Confederate States, that I solemnly forbid any movement upon Kentucky soil, or occupation of any part or place therein, for any purpose whatever, until authorized by invitation or permission of the legislative and executive authorities. I especially forbid all citizens of Kentucky, whether in the State guard or otherwise, from making any hostile demonstration against any of the aforesaid sovereignties; to be obedient to the orders of lawful authorities; to remain quietly and peaceably at home when off of military duty, and refrain from all words and acts likely to provoke a collision, and so otherwise to conduct themselves that the deplorable calamity of invasion may be averted; but, in the mean time, to make prompt and efficient preparation to assume the paramount and supreme law of self-defense, and strictly of self-defense alone.'

"The closing speech of this convention was made by Senator Powell, and the resolutions passed by it and a summary statement of its proceedings were signed by him as its president.

"On the 10th of September last, whilst the legislature of Kentucky was in session in the town of Frankfort, and after her territory had been invaded at two distant points by the confederate armies, and whilst Humphrey Marshall was employed in organizing and drilling an armed body of rebels in the contiguous county of Owen, a large Southern State's rights convention assembled and held its sessions in Frankfort, for the apparent purpose of overawing the legislature, controlling its deliberations, and deterring it from passing measures to support the Union and the Government of the United States, Lazarus W. Powell was a delegate to that convention from the county of Henderson, and was appointed on its committee of resolutions. Among other resolutions, that committee reported these:

"'*Resolved*, That every material interest of Kentucky, as well as the highest dictates of patriotism, demand that peace should be maintained within her borders, and this convention solemnly pledges the honor of its members to do all in their power to promote this end.

"'2. That it is the deliberate sense of this convention, and it is believed of an overwhelming majority of the people of Kentucky, that the best and perhaps the only mode of effecting this great object is by adhering strictly, rigidly, and impartially to her chosen and oft-declared position of neutrality during the existence of the deplorable war now raging between the sections; taking sides neither with the Government nor with the seceding States, and declaring *her soil* must be *preserved inviolate* from the *armed occupation* of either.

* * * * * * *

"'9. That we consider it incompatible with the neutrality avowed by Kentucky to vote money for the prosecution of the civil war, or to tax the people of the State, or augment its debt for a purpose so unwise and for a cause so hopeless as the military subjugation of the Confederate States.'

"This was a convention of most intense secessionists, and was attended by John C. Breckinridge and many of the leaders of that party from generally over the State. William Preston and R. W. Wooley, esquires, made speeches to it fraught with the rankest treason, and denouncing the fiercest war against the United States. Its resolutions were unanimously adopted, and its business closed with the following one, offered by Senator Powell:

"'*Resolved*, That Col. William Preston, George W. Johnson, esq., General Lucius Desha, Capt. Richard Hawes, and Thomas P. Porter, esq., be, and they are hereby, appointed a committee of organization, in order to carry out the purposes of this convention; and full powers are conferred upon them for that object.'

"Those men were thus commissioned in the cause of conspiracy, treason, and rebellion. By the warrant given them, on the motion of Senator Powell, they went forth and organized or advised and assisted in the organization of armed bands of traitors, and soon thereafter led them into the confederate camps, where they are yet struggling to consummate the disruption of the Union and the overthrow of the Constitution and laws of the United States. From the beginning of this great rebellion to the present time Senator Powell has neither done nor said anything in Congress or out of Congress to strengthen or sustain the United States in this mighty struggle for national life. Whilst the true and loyal men of his own State were engaged in an arduous and protracted struggle to bring her to perform her duty to the nation and its government, he not only withheld from them all assistance and sympathy, but gave to the rebels the moral force of his disloyal position and opinions, and all the aid and comfort which he could render them short of the commission of technical treason. His purposes, if not his acts, have been treasonable. Being an ex-governor of the State of Kentucky, and one of her Senators in Congress, his example and counsel have doubtless been potential with her people and of mischievous tendency in other States. Under the false and delusive cry of neutrality and peace, and the absurd purpose to protect the soil of the State against invasion from the military force of the United States, he has doubtless assisted to seduce hundreds and hundreds from loyalty and duty into rebellion and treason. He has not supported the Constitution of the United States, but he has sounded the charge to his recruits, and they have made the overt attack upon it. Wherefore—

"*Be it resolved*, That the said Lazarus W. Powell be, and he is hereby, expelled from the Senate."

* * * * * * *

Mr. Wilkinson presented papers in relation to the resolution submitted by him this day for the expulsion of the Hon. Lazarus W Powell from the Senate; which were referred to the Committee on the Judiciary.

FRIDAY, *March* 7, 1862.

[Remarks on the resolution are found on pages 1112, 1113 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

WEDNESDAY, *March* 12, 1862.

Mr. Trumbull, from the Committee on the Judiciary, to whom was referred the resolution submitted by Mr. Wilkinson on the 20th of February for the expulsion of the Hon. Lazarus W. Powell from the Senate, reported it without amendment, and with a recommendation that the resolution do not pass.

THUESDAY, *March* 13, 1862.

The Senate proceeded to consider the resolution for the expulsion of the Hon. Lazarus W. Powell from the Senate; and

After debate,

On motion by Mr. Powell,

Ordered, That the further consideration of the resolution be postponed to to-morrow at 1 o'clock.

[The debate is found on pages 1208–1216 of the Congressional Globe, part 2, 2d sess 37th Cong.]

FRIDAY, *March* 14, 1862.

The Senate resumed the consideration of the resolution to expel the Hon. Lazarus W Powell from the Senate; and

After debate,

On the question to agree to the resolution, as follows:

"*Resolved*, That the said Lazarus W. Powell be, and he is hereby, expelled from the Senate,"

It was determined in the negative—yeas 11, nays 28.

Those who voted in the affirmative are Messrs. Davis, Dixon, Harlan, Howard, Howe, Lane of Indiana, Pomeroy, Sumner, Ten Eyck, Wade, and Wilkinson.

Those who voted in the negative are Messrs. Anthony, Browning, Carlile, Clark, Cowan, Doolittle, Fessenden, Foot, Foster, Hale, Harris, Henderson, Kennedy, King, Lane of Kansas, Latham, McDougall, Nesmith, Pearce, Rice, Saulsbury, Stark, Thomson, Trumbull, Willey, Wilson of Massachusetts, Wilson of Missouri, and Wright.

So the resolution was not agreed to.

[The debate is found on pages 1230–1234 of the Congressional Globe, part 2, 2d sess. 37th Cong.]

[Remarks of Mr. Trumbull, of Illinois, March 14, 1862.]

"I consider it due to the committee, whose organ I was in reporting adversely to the passage of this resolution, simply to state, not by way of argument, or of provoking reply, the ground upon which the committee reported adversely to the passage of this resolution. It was not because the committee approved of the doctrine of neutrality in Kentucky. In my judgment that was a most mischievous position, and one wholly untenable, either in April, or June, or September; but it is known that the people of Kentucky very generally assumed that ground, and the Government of the United States, if they did not recognize the neutrality of Kentucky, we may at least say paid some respect to it. The resolutions that were adopted, in which they declared that the United States had no right to pass its troops over the soil of Kentucky, were, in my judgment, preposterous. It was downright opposition to the constituted authorities of the Government; wholly unjustifiable. I have no excuse for it. I think it is without excuse. But, sir, such was the position of the great body of the people of that State; and many persons now believe that it was owing to this position of neutrality which was then assumed that Kentucky has at last arrayed herself on the side of the Union. I do not think so; but good Union men doubtless did take that position.

'Well, sir, the time came when, notwithstanding Kentucky had assumed this false attitude, it was necessary that her people should take sides either with the Government or against those arrayed for its protection. Some men who got upon this neutrality platform left it sooner than others; some in June, if you please; some earlier; some stood on it till September; but when the time came that Kentuckians had to meet this thing face to face, go with the Government or against it, fight for one or the other, then, sir, the traitors arrayed themselves, and undertook to get up a provisional government in the State of Kentucky. Breckinridge and the traitors alluded to by the Senator on my right [Mr. Davis] went into the organization; they joined the rebels; the Senator from Kentucky, whose case is under consideration, came here—came to the Government of the United States to discharge his duties here. He does not agree with me in sentiment; his opinions are not my opinions; I do not agree with the views that he has so often announced here; but he is entitled to his own opinions; and no man is to be expelled from this body because he disagrees with others in opinion. Since Kentucky assumed this position and took sides with the Union nothing has been shown to satisfy the committee, at least, that the Senator from Kentucky has had any communication or done anything to favor the cause of the rebellion. I think neutrality did favor it; but, sir, that is now over."

[Thirty-seventh Congress—Second session.]

JAMES F. SIMMONS,

Senator from Rhode Island from March 4, 1841, *till March* 3, 1847, *and from March* 4, 1857, *till he resigned in August*, 1862.

July 2, 1862, near the end of Mr. Simmons's second term in the Senate, a resolution was submitted that he be expelled from the Senate. The preamble stated that it appeared from a report of the Secretary of War that Mr. Simmons had exercised his official influence over certain of the heads of the Departments in procuring an order authorizing a certain person to manufacture rifles in behalf of the Government for the Army and Navy, and that Mr. Simmons had agreed to receive as a compensation for such services the sum of $50,000, and that he had already received two promissory notes amounting to $10,000. July 8 the resolution was referred to the Committee on the Judiciary by a vote of 31 yeas to 7 nays. July 14 the committee reported that the facts were substantially as above given, and that they were of opinion that "such a practice is entirely indefensible, and that it was highly improper for a Senator of the United States to have acted thus, even when the Government sustained no loss thereby;" that it was manifest that Congress disapproved of such conduct from the fact that they had promptly passed a law making it a penal offense thereafter; but that to visit a severe penalty upon an act which at the time of its commission was not punishable or forbidden by public law would be retroactive in its effect, and render the step liable to that objection to which all *post facto* laws are justly subject. The committee unanimously reported back the resolution, accompanied by the statement of facts, that the Senate might take such action as they might think fit. No action was taken. [Congress adjourned within three days after the report was made, and Mr. Simmons had resigned his seat in the Senate before the next session.]

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from Senate Journals, 2d sess. 37th Cong., with the report of the committee from Senate Reports, 2d sess. 37th Cong., No. 39.

The case was not debated.

WEDNESDAY, *July* 2, 1862.

Mr. Wright submitted the following resolution for consideration:

"Whereas, by a report made to the Senate of the United States by the Secretary of War, the Hon. E. M. Stanton, bearing date June 21, 1862, it appears that the Senator from the State of Rhode Island, James F. Simmons, gave and exercised his official influence over certain of the heads of the Departments of our Government in procuring for one C. D. Schubarth an order, dated October 11, 1861, authorizing the said Schubarth, in behalf of the Government, to manufacture, for the use of the Army and Navy, 50,000 breech-loading rifles; and, further, that the said Senator did agree to receive, as a compensation for services rendered in such procurement, the sum of $50,000, and did subsequently accept two several promissory notes from certain parties in New York, 'one payable in August, and one in September next, both amounting to $10,000,' in payment for procuring said order: Therefore,

"*Resolved*, That the said James F. Simmons be, and is hereby, expelled from the seat he holds in this Senate."

TUESDAY, *July* 8, 1862.

On motion by Mr. Wright, the Senate proceeded to consider the resolution submitted by him on the 2d instant for the expulsion of the Hon. James F. Simmons, a Senator from the State of Rhode Island, from the Senate; and,

On motion by Mr. Ten Eyck that the resolution be referred to the Committee on the Judiciary, it was determined in the affirmative—yeas 31, nays 7.

On motion by Mr. Wright, the yeas and nays being desired by one-fifth of the Senators present,

Those who voted in the affirmative are Messrs. Anthony, Browning, Carlile, Chandler, Clark, Collamer, Cowan, Davis, Doolittle, Fessenden, Foot, Grimes, Hale, Harlan, Harris, Howard, Howe, Kennedy, Lane of Kansas, McDougall, Morrill, Rice, Sherman, Stark, Sumner, Ten Eyck, Wilkinson, Willey, Wilmot, Wilson of Massachusetts, and Wilson of Missouri.

Those who voted in the negative are Messrs. Foster, Henderson, King, Nesmith, Powell, Trumbull, and Wright.

So the motion was agreed to, and it was

Ordered, That the resolution be referred to the Committee on the Judiciary.

MONDAY, *July* 14, 1862.

Mr. Ten Eyck, from the Committee on the Judiciary, to whom was referred a resolution to expel the Hon. James F. Simmons, a Senator from the State of Rhode Island, from the Senate, submitted a report (No. 69); which was ordered to be printed.

REPORT OF COMMITTEE.

[The committee consisted of Messrs. Trumbull (chairman), Foster, Ten Eyck, Cowan, Harris, Bayard, and Powell.]

IN THE SENATE OF THE UNITED STATES.

JULY 14, 1862.—Ordered to be printed.

Mr. Ten Eyck submitted the following report:

The Committee on the Judiciary, to whom was referred a resolution for the expulsion of James F. Simmons, a Senator of the United States from the State of Rhode Island, have had the same under consideration, and, after full deliberation, make the following report:

That in October, 1861, Senator Simmons being in Washington on his own private business, was called upon by a Mr. Schubarth with a letter of introduction from Messrs. A. D. & J. Y. Smith, a wealthy business firm in Providence, Rhode Island, requesting him to aid Mr. Schubarth in procuring an order from the Government for the manufacture of a breech-loading rifle for the use of the Army and Navy, of which he was the inventor, and stating that if the order was procured they (the Messrs. Smith) were to be concerned in its execution.

Mr. Schubarth was introduced by Senator Simmons to the Secretary of War, General Ripley, of the Ordnance, and Captain Harwood, of the Navy Department. His rifle was tried at the navy-yard, and a favorable report made, but the Government declined ordering his breech-loading rifle, and, preferring the Springfield rifled muskets, gave an order on the 11th of October last for 20,000, at the rate of $20 for each arm, with the appendages.

When called upon by Mr. Schubarth with the letter of the Messrs. Smith, as above stated, Mr. Simmons determined to aid him in procuring the order for the manufacture of the rifle invented by him, by going with him to the Departments, recommending his arm, and soliciting a contract in the same manner as he had done before in other cases, and has since done in behalf of constituents of his without any offer of compensation having been made to him for his aid, and without expecting or dreaming of receiving any. That after he had thus undertaken to assist Mr. Schubarth, either before or after he had introduced him at the Departments, (Mr. Simmons thinks it was after and some time during the stay of Mr. Schubarth in Washington, while going to or returning from the Departments,) Schubarth said he had a letter from the Messrs. Smith authorizing him to pay a commission for obtaining an order, which he offered to Mr. Simmons to be read, but which he declined reading, saying, playfully, "that the Messrs. Smith were rich enough to pay, and that if he got commissions for all he did for his constituents he should be as rich as some of them were;" but it appears that no suggestion was made to Mr. Simmons to pay him a commission or compensate him in any way for any aid he might render until after he had determined to assist the parties in getting the contract; and that nothing further ever passed between Mr. Simmons and the Messrs. Smith on the subject of commissions.

That afterwards, in November, 1861, Mr. Simmons being in Washington, on his way to Hatteras Inlet, for the purpose of consulting the Government about procuring a vessel load of cotton, Mr. Schubarth informed him that he could do nothing with the order he had obtained unless it was made for the same number and as long a time allowed for delivery as other parties had, and requested him to aid in getting such alteration, which he did; and on the 26th of November last an additional order was made for the manufacture of 30,000 more.

In January last, Mr. Schubarth informed Mr. Simmons that the Messrs. Smith declined pursuing the business. And seeing him afterwards in February, in New York, Schubarth told him he had made arrangements with other parties for means to carry out the contract, and that they wanted to have an understanding with him about his commissions. Mr. Simmons states that he saw these parties, and took from them an agreement, in writing, to pay at certain stipulated times (in about a year from May last) the amount agreed upon. The agreement was without qualification or condition, and had no connection with what the Government might subsequently do, only binding themselves to a due execution of the order on their part. Under and in pursuance of this agreement they subsequently gave him one note, payable in August, and one in September next, both amounting to $10.000, which he expected would be paid, as he had no doubt of their responsibility.

Mr. Simmons further states that he never expected Schubarth to pay him a cent for the assistance he rendered him; that he was in moderate circumstances; that the Smiths were rich and that he expected them to pay; and that he should have aided just

as soon, and acted as earnestly in endeavoring to procure the orders, without compensation, as he had repeatedly done in other cases for his constituents. Mr. Schubath states, on the contrary, that he considers himself bound to give Senator Simmons 5 per cent. commission on both orders, and he says he made the offer of commissions to Senator Simmons because he had understood that a commission was paid for obtaining contracts, and he thinks it was one of the Messrs. Smith who told him so. It may not be amiss to state that Mr. Simmons, who has appeared before the committee and with great frankness and fairness detailed all the circumstances of the transaction, and answered all questions put to him promptly and without hesitation, also stated that he is now, and was at the time, unconscious of having done anything wrong in acting as he did, and that he was not aware that it was unlawful, there being no law prohibiting it; that he considered he was not only benefiting his constituents, but was also doing the Government a service by procuring for it responsible contractors for the prompt supply of arms, which was then so greatly needed, he having about that time learned in high quarters that although 500,000 men had recently been called to the field, the Government had then only 200,000 stand of arms to put in their hands.

It further appears that Senator Simmons still holds the notes given him for these commissions as agreed upon, and expects to receive payment on them when they fall due.

It also appeared to the committee that both before and after the contract for these arms was made, many other contracts were made for similar arms, between July 1, 1861, and January 1, 1862, and the lowest price paid by the Department for arms of this description was $20, the price agreed to be paid to Mr. Schubarth; that $20 was the lowest bid that was made at the Department for the manufacture of such arms during the periods aforesaid, and that the Government lost nothing in consequence of the offers of Mr. Schubarth to pay Mr. Simmons a commission for his assistance in this particular, after he had voluntarily undertaken to assist in procuring the contract without reward.

The committee on these facts are of opinion that although Senator Simmons may have thought, as he declares, that his act was neither unlawful or wrong (a declaration which his age, respectability, and long, useful, and honorable life, it would seem, should favor, whilst it is true that these very considerations should make a willful departure from the line of correct conduct more glaring and censurable), still, that such a practice is entirely indefensible, and that it was highly improper for a Senator of the United States to have acted thus, even where the Government sustained no loss thereby; but especially at a time when the very existence of the Government and the Union was endangered by a fierce and huge rebellion, to suppress which the patriotism of the country was everywhere engaged—a rebellion which, first by robbery and afterward by occasioning unlimited requisitions for the purchase of supplies and arms, had subjected the public treasury to untold and frightful drains.

That Congress disapproves of such conduct is manifest from the fact that they have promptly passed a law making it a penal offense hereafter; this will prevent all such acts in future; but to visit a severe and striking penalty upon an act which at the time of its commission was not punishable or forbidden by any public law would be retroactive in its effect, and render the step liable to that objection to which all *post facto* laws are justly subject.

The committee would further state in this connection that it was the common practice until a recent period for members of Congress to prosecute claims against the Government for fees and rewards, and that for many years our most distinguished public men were in the habit of prosecuting claims under such circumstances without censure or criticism; but this was made a misdemeanor by an act of Congress in 1853, and since that period the practice has been discontinued.

The committee unanimously report back the resolution, accompanied by the statement of facts herein contained (about which there appears to be no dispute), in order that the Senate may take such action in the matter as they in their wisdom and discretion may think fit.

[Forty-second Congress—Third session.]

JAMES W. PATTERSON,

Senator from New Hampshire from March 4, 1867, till March 3, 1873.

February 4, 1873, a message was received from the House of Representatives that the House had resolved that there be transmitted to the Senate a copy of evidence reported to the House by a select investigating committee, the preamble to the resolution reciting that the evidence contained matter affecting members of the Senate. The communication was referred to a select committee. February 27, the committee reported, exonerating the other Senators mentioned in the report, and reporting the following resolution in regard to Mr. Patterson: "*Resolved*, That James W. Patterson be, and he is hereby, expelled from his seat as a member of the Senate." Mr. Patterson's term expired March 3, no action having been taken by the Senate on the resolution. March 26, the Senate resolved that "Observations on the report," &c., submitted by Mr. Patterson, be received, filed, and printed with the report, the preamble reciting that it was manifestly impossible for the Senate to consider the resolution at the session then just passed, and that it was very questionable if it was competent for the Senate to consider the same after Mr. Patterson had ceased to be a member of the body.

The history of the case here given consists of a transcript of the proceedings of the Senate relating to it from the Senate Journal, 42d Cong., 3d sess. The report of the committee is found in Senate Reports, 42d Cong., 3d sess., No. 519.

Special references to the debates of each day are inserted below.

TUESDAY, *February* 4, 1873.

The Presiding Officer (Mr. Anthony in the chair) laid before the Senate the following message, this day received from the House of Representatives:

IN THE HOUSE OF REPRESENTATIVES,
February 4, 1873.

Mr. Poland, from the select investigating committee, &c., submitted the following; which was agreed to:

"Whereas the evidence taken by a select committee of this House appointed December 2, 1872, for the purpose of examining into charges of bribery of members of this House, contains matter affecting members of the Senate: Therefore,

"*Resolved*, That the Clerk of the House be directed to transmit to the Senate a copy of all the evidence thus far reported to the House by said committee, together with a copy of this resolution."

Attest:

EDW. McPHERSON, *Clerk.*

Whereupon,

On motion by Mr. Patterson, and by unanimous consent,

"*Resolved*, That a select committee, consisting of five Senators, be appointed by the Presiding Officer, to whom shall be referred the communication this day received from the House of Representatives in relation to matter affecting members of the Senate, together with the copy of the evidence accompanying the same, and that the said committee have power to send for persons and papers, and to employ a clerk."

WEDNESDAY, *February* 5, 1873.

The Presiding Officer (Mr. Anthony in the chair) appointed Mr. Morrill of Maine, Mr. Scott, Mr. Wright, Mr. Stockton, and Mr. Stevenson the select committee, under the resolution of the Senate of the 4th instant, to whom shall be referred the communication yesterday received from the House of Representatives in relation to matter affecting members of the Senate disclosed before an investigating committee of the House of Representatives.

[The debate is found on page 1099 of the Congressional Globe, part 2, 3d sess. 42d Cong.]

THURSDAY, *February* 6, 1873.

Mr. Stevenson submitted the motion that he be excused from service on the select committee appointed under the resolution of the Senate of the 4th instant, to whom was referred the communication of the House of Representatives in relation to matter affecting members of the Senate, disclosed before an investigating committee of the House of Representatives; and

On the question to agree thereto,

After debate,

It was determined in the negative.

Mr. Stockton submitted the motion that he be excused from service on the said committee; and

On the question to agree thereto,

After debate,

It was determined in the negative.

[The debate is found on pages 1136, 1137 of the Congressional Globe, part 2, 3d sess. 42d Cong.]

MONDAY, *February* 10, 1873.

Mr. Morrill, of Maine, submitted the following resolution; which was considered by unanimous consent, and agreed to:

"*Resolved*, That the select committee appointed to consider the evidence from the House of Representatives affecting certain members of the Senate be authorized to sit during the sessions of the Senate."

SATURDAY, *February* 22, 1873.

Mr. Morrill, of Maine, submitted the following resolution; which was read the first and second times by unanimous consent:

"*Resolved*, That there be paid, out of the contingent fund of the Senate, for expenses of the special committee of the Senate to whom was referred the communication of the House in relation to members of the Senate, the sum of $1,000, or so much thereof as may be necessary."

The Senate proceeded to consider the said resolution as in Committee of the Whole; and no amendment being made, it was reported to the Senate.

Ordered, That it be engrossed and read the third time.

The said resolution was read the third time, by unanimous consent.

Resolved, That it pass.

THURSDAY, *February* 27, 1873.

Mr. Morrill, of Maine, from the select committee to whom was referred the communication of the House of Representatives of the 4th instant, in relation to certain matter affecting members of the Senate, together with a copy of the evidence accompanying the same, submitted a report (No. 519) accompanied by the following resolution:

"*Resolved*, That James W. Patterson be, and he is hereby, expelled from his seat as a member of the Senate."

SATURDAY, *March* 1, 1873.

[A debate on the question of taking up the report of the committee for consideration is found on pages 2068, 2069 of the Congressional Globe, part 3, 3d sess. 42d Cong.]

MONDAY, *March* 3, 1873.

[A debate on the question of taking up the report of the committee for consideration is found on pages 2184, 2185 of the Congressional Globe, part 3, 3d sess. 42d Cong.]

[Special session of the Senate, March, 1873.]

FRIDAY, *March* 14, 1873.

Mr. Anthony submitted the following resolution for consideration; which was ordered to be printed:

"Whereas at the last session of the Senate a resolution was reported from the select committee on evidence affecting certain members of the Senate, 'that James W. Patterson be, and he is hereby, expelled from his seat as a member of the Senate'; and

"Whereas it was manifestly impossible to consider this resolution at that session without serious detriment to the public business; and

"Whereas it is very questionable if it be competent for the Senate to consider the same after Mr. Patterson has ceased to be a member of the body: Therefore,

"*Resolved*, That the failure of the Senate to take the resolution into consideration is not to be interpreted as evidence of the approval or disapproval of the same.

"*Resolved, further*, That Mr. Patterson have leave to make a statement, which shall be entered upon the Journal of the Senate and published in the Congressional Record."

TUESDAY, *March* 25, 1873.

On motion by Mr. Anthony, the Senate proceeded to the consideration of the resolution submitted by him on the 14th instant, declaring that the failure of the Senate to consider the resolution for the expulsion of J. W. Patterson from the Senate shall not be inter-

preted as evidence of the approval or disapproval thereof; and granting leave to Mr. Patterson to make a statement for publication in the Congressional Record; and,

Pending debate,

On motion by Mr. Chandler, the Senate proceeded to the consideration of executive business.

[The debate is found on pages 193–197 of the Congressional Record, vol. i.]

WEDNESDAY, *March* 26, 1873.

On motion by Mr. Anthony, the Senate resumed the consideration of the resolution submitted by him on the 14th instant, declaring that the failure of the Senate to consider the resolution for the expulsion of J. W. Patterson from the Senate shall not be interpreted as evidence of the approval or disapproval thereof, and granting leave to Mr. Patterson to make a statement for publication in the Congressional Record; and

The resolution having been amended on the motion of Mr. Morrill, of Maine, it was agreed to, as follows:

"Whereas at the last session of the Senate a resolution was reported from the select committee on evidence affecting certain members of the Senate, 'that James W. Patterson be, and he is hereby, expelled from his seat as a member of the Senate'; and

"Whereas it was manifestly impossible to consider this resolution at that session without serious detriment to the public business; and

"Whereas it is very questionable if it be competent for the Senate to consider the same after Mr. Patterson has ceased to be a member of the body: Therefore,

"*Resolved*, That the pamphlet entitled 'Observations on the report of the committee of the Senate of the United States respecting the Credit Mobilier of America,' submitted by Mr. Patterson, be received, filed, and printed with the report of said committee."

[The debate is found on page 204 of the Congressional Record, vol. i.]

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Remarks of, in case of James Harlan, 235.

BEVERIDGE, ALBERT J., SENATOR FROM INDIANA.

Remarks of, in case of John W. Smith, 1000.

BRIBERY.

1. To deprive a Senator of his seat on the charge of bribery it must be shown (a) that the person elected participated in one or more acts of bribery or attempted bribery or sanctioned or encouraged the same; (b) that by bribery or corrupt practices enough votes were obtained for him to change the result of the election.—*Henry B. Payne*, 700; *William Lorimer (first)*, 1004.
2. Charges that an election was procured by bribery or corrupt practices investigated, and held not to be sustained by proof.—*Pomeroy* and *Caldwell*, 426; *Powell Clayton*, 444; *George E. Spencer*, 611; *La Fayette Grover*, 661; *Marcus A. Hanna*, 878; *William Lorimer* (first), 1002, 1025; *Isaac Stephenson*, 1114, 1155.
3. An election procured by bribery, held by a committee to be void.—*William A. Clark*, 906.
4. Charges of bribery and corruption in the election of a Senator investigated and found that not enough votes were influenced thereby to affect the result, and that the Senator did in no way authorize the acts proved.—*John J. Ingalls*, 692; *William Lorimer* (first), 1002, 1014.
5. A committee's holding that where certain members of a legislature electing a Senator were shown to have received money, yet not for the purpose of electing a Senator, the election was valid, not upheld by the Senate.—*William Lorimer* (second), 1097.
6. Procurement of advertising space or editorial comment in the newspapers, or services of men to speak either publicly or personally, upon payment of money by or on behalf of a candidate not held to be bribery. (1912.)—*Isaac Stephenson*, 1122, 1131.
7. Committee finding charges of corruption not sustained in a case, is divided on question of recognition of proceedings connected with the direct primary as a part of the election of a Senator by the legislature as provided for in the Constitution.—*Isaac Stephenson*, 1126, 1134.
8. Charge that three legislators were fraudulently influenced to absent themselves from voting for a Senator making election invalid, not sustained.—*Stephenson*, 1125.
9. Expenditure of $107,000 in a primary campaign, in the absence of a State or Federal law limiting amount of expenditures by candidates, criticized by a committee but not held sufficient to establish corruption allegations.—*Stephenson*, 1126, 1133.
10. The allegation of mere rumors of bribery and indefinite allegations of corruption not sufficient to cause the Senate or its committees to investigate the election of a Senator.—*Lapan* and *Miller*, 697, 698; *Watson* and *Chilton*, 1159, 1164.
11. Investigation of conduct by special committee of Senate accorded Senator who was indicted by a Federal grand jury for alleged violation of the laws of the United States but discharged by judge without the cause being heard on its merits on the ground that the date of the offenses charged was prior to his taking the oath as a Senator. Committee finds charges of misconduct unsustained.—*Charles H. Dietrich*, 987.

See, also, CORRUPTION.
EXPULSION.
JURISDICTION.

BROWN, ALBERT G., SENATOR FROM MISSISSIPPI.

Remarks of, in case of James Shields, 270.

BURROWS, JULIUS C., SENATOR FROM MICHIGAN.

1. Remarks of, in case of Henry A. du Pont, 866.
2. Remarks of, in case of Matthew S. Quay, 129.
3. Remarks of, in case of John W. Smith, 996.
4. Remarks of, in case of James A. Hemenway, 994.

CAFFERY, DONELSON, SENATOR FROM LOUISIANA.

Remarks of, in case of Henry W. Corbett, 92.

CHANDLER, WILLIAM E., SENATOR FROM NEW HAMPSHIRE.

1. Remarks of, in case of William N. Roach, 810.
2. Remarks of, in case of Ady *v.* Martin, 813.

CHILTON, WILLIAM E., SENATOR FROM WEST VIRGINIA.

Remarks of, in case of Watson and Chilton, 1160.

CITIZENSHIP.

1. Burden of proof of citizenship rests on claimant to seat.—*Albert Gallatin*, 157.
2. The certificate of a governor of a State that a person elected a Senator was a citizen of the State held sufficient, no term of residence or other qualifications being prescribed by the constitution or laws of the State.—*Stanley Griswold*, 174.
3. The election of an alien by birth, naturalized October 21, 1840, and elected a Senator January 13, 1849, held void, he not having been a citizen of the United States for the time required, at the commencement of the term for which he was elected.—*James Shields*, 218.
4. A person of African blood whose right to a seat in the Senate was contested on the ground that he had not been nine years a citizen in 1870, admitted.—*H. R. Revels*, 370.
5. An Army officer born in Maine, who had some effects in his father's possession there and had visited there, but owned no land and had no house in the State, elected from a State where he had held a military command for a short time, and where he had declared his intention of residing, admitted to his seat against the report of the committee.—*Adelbert Ames*, 375.

See, also, CONSTITUTION.

COMMITTEE.

1. Cases referred to the Committee on Privileges and Elections. (*See* Introduction xxvii.)
2. Investigation of Senator's election made by committee of the Senate made up of members of the Committee on Privileges and Elections.—*William Lorimer* (second), 1030.
3. Investigation of charges against Senator made by special committee appointed by President pro tempore of the Senate.—*Stanley Matthews*, 670; *Charles H. Dietrich*, 987.

CLINGMAN, THOMAS L., SENATOR FROM NORTH CAROLINA.

Remarks of, in case of Louis T. Wigfall, 1192.

COMPENSATION.

1. A Senator reimbursed from the contingent fund for the expenses of defending his title to his seat.—*Sykes* vs. *Spencer*, 611, 633; *John J. Ingalls*, 692, 696; *Corbin* vs. *Butler*, 637, 660; *Ady* vs. *Martin*, 812, 816; *Addicks* vs. *Kenney*, 875, 877; *Nathan B. Scott*, 888, 904.
2. A Senator reimbursed by appropriation for necessary expenses in defending his title to his seat.—*Spofford* vs. *Kellogg*, 567, 607; *Clark, Maginnis* vs. *Sanders, Power*, 727, 760; *Clagett* vs. *Dubois*, 764, 804; *Reed Smoot*, 986.
3. A claimant for a seat refused compensation and mileage.—*Segar* and *Underwood*, 310, 313; *Sykes* vs. *Spencer*, 611, 630.

4. A resolution to defray expenses of those prosecuting a protest against right of a Senator to his seat tabled.—*Reed Smoot*, 986.
5. Mileage paid from the contingent fund to claimants of seats. Committee on contingent fund, however, reports that it has not the power to pass claims for mileage made in behalf of claimants not Members of Congress.—*Fishback*, *Baxter*, and *Snow*, 298, 304.
6. Contestants allowed expenses for the prosecution of their claims.—*Segar* and *Underwood*, 310, 314; *Ray* vs. *McMillen*, 481, 535; *Spofford* vs. *Kellogg*, 567, 607; *Thos. C. Manning*, 608; *Corbin* vs. *Butler*, 637, 660; *Lucas* vs. *Faulkner*, 722, 726; *Clark*, *Maginnis* vs. *Sanders* and *Power*, 727, 760; *Clagett* vs. *Dubois*, 764, 804; *Davidson* vs. *Call*, 806, 808; *Lee Mantle*, 52, 81; *Asahel C. Beckwith*, 83, 84; *John B. Allen*, 85, 87; *Ady* vs. *Martin*, 812, 816; *Addicks* vs. *Kenney*, 875, 877; *Henry A. du Pont*, 874; *Nathan B. Scott*, 888, 904; *Maginnis* vs. *Clark*, 143, 144.
7. Compensation paid contestants from the date of election to the decision of their cases.—*Whitley* and *Farrows* vs. *Hill* and *Miller*, 343, 369.
8. Contestants paid mileage and compensation from the beginning of the term for which election was claimed to the decision of the case.—*Norwood* vs. *Blodgett*, 389, 394; *Ransom* vs. *Abbott*, 396, 424; *Sykes* vs. *Spencer*, 630.
9. Contestants paid mileage and compensation from the beginning of the session to the settlement of the claim.— *Yulle* vs. *Mallory*, 223, 227; *Stanton* vs. *Lane*, 276, 283; *McMillen* vs. *Pinchback*, 538, 564.
10. Contestants paid mileage and compensation from the presentation of their credentials to the decision of the case.—*Potter* vs. *Robbins*, 179, 181; *Hart* vs. *Gilbert*, 378, 380.
11. A Senator admitted to seat paid from contingent fund mileage at the rate allowed for attendance at the session.—*Chas. H. Bell*, 26, 34.
12. A Senator for whom an appropriation had been proposed to meet his expenses incurred in defense of his seat in the Senate asked to have it rejected.—*William Lorimer* (first), 1025.
13. An amendment to a deficiency bill granting a certain sum of money to a Senator whose election had been declared invalid not acted upon before adjournment.—*William Lorimer* (second), 1113.
14. Compensation of Senators from newly admitted States does not begin until the admission of the State.—*James Shields*, 267, 271; *Adelbert Ames*, 375, 377.
15. A Senator appointed for a term expiring on the date of resignation of a Senator, deceased before the date of his resignation was reached, received compensation to the date of admission of the Senator elected to fill the vacancy caused by resignation.—*Archibald Dixon*, 13, 15.
16. A Senator appointed to fill a vacancy, who claimed the right to sit after the legislature had met and failed to fill the vacancy, received compensation and mileage to the date of the decision by the Senate.—*Samuel S. Phelps*, 16, 22.
17. A Senator elected to fill a vacancy caused by the resignation of a Senator who had never taken his seat received compensation from date of the beginning of the term.—*Ransom* vs. *Abbott*, 396.

CONSTITUTION.

Extracts from Constitution relating to election and qualification of Senators.—(*See* Introduction, xx.)

1. Each House of Congress shall be the judge of the election, return, and qualification of its Members. Opinions of committees that Senate sits in judicial capacity and that power should be exercised in accordance with known principles of law.—*Ransom* vs. *Abbott*, 397, 406; *Henry A. du Pont* 874; *William Lorimer* (first) 1016; *William Lorimer* (second) 1061.
2. Views of committees that Senator may be deprived of seat although he may have done no acts of which a court of justice can take cognizance.—*John Smith*, 1170; *Reed Smoot*, 931.
3. The Senate refused to exclude a Senator for alleged disqualifications other than those mentioned in the Constitution —*Reed Smoot*, 931.

See, also, CITIZENSHIP.
JURISDICTION.
OATH.
QUALIFICATION OF SENATORS.
TIME OF ELECTION OF SENATORS.

CONTESTANTS.

1. Contestants allowed on the floor of the Senate and to be heard in their own behalf.—*Stanton* vs. *Lane*, 276, 282; *Clagett* vs. *Dubois*, 764, 801.
2. Contestants allowed on the floor of the Senate and to be heard in their own behalf with a time limit of two hours.— *Yulle* vs. *Mallory*, 223, 226; *Clagett* and *Dubois*, 801, 802.
3. Contestants not allowed on the floor to be heard in their own behalf.—*Fishback*, *Baxter*, and *Snow*, 298, 303.
4. Contestants elected by rival governments not seated through failure to determine claims of electing bodies.—*Louisiana Cases*, 481.
5. Contestant who resigned pending the question of his right to a seat granted right to withdraw his credentials from the files of the Senate.—*McMillen* vs. *Pinchback*, 538, 559.

CONVENTION, JOINT.

1. Conduct of lieutenant governor while presiding over a joint convention discussed.—*Ady* vs. *Martin*, 812; *Isaac Stephenson*, 1122, 1130.
2. Right of acting governor to vote for a Senator in joint convention affirmed.—*Henry A. du Pont*, 818.
3. A Senate committee held that mere failure of presiding officer of a joint convention to declare a person elected as Senator could not in any way defeat the will of the two houses expressed in their separate votes.—*Isaac Stephenson*, 1122, 1130.

See, also, ACT OF 1866.

CORRUPTION.

1. An election procured by corrupt means held by a committee to be void.—*Pomeroy* and *Caldwell*, 426, 433; *William A. Clark*, 906.
2. Holding of a committee's minority that election of a Senator was obtained by corrupt means upheld by Senate.—*William Lorimer* (second), 1026, 1113.
3. A resolution calling upon a committee to investigate whether corruption existed in the election of a Senator referred to committee, which did not report on resolution up to the close of a Congress.—*Henry A. du Pont*, 1156.
4. A committee holds an election corrupt where the person elected had made an arrangement with the rival candidate for his withdrawal for a pecuniary consideration.—*Pomeroy* and *Caldwell*, 426, 430.
5. Report of a committee on finding that a Senator had received money for using his influence to secure a contract for certain persons, stating that as the act was not punishable or forbidden when committed, explusion would be in the nature of an *ex post facto* penalty, not acted upon.—*James F. Simmons*, 1206.
6. The Senate declines on vague and indefinite charges of corruption to investigate the election of duly returned Members.—*Simon Cameron*, 264, 266; *Watson* and *Chilton*, 1159, 1164.
7. Charge that three members of a legislature were fraudulently influenced to absent themselves from voting for a Senator making his election invalid not sustained.—*Isaac Stephenson*, 1125, 1130.

See, also, BRIBERY.
EXPULSION.

COUNSEL.

A Senator allowed to appear by counsel before Senate to show cause why the report of the committee recommending his expulsion should not be adopted.—*John Smith*, 1170, 1177.

CREDENTIALS.

1. Credentials held to present a sufficient certificate of the executive of the State under its seal and countersigned by the secretary of state.—*Shoup* and *McConnell*, 761.
2. Credentials presented and ordered to lie on the table pending discussion of the right of a claimant to a seat in the Senate.—*Warren T. Reese*, 817.
3. In cases where credentials of a Senator consist of "a certificate of his due election from the executive of his State," he is entitled to be sworn in, and all questions relating to his qualifications should be postponed and acted upon by the Senate afterwards. Reasons therefor.—*Reed Smoot*, 928, 929, 930.

4. In case where credentials were presented by Senators antecedent to the admission of the State they claim to represent, held not entitled to seats.—*Blount* and *Cocke*, 173.

See, also, PRIMA FACIE TITLE.
RECONSTRUCTION.
STATES NEWLY ADMITTED, 1.

CRIMES.

1. Whether the commission of a criminal offense by a person before his election as a Senator furnishes ground for his expulsion from the Senate, debated but not decided.—*William N. Roach*, 809.
2. A Senator convicted in the courts resigned after Senate had ordered an inquiry as to effect of a Supreme Court decision in his case.—*Joseph R. Burton*, 995.

See, also, STATUTES.
BRIBERY, 12.

CRITTENDEN, JOHN J., SENATOR FROM KENTUCKY.

1. Remarks of, in case of Lyman Trumbull, 232.
2. Remarks of, in case of James Shields, 269.

DECISION.

1. Decision of right to a seat in the Senate when once made should not afterwards be disturbed.—*Henry A. du Pont*, 818; *Addicks* vs. *Kenney*, 875.
2. Senate authorizes investigation as to whether corrupt methods and practices were used in the election of a Senator previously declared by vote of the Senate to be entitled to a seat.—*William Lorimer* (second), 1030.

See, also, RES ADJUDICATA.
JURISDICTION.

DILLINGHAM, WILLIAM P., SENATOR FROM VERMONT.

Remarks of, in case of William Lorimer (second), 1027.

DISABILITIES.

The fact that a person is under political disabilities at the time of his election as Senator does not make his election void.—*Ransom* vs. *Abbott*, 396.

DISLOYALTY OF SENATORS.

1. Senator elect charged with disloyalty to the United States admitted.—*Benjamin Stark*, 284.
2. A person elected as Senator, who had voluntarily given aid, counsel, and encouragement to persons engaged in armed hostility to the United States, refused admission.—*Philip F. Thomas*, 333.
3. A majority of a committee holds a certain oath encouraged by a religious hierarchy, of which a Senator was a member, to be an obligation of disloyalty to the Government.—*Reed Smoot*, 931, 951.

See, also, EXPULSION OF SENATORS.

DOOLITTLE, JAMES R., SENATOR FROM WISCONSIN.

1. Remarks of, in case of Segar and Underwood, 313.
2. Remarks of, in case of Philip F. Thomas, 336.

DUBOIS, FRED T., SENATOR FROM IDAHO.

Remarks of, in case of John B. Allen, 87.

EDMUNDS, GEORGE F., SENATOR FROM VERMONT.

Remarks of, in case of Henry W. Blair, 44.

ELECTION OF SENATORS.

Legality and regularity of proceedings in, discussed.—*Ady* vs. *Martin*, 812.

See, also, ACT OF 1866.
BRIBERY.
CORRUPTION.
FRAUD.
JURISDICTION.
LEGISLATURE.
STATE REGULATION OF ELECTION.
STATES IN REBELLION.
TIME FOR ELECTION OF SENATORS.
VALIDITY OF ELECTION.

EXECUTIVES OF STATES, APPOINTMENTS BY.

See APPOINTMENTS BY EXECUTIVES OF STATES.

EXPENSES OF CONTEST.

See COMPENSATION.

EXPULSION OF SENATORS.

1. A Senator found guilty of a "high misdemeanor," having attempted to seduce an officer of the United States from his duty and to alienate the Indians, expelled.—*William Blount*, 1165.
2. A Senator charged with connection with the conspiracy of Aaron Burr and indicted for treason, held by a committee guilty of conduct incompatible with his station as a Senator, but not expelled for lack of necessary majority.—*John Smith*, 1170.
3. Testimony against a Senator charged with fraud and extortion prior to his election found not to sustain any allegation of criminality or to show anything to disqualify him for a seat in the Senate.—*Henry M. Rice*, 1185.
4. Senators engaged in a conspiracy for the destruction of the Union, or who, with full knowledge of the conspiracy, had failed to advise the Government of it, expelled.—*James M. Mason et al.*, 1193.
5. Senators having "withdrawn" from the Senate, their seats were declared vacant and their names omitted from the roll.—*Jefferson et al.*, 1187.
6. Senator who had "joined the enemies of his country," expelled.—*John C. Breckinridge*, 1195.
7. Resolution for the expulsion of a Senator who had declared in debate that he owed no allegiance to the Government, referred to a committee.—*Louis T. Wigfall*, 1190.
8. A Senator who had written a letter containing expressions disloyal to the United States, expelled.—*Trusten Polk*, 1196.
9. A Senator alleged to have made disloyal speeches, who failed to attend the Senate, expelled.—*Waldo P. Johnson*, 1198.
10. A Senator who had written a letter addressed to the "President of the Confederation of States," and commending to his consideration a gentleman who wished to dispose of an improvement in firearms, expelled.—*Jesse D. Bright*, 1200.
11. Resolution to expel a Senator on the ground that his "purposes if not his acts were treasonable" failed to pass.—*Lazarus W. Powell*, 1203.
12. Report of a committee on finding that a Senator had received money for using his influence to secure a contract for certain persons, stating that as the act was not punishable or forbidden when committed expulsion would be in the nature of an *ex post facto* penalty, not acted upon.—*James F. Simmons*, 1206.
13. Report of committee recommending the expulsion of a Senator, not acted on for want of time.—*James W. Patterson*, 1209.
14. A motion to expel a Senator found by a committee to be disloyal to the United States failed of passage.—*Benjamin Stark*, 284, 288 *et seq.*
15. A final judgment of conviction under R. S. 1782 does not operate ipso facto to vacate the seat of a convicted Senator or compel the Senate to expel him.—*Joseph R. Burton*, 995. (See court decision.)
16. A majority of a committee divided as to whether a case should be one of expulsion or one simply declaring a Senator not entitled to his seat.—*Reed Smoot*, 928, 929, 985.

17. Opinion expressed that the reason a two-thirds vote was provided in the Constitution to expel a member was that the mental, moral, or physical defect should be so unquestionable that two-thirds of the Senate would be impelled to vote for expulsion.—*William Lorimer* (first), 1022.
18. Senate amends a resolution declaring a Senator not entitled to his seat in such a manner as to require a two-thirds vote, refused to substitute a resolution of expulsion, then by vote refused to adopt the resolution declaring Senator not entitled to seat.—*Reed Smoot*, 928, 985, 986.

See, also, BRIBERY.
CORRUPTION.
DISLOYALTY OF SENATORS.

FLOOR OF THE SENATE.

See CONTESTANTS.

FORAKER, JOSEPH B., SENATOR FROM OHIO.

1. Remarks of, in case of Henry W. Corbett, 99.
2. Report by, in case of Reed Smoot, 952.

FOSTER, LAFAYETTE S., SENATOR FROM CONNECTICUT.

Remarks of, in case of Louis T. Wigfall, 1190.

FOURTEENTH AMENDMENT.

See RECONSTRUCTION.

FRAUD.

1. Election of a legislature electing a Senator held void, by a committee, on account of fraud and new election recommended.—*Ray* v. *McMillen*, 481.
2. Charges of a Senator's connection with frauds connected with the conduct and returns of elections investigated and found not sustained.—*Stanley Matthews*, 670.

See, also, BRIBERY.
CORRUPTION.

FRAZIER, JAMES B., SENATOR FROM TENNESSEE.

Remarks of, in case of William Lorimer (first), 1024.

GOVERNOR.

1. Right of acting governor to vote in joint convention for election of Senator affirmed.—*Henry A. du Pont*, 818.
2. Right to revoke appointment by lieutenant governor of Senator considered but not decided.—*Maginnis* v. *Clark*, 143.

See, also, APPOINTMENTS BY EXECUTIVES OF STATES.
LEGISLATURE.

GRAY, GEORGE, SENATOR FROM DELAWARE.

Remarks of, in case of Henry A. du Pont, 870.

HEYBURN, WILLIAM B., SENATOR FROM IDAHO.

1. Remarks of, in case of William Lorimer (first), 1015.
2. Remarks of, in case of Isaac Stephenson, 1116.

HILL, BENJAMIN H., SENATOR FROM GEORGIA.

Remarks of, in case of Lapham and Miller, 698.

HOAR, GEORGE F., SENATOR FROM MASSACHUSETTS.

1. Remarks of, in case of Henry W. Blair, 39.
2. Statement of, in case of David Turpie, 719.
3. Remarks of, in case of Lee Mantle, 78.
4. Remarks of, in case of Addicks *v.* Kenney, 876.
5. Remarks of, in case of Matthew S. Quay, 125.
6. Remarks of, in case of Reed Smoot, 929.

INVESTIGATION OF CHARGES.

1. A special committee to be appointed by the President pro tempore authorized by the Senate to investigote certain charges against a Senator.—*Charles H. Dietrich*, 987, 988.
2. A special committee of investigation made up of members of the Committee on Privileges and Elections authorized to conduct investigation and to report directly to the Senate.—*William Lorimer* (second), 1026.
3. A committee instructed to inquire into and report to the Senate upon the sources and use of an alleged fund in a legislature in its relation to and effect upon an election of a Senator.—*William Lorimer* (second), 1030, 1043, 1072.

See, also, BRIBERY.
EXPULSION.
JURISDICTION.

JURISDICTION.

1. The Senate has no jurisdiction of a charge of perjury against a Senator, and the want of jurisdiction is not supplied by his consent to an investigation.—*Humphrey Marshall*, 168.
2. The Senate may inquire into the manner of the election of a member of its body to the extent and for the purpose of ascertaining whether such election was an honest one representing the will of the members of the legislative body which certifies his election.—*William Lorimer* (first), 1016.
3. The allegation of mere rumors of bribery in the election of a Senator, unaccompanied by evidence, is not sufficient to require the Senate to assert its jurisdiction by an investigation.—*Simon Cameron*, 264; *Lewis V. Bogy*, 609; *Lapham* and *Miller*, 697; *Henry B. Payne*, 700; *Watson* and *Chilton*, 1174.
4. Election of members of a legislature claiming to elect a Senator, investigated, when two bodies claimed to be the legislature and elected Senators.—*Ray* vs. *McMillen*, 481; *Clark* and *Maginnis* vs. *Sanders* and *Power*, 727.
5. Inquiry made into the title of members of a legislature where those titles are disputed and their presence is necessary to make a quorum.—*Sykes* vs. *Spencer*, 611.
6. The judgment of a branch of the State legislature as to the election of two of its members held conclusive on the Senate of the United States irrespective of the motives governing that judgment.—*David Turpie*, 719.
7. The Senate does not consider any questions arising on the credentials of a Senator until the term for which he claims to be elected.—*Fred T. Dubois*, 763.
8. Doubt expressed on the right of the Senate to consider charges against a Senator whose term had expired.—*James W. Patterson*, 1209.
9. Committee investigates charges of corruption in connection with a primary, but is divided on the question of the effect of the primary upon the election of a Senator as provided for in the Constitution and by statutes.—*Isaac Stephenson*, 1126, 1134.
10. The jurisdiction of the two houses of the State legislatures by their own authority is original and exclusive in the judgment of the elections and qualifications of their own members.—*Henry A. du Pont*, 856; *Nathan B. Scott*, 891.

See, also, BRIBERY.
CRIMES.
RES ADJUDICATA.

KNOX, PHILANDER C., SENATOR FROM PENNSYLVANIA.

Remarks of, in case of John W. Smith, 1000.

LA FOLLETTE, ROBERT M., SENATOR FROM WISCONSIN.

Remarks of, in case of William Lorimer (second), 1026.

LEGISLATURE.

1. Legality and regularity of proceedings in a legislature in the election of Senator discussed.—*Ady* vs. *Martin*, 812; *Isaac Stephenson*, 1124, 1129.
2. A house of a State legislature recognized by the governor and other branches of the State government as legal, presided over by an officer recognized by the house as the proper presiding officer, must be taken by the United States Senate to be the lawful house for the election of Senators.—*David Turpie*, 719.
3. The decision of a branch of a State legislature as to the election and qualifications of its members, held conclusive on the Senate of the United States.—*Nathan B. Scott*, 888, 891.
4. Validity of election of members of legislature not inquired into by the Senate in case of contested election of a Senator.—*George Goldthwaite*, 384; *Ady* vs. *Martin*, 812; *Addicks* vs. *Kenney*, 875.
5. A legislature composed partly of persons holding office beyond the term for which they were elected for want of the election of successors under the law of Rhode Island held the legislature of the State and a Senator elected by it admitted.—*Potter* vs. *Robbins*, 179.
6. Persons elected by a legislature set up and continued by sufferance of the military power in a State in insurrection not admitted.—*Fishback*, *Baxter*, and *Snow*, 298.
7. Senators elected by a provisional government not admitted.—*Jones* and *Garland* vs. *McDonald* and *Rice*, 340.
8. Persons elected by a body claiming to be the legislature of a State, most of which was in insurrection, though the parts of the State represented in that legislature were exempted in the President's proclamation, not admitted.—*Segar* and *Underwood*, 310.
9. A Senator chosen by a legislature elected by a compromise when there had been two rival governments, and while persons elected by each of these governments were claimants for seats, admitted after a decision that one of the claimants was not entitled.—*James B. Eustis*, 481, 560.
10. A Senator elected by one of two bodies claiming to be the legislature of a State, admitted although the legislature electing him had ceased to have any existence subsequently.—*Spofford* vs. *Kellogg*, 567.
11. A Senator elected by a body including persons lawfully elected, but not holding certificates of election, whose presence was necessary to make a quorum, admitted, although the other claimant was elected by a body including persons not elected but holding proper certificates.—*Sykes* vs. *Spencer*, 611.
12. The fact that one of the two houses of a legislature was never legally organized does not give the governor of the State a right to appoint a Senator to fill a vacancy caused by the expiration of a term and the failure of the legislature to elect.—*Henry W. Corbett*, 89.
13. The right of an acting governor to take part in proceedings and vote while the two houses of the legislature are in joint convention for the purpose of electing a Senator affirmed.—*Henry A. du Pont*, 818.
14. The State canvassing board held the proper body to issue certificates of election to members of a legislature and a Senator elected by a convention of which these members were a part entitled to admission.—*Clark* and *Maginnis* vs. *Sanders* and *Power*, 727.
15. Question of the recognition of direct primary proceedings as a part of the election of a Senator by a legislature under existing (1912) constitutional and legislative provisions, and whether or not if corruption were found in such primaries in an investigation of the election of a Senator it could be held to so affect the election by the legislature as to warrant the unseating of a Senator, discussed.—*Isaac Stephenson*, 1126, 1134, 1138.

See, also, Act of 1866.
Prima Facie Title.
State Government.
Time for Election of Senators.

LIEUTENANT GOVERNOR.

1. Conduct of, while presiding over joint convention for the election of Senator, discussed.—*Ady* vs. *Martin*, 812; *Isaac Stephenson*, 1122, 1130.
2. Right of, to appoint a Senator in the absence of governor, considered but not decided.—*Maginnis* vs. *Clark*, 143.
3. A lieutenant governor while presiding over a joint assembly ordered it to proceed to ballot jointly for a Senator although one man had received a majority of all the votes cast in each House on the day before.—*Isaac Stephenson*, 1122.

See, also, ACTING GOVERNOR.

MAJORITY.

Members of a branch of the legislature in a senatorial election who answer only "present" construed as blanks in determining the question of a majority of votes cast for a Senator.—*Isaac Stephenson*, 1129.

See ACT OF 1866.

McCOMAS, LOUIS E., SENATOR FROM MARYLAND.

Remarks of, in case of Nathan B. Scott, 901.

MILEAGE.

See COMPENSATION.

MITCHELL, JOHN H., SENATOR FROM OREGON.

1. Remarks of, in case of Lee Mantle, 72.
2. Remarks of, in case of Henry A. du Pont, 858.

OATH.

1. Senator unable to take the oath prescribed by the act of July 2, 1862, admitted on taking a special oath.—*Whiteley* and *Farrow* vs. *Hill* and *Miller*, 343, 369.
2. A majority of a committee, convinced that a Senator had taken an oath of hostility to the Nation, held this a reason for vacating his seat.—*Reed Smoot*, 951.

See, also, PRIMA FACIE TITLE.

OFFENSES.

See BRIBERY.
CORRUPTION.
CRIMES.
EXPULSION.

ORGANIZATION OF LEGISLATURE.

See ACT OF 1866.

PETTUS, EDMUND W., SENATOR FROM ALABAMA.

1. Remarks of, in case of Henry W. Corbett, 95.
2. Remarks of, in case of Nathan B. Scott, 902.

PIKE, AUSTIN F., SENATOR FROM NEW HAMPSHIRE.

Remarks of, in case of Henry W. Blair, 42.

POMERENE, ATLEE, SENATOR FROM OHIO.

Remarks of, in case of Isaac Stephenson, 1129.

PRECEDENTS.

1. The Senate is not bound by any precedent excepting those made by the Senate in determining similar cases.—*William Lorimer (second)*, 1100.

See, also, CREDENTIALS.
DECISION.
OATH.
JURISDICTION.
QUALIFICATION OF SENATORS.
VALIDITY OF ELECTION.

PRIMARY ELECTIONS.

1. In an investigation of the charges of corruption in the election of a Senator, a Senate committee investigates expenditures of Senator in the primary campaign.—*Isaac Stephenson*, 1114.
2. Question of the recognition of direct primary proceedings as a part of the election of a Senator by a legislature under existing (1912) constitutional and legislative provisions, and whether or not if corruption were found in such primaries in an investigation of the election of a Senator it could warrant the unseating of a Senator, discussed.—*Isaac Stephenson*, 1126, 1134, 1138.

See, also, BRIBERY, 10.

PRIMA FACIE TITLE.

1. Senators admitted upon their credentials which were in regular form as prima facie entitled to their seats.—*Potter* vs. *Robbins*, 179; *Graham N. Fitch*, 244; *George Goldthwaite*, 384; *L. Q. C. Lamar*, 634; *P. B. S. Pinchback*, 538; *John T. Morgan*, 636; *La Fayette Grover*, 661; *Nathan B. Scott*, 888; *Reed Smoot*, 928; *John W. Smith*, 996.
2. A Senator admitted as prima facie entitled on a transcript of the record of the proceedings of the joint convention of the legislature, there being no dispute as to the facts.—*Wilkinson Call*, 805.
3. The fact that a Senator has been admitted as prima facie entitled does not preclude investigation.—*Corbin* vs. *Butler*, 637, 643.
4. Credentials in due form are not sufficient to establish a prima facie right to a seat when the right of the governor signing them to hold his office is disputed.—*McMillan* vs. *Pinchback*, 538.
5. A Senator elected by votes of members of a legislature alleged not to be entitled to seats, admitted as prima facie entitled.—*George Goldthwaite*, 384.
6. A Senator whose credentials were correct in form admitted, notwithstanding the charge that the government electing him was a usurpation.—*L. Q. C. Lamar; Cf. Louisiana cases, P. B. S. Pinchback*, 538.
7. A Senator whose credentials were otherwise regular admitted as prima facie entitled notwithstanding an objection on the ground that the legislature electing him did not represent the people.—*John T. Morgan*, 636.
8. Committee discharged from the consideration of the credentials of one of two contestants and contestant sworn.—*Corbin* vs. *Butler*, 637.
9. A Senator with proper credentials admitted as prima facie entitled notwithstanding a protest from citizens of the State.—*LaFayette Grover*, 661; *Reed Smoot*, 928.
10. Senator having credentials in due form admitted, after debate, notwithstanding that the attention of the Senate had been called to the fact that the journal of the Senate disclosed the information that the legislature must have proceeded to the election prior to the second Tuesday after notice of vacancy.—*John W. Smith*, 996.

See also, CREDENTIALS.

PRITCHARD, JETER C., SENATOR FROM NORTH CAROLINA.

Remarks of, in case of Henry A. du Pont, 864.

PRIVILEGES AND ELECTIONS, COMMITTEE ON.

List of all cases referred by the Senate to this committee on which reports have been made, and by whom. Introduction, XXVII.

PRIVILEGES OF CONTESTANTS.

See CONTESTANTS.

PUGH, GEORGE E., SENATOR FROM OHIO.

1. Remarks of, in case of Lyman Trumbull, 234.
2. Remarks of, in case of James Shields, 268.

PUGH, JAMES L., SENATOR FROM ALABAMA.

Remarks of, in case of Lee Mantle, 68.

QUALIFICATIONS OF SENATORS.

1. Person elected a Senator who had resided in different States during thirteen years, and had taken an oath of allegiance in one seven years before his election, held not "nine years a citizen of the United States" and not entitled to a seat in the Senate.—*Albert Gallatin*, 157.
2. A Senator-elect "laboring under mental and physical debility, but not of unsound mind," admitted.—*John M. Niles*, 216.
3. A judge elected for a term of nine years under a State constitution which declared him ineligible for any office of trust or profit in the United States during that term and one year thereafter, who had resigned his office, was elected a Senator within the original term, but more than a year after resignation. *Held*, entitled to the seat.—*Lyman Trumbull*, 228.
4. A Senator appointed to a military office in the service of the United States after his election to the Senate accepted the office, but resigned it before his credentials were presented. Admitted against the report of the committee.—*Stanton* vs. *Lane*, 276.
5. The election of a person who was under political disabilities at the time of his election is not void, and the candidate receiving the next highest number of votes is not therefore entitled to the seat.—*Ransom* vs. *Abbott*, 396.
6. A person accused of violating R. S., secs. 1781 and 1782, is not disqualified from holding the office of Senator unless he has been convicted of such violation.—*Lapham* and *Miller*, 697.
7. The fact that a candidate holds an office under a State constitution which declares him ineligible to any other office during the term does not invalidate his election.—*Lucas* vs. *Faulkner*, 722.
8. A person with proper credentials should be admitted and all questions relating to qualifications determined afterwards. Reasons therefor.—*Reed Smoot*, 928, 929, 930.
9. The Senate declined to exclude Senator for alleged disqualifications other than those mentioned in the Constitution.—*Reed Smoot*, 928, 986.
10. Senate committee, after investigation, exonerated Senator of unlawful action or unworthy conduct in connection with alleged violations of R. S., secs. 1781, 3739, etc., for which he was indicted by a Federal grand jury but acquitted without a trial of the cause on its merits, the alleged offences dating at a time when he was a Senator-elect.—*Charles H. Dietrich*, 987, 992.
11. Question of necessary qualifications of a Senator discussed by committee.—*Reed Smoot*, 931.
12. Not finding that a Senator was a polygamist, a majority of a committee held that his membership in a religious hierarchy that encouraged polygamy was a reason for removing him from the Senate.—*Reed Smoot*, 928, 951.
13. A minority of a committee held that there was no just ground for expelling a Senator or finding him disqualified to hold his seat because he, in common with all the people of his State, had not made war upon polygamy, but had acquiesced, in common with all the people, in a condition for which he had no original responsibility.—*Reed Smoot*, 956,967.

See, also, CITIZENSHIP.
DISLOYALTY OF SENATORS.

QUORUM OF LEGISLATURE.

1. The right to forcibly detain a member of a legislature to make a quorum to elect a Senator discussed.—*Spofford* vs. *Kellogg*, 567, 571.
2. Inquiry made into the title of members of a legislature when those titles were disputed and their presence necessary to make a quorum.—*Sykes* vs. *Spencer*, 611.

See, also, ACT OF 1866. 9, 10, 13, 14.
LEGISLATURE. 10.

RAYNER, ISIDOR, SENATOR FROM MARYLAND.

Remarks of, in case of John W. Smith, 999.

RECONSTRUCTION.

1. The "adoption" of the thirteenth and fourteenth amendments to the Constitution by the Legislature of Florida held sufficient ratification, and a Senator subsequently elected by the legislature admitted.—*Marvin* vs. *Osborn*, 341.
2. A Senator elected before a State was declared entitled to representation not admitted.—*Marvin* vs. *Osborn*, 341.
3. Senators elected by a legislature which included members whose right to sit had been challenged on the ground of disqualification under the fourteenth amendment of the Constitution, but who were declared qualified by the legislature, admitted to seats.—*Whiteley* and *Farrow* vs. *Hill* and *Miller*, 343.
4. Report asserting the right of the Senate to investigate the qualifications of members of a legislature in determining whether the legislature had complied with the act authorizing it to sit, and hence to elect Senators.—*Whiteley* and *Farrow* vs. *Hill* and *Miller*, 343, 344.
5. A Senator whose credentials were signed by an Army officer as provisional governor of a State admitted.—*H. R. Revels*, 370.
6. Subsequent recognition by Congress of the right of a State to representation under a constitution in pursuance of which a legislature was organized and elected Senators, held to relate back and make valid the Senators' election.—*Hart* vs. *Gilbert*, 378; *Reynolds* vs. *Hamilton*, 381.

See, also, CITIZENSHIP.
LEGISLATURE.

RECONSIDERATION.

1. Vote reconsidered to allow a member whose title was in question to be heard.—*Jared W. Williams*, 23, 25.
2. A Senator's election having once been investigated and declared by the Senate not to be invalid, was again investigated at a subsequent Congress upon the claim of newly discovered evidence and this time declared to be invalid.—*William Lorimer* (second), 1026, 1113.

See, also, RES ADJUDICATA.

REED, JAMES A., SENATOR FROM MISSOURI.

Remarks of, in case of Henry A. du Pont (1912), 1156.

RES ADJUDICATA.

1. After a decision of the Senate in favor of the title of persons claiming seats, an election of others by the State legislature is void, the decision of the Senate being "conclusive upon the legislature and all persons acting under their authority, as well as on the Senators named in the resolution."—*Lane* and *McCarty* vs. *Fitch* and *Bright*, 244, 255.
2. A report of a committee of another Congress in favor of reopening on the ground of newly discovered evidence the question of a Member's right to a seat once decided not acted upon.—*Spofford* vs. *Kellogg*, 567, 589.
3. A decision by the Senate that a Member was entitled to his seat held final.—*Fitch*, *Bright*, *Lane*, and *McCarty*, 244; *George E. Spencer*, 611, 633; *Corbin* vs. *Butler*, 637, 660.
4. A decision by the Senate that a contestant is not entitled to a seat held final.—*Henry A. du Pont*, 818, 873; *Addicks* vs. *Kenney*, 875.
5. Following a second investigation of the election of a Senator, the majority of a committee held that no new evidence was discovered showing corruption in the election and that the previous judgment of the Senate should be held conclusive and final.—*William Lorimer* (second), 1026, 1062, 1097, 1113.
6. A committee held that in ordering a new investigation of a Senator's election, which had once been passed upon as valid, the Senate did not vacate or attempt to vacate its former judgment, that a defense of res adjudicata could be invoked when, as a result of the investigation, a resolution might be offered declaring the election invalid.—*William Lorimer* (second), 1066.

7. A minority of a committee reported that the Senate in ordering a new investigation of an election of a Senator acted upon the question of res adjudicata in determining that there were sufficient grounds for another investigation.—*William Lorimer* (second), 1100.

RESIGNATION.

1. The title of a Senator elected to fill a vacancy caused by the resignation of a Senator to take effect in the future can not be defeated by the death of the resigning Senator before the date fixed for resignation.—*Archibald Dixon*, 13.
2. Resignation may be made to take effect in the future.—*Horace Chilton*, 18; *James A. Hemenway*, 993.
3. A letter of resignation addressed to the executive of a State to take effect on a future day and withheld by the executive until after that day does not vacate the Member's seat, though the Senate have unofficial information of the election of a successor.—*Jesse Bledsoe*, 175.
4. Resignation of one of two contestants and credentials withdrawn from the files of the Senate pending the question of his right to a seat.—*McMillen* vs. *Pinchback*, 538, 559.
5. Senator admitted who was elected prior to the date when the resignation of a Senator, announced to take place in the future, had been reached.—*James A. Hemenway*, 993.
6. A Senator convicted in the courts resigned after resolution of inquiry had been adopted in Senate.—*Joseph R. Burton*, 995.

See, also, CONTESTANTS.

SAULSBURY, WILLARD, SENATOR FROM DELAWARE.

Remarks of, in case of Willey and Carlile, 274.

SEWARD, WILLIAM H., SENATOR FROM NEW YORK.

Remarks of, in case of James Harlan, 236.

SHERMAN, JOHN, SENATOR FROM OHIO.

Remarks of, in case of Segar and Underwood, 312.

SPOONER, JOHN C., SENATOR FROM WISCONSIN.

Remarks of, in case of Henry W. Corbett, 97.

STARE DECISIS.

1. Doctrine applied.—*Henry A. du Pont*, 818, 873.
2. Doctrine discussed.—*Henry A. du Pont*, 818, 873; *Addicks* vs. *Kenney*, 875; *Henry W. Corbett*, 89.

STATE GOVERNMENT.

1. A government maintained by and not in subordination to the military power is such a government as is entitled to representation in the Senate.—*Fishback, Baxter*, and *Snow*, 298.
2. The judgment of a branch of a State legislature as to the election of two of its members held conclusive on the Senate of the United States irrespective of the motives governing that judgment.—*David Turpie*, 719.

See, also, LEGISLATURE.

STATE REGULATION OF ELECTION.

1. A resolution declaring a majority of all the members-elect of the legislature necessary for all elections; held joint in fact though not in form, and sufficient, though without the forms of law usual in legislation, to regulate the manner of holding elections.—*Yulee* vs. *Mallory*, 223.
2. A failure to comply with merely directory provisions of a State statute regulating the choice of Senators does not vitiate an election, there being no objection to the omission.—*Simon Cameron*, 264.

3. A rule adopted by a joint convention for the election of a Senator, making a plurality of votes sufficient for an election, decided not valid and the person elected rejected.—*John P. Stockton*, 322.
4. Opinion expressed that a resolution adopted by a branch of a legislature before voting for a United States Senator that any person not desiring to vote for a candidate might vote by answering "present" could neither add nor detract from the requirements of the statute governing the election of Senators.—*Isaac Stephenson*, 1129.

See, also, ACT OF 1866.

STATES IN REBELLION.

1. Senators elected by a legislature of a State in rebellion to fill a vacancy caused by the withdrawal of Senators, admitted, though elected before their predecessors were expelled.—*Willey* and *Carlile*, 273.
2. A person elected by a legislature claiming to be loyal in a State declared in insurrection refused admission until action on the recognition of that legislature by Congress.—*Fishback*, *Baxter*, and *Snow*, 298, 302.
3. Persons elected as Senators from a State declared to be in insurrection refused admission until recognition of the government electing them by Congress.—*Cutler* and *Smith* and *Hahn*, 306.
4. A Senator who had completed a term of office and become a candidate for reelection in a State in insurrection, with a view to aiding and protecting loyal people, admitted on taking the oaths required by the laws and Constitution.—*David T. Patterson*, 329.
5. Senators admitted although their credentials were alleged not to conform in some particulars to the requirements of the act of 1866, and the election was claimed to have taken place before the State was declared entitled to representation.—*Jones* and *Garland* vs. *McDonald* and *Rice*, 340.
6. A revolution in a State resulting in the overthrow of the legislature electing a Senator does not affect the right of that Senator to his seat.—*Spafford* vs. *Kellogg*, 567.

See, also, EXPULSION.
LEGISLATURE.
VALIDITY OF ELECTION.

STATES NEWLY ADMITTED.

1. Persons claiming to be Senators by virtue of credentials antedating the admission of the State they claim to represent, held not entitled to seats.—*Blount* and *Cocke*, 173.
2. Senator elected by a Territory after the passage of an enabling act refused admission before the admission of the State.—*James Shields*, 267.
3. A vacancy occurring in consequence of a Senator from a newly admitted State drawing a short term may be filled by executive appointment before the vacancy occurs, no session of the legislature intervening.—*Ambrose H. Sevier*, 7.

STATUTES.

1. Senate committee exonerates Senator of unlawful action or unworthy conduct in connection with alleged violation of R. S., secs. 1781, 3739, etc., for which he was indicted by a Federal grand jury, but acquitted without a trial of the cause on its merits on the ground that the alleged offenses dated at a time he was a Senator elect.—*Charles H. Dietrich*, 987, 990, 992.
2. A Senator convicted in the courts under R. S., secs. 3924, 4041, and 1782 resigned after the Senate had ordered an inquiry.—*Joseph R. Burton*, 995.
3. A person accused of violating R. S., secs. 1781 and 1782, is not disqualified from holding the office of Senator unless he has been convicted of such violation.—*Lapham* and *Miller*, 697.
4. Laws relating to expenditures in campaigns. (*See* Introduction.)

See, also, ACT OF 1866.
JURISDICTION.
OATH.
QUALIFICATIONS OF SENATORS.
EXTRACTS FROM LAWS IN INTRODUCTION.

SUMNER, CHARLES, SENATOR FROM MASSACHUSETTS.

1. Remarks of, in case of Segar and Underwood, 311.
2. Remarks of, in case of Philip F. Thomas, 337.

SUTHERLAND, GEORGE, SENATOR FROM UTAH.

Remarks of, in case of Isaac Stephenson, 1129.

TELLER, HENRY M., SENATOR FROM COLORADO.

Remarks of, in case of James A. Hemenway, 994.

TERM OF SENATORS APPOINTED.

1. A Senator appointed during a recess of the legislature entitled to hold his seat during the next session of the legislature unless the legislature should elect a Senator and the Senate should be officially notified of the fact.—*Samuel Smith*, 4.
2. A Senator appointed to fill a vacancy entitled to sit until the legislature at its next session elect a person to fill the unexpired term and the Senate be notified of his acceptance. Presentation of his credentials is such notice.—*Robert C. Winthrop*, 10.
3. A Senator appointed for a term ending on the date fixed for his resignation to fill the vacancy caused by the death of the resigning Senator admitted to the seat and received compensation to the date of the admission of the successor elected by the legislature.—*Archibald Dixon*, 13.
4. A Senator appointed to fill a vacancy not entitled to the seat after the adjournment of the legislature without electing a person to fill the unexpired term.—*Samuel S. Phelps*, 16.
5. A Senator appointed to fill a vacancy claimed title to the seat after the legislature had been adjourned "to the last Wednesday in May next"—a period of ten months—no Senator being elected: *Held* that the adjournment was an adjournment *sine die* and the right of representation under the appointment had expired.—*Jared W. Williams*, 23.

TIME FOR ELECTION OF SENATORS.

1. The legislature whose election next precedes the expiration of the term held the proper legislature to elect the succeeding term.—*Charles H. Bell*, 26; *Henry W. Blair*, 36.
2. The legislature chosen next preceding the expiration of the term of a Senator did not meet until after the expiration of such term, and the governor made temporary appointment, debated but not decided.—*John A. Henderson*, 104.

See also, ACT OF 1866.

TOOMBS, ROBERT, SENATOR FROM GEORGIA.

Remarks of, in case of James Shields, 270.

TRUMBULL, LYMAN, SENATOR FROM ILLINOIS.

Remarks of, in case of Willey and Carlile, 274.

TURPIE, DAVID, SENATOR FROM INDIANA.

Remarks of, in case of Henry A. du Pont, 861.

VACANCY.

See APPOINTMENTS BY EXECUTIVES.
WITHDRAWAL OF SENATORS.
STATES IN REBELLION.

VALIDITY OF ELECTION.

1. A member of a State legislature who votes for himself for Senator does not thereby invalidate the election, though his vote may be necessary for his election.—*Ephraim Batemann*, 176.
2. A revolution in a State resulting in the overthrow of the legislature electing a Senator does not affect the right of that Senator to his seat.—*Spofford* vs. *Kellogg*, 567.
3. A Senator's election declared by vote of the Senate to be invalid with no claim that Senator had part in or knowledge of corruption charged.—*William Lorimer* (second), 1025.
4. Minority of a committee holds methods used in connection with a primary a reason why the election of a Senator should be declared invalid.—*Isaac Stephenson*, 1154.

See, also, CONTESTANTS.
CORRUPTION.
FRAUD.

VANCE, ZEBULON B. SENATOR FROM NORTH CAROLINA.

Remarks of, in case of Lee Mantle, 76.

VICE PRESIDENT.

The Vice President in the case of a tie voted on a question involving the right of a Member to a seat.—*Corbin* vs. *Butler*, 637, 639; *Spofford* vs. *Kellogg*, 567, 586.

VICKERS, GEORGE, SENATOR FROM MARYLAND.

Remarks of, in case of H. R. Revels, 371.

VOTE.

1. The vote of a Member whose title to his seat was disputed refused to be received by the Senate on the question of his right to sit.—*John P. Stockton*, 322.
2. Case in which Senate apparently held the opinion that Senator could not be declared not entitled to his seat except by a two-thirds vote specified by the Constitution for expulsion.—*Reed Smoot*, 928, 985, 986.

See, also, CONTESTANTS.

WAIVER.

1. Merely formal requirements of a State law governing the election of Senators may be waived by common consent.—*Simon Cameron*, 264.
2. The Senate has no jurisdiction over a charge of perjury against a Senator, and the want of jurisdiction is not supplied by his consent to an investigation.—*Humphrey Marshall*, 168.

See, also, WITHDRAWAL OF CONTESTANT.

WILLEY, WAITMAN T., SENATOR FROM WEST VIRGINIA.

Remarks of, in case of Segar and Underwood, 311.

WITHDRAWAL OF CONTESTANT.

Claim of contestant withdrawn.—*Corbin* v. *Butler*, 637.

WITHDRAWAL OF CHARGES.

The only specific charge against the election of two Senators being withdrawn, a Senate committee held that the charges were without foundation, and asked to be discharged from further consideration.—*Watson* and *Chilton*, 1159.

WITHDRAWAL OF SENATORS.

See EXPULSION.

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